
New York Supreme Court

Appellate Division—Second Department

JOSE AYBAR and JOSE AYBAR as Administrator of THE ESTATE
OF CRYSTAL CRUZ-AYBAR,

**Docket No.:
2019-12110**

Plaintiffs,

– and –

ORLANDO GONZALES, JESENIA AYBAR as
Administrator 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 T.C.,

Plaintiffs-Respondents,

(For Continuation of Caption See Inside Cover)

JOINT RECORD ON APPEAL Volume 2 of 2 (Pages 483 to 966)

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Appellant Ford Motor Company*

(For Continuation of Appearances See Inside Cover)

– against –

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Defendant-Respondent.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff-Respondent,

– against –

THE GOODYEAR TIRE & RUBBER COMPANY
and FORD MOTOR COMPANY,

Third-Party Defendants-Appellants,

– and –

GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD,

Third-Party Defendant.

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Aybar as Administratrix of The
Estate of T.C.*

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¹ The Order Appealed From inadvertently references NYSCEF Doc Nos. 55-60 instead of Doc Nos. 88-92; Doc Nos. 55-60 is assigned to Plaintiff's Motion for Pro Hac Vice Admission (Motion Seq. No. 15) which was decided on April 13, 2018 (Doc No. 64).

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**EXHIBIT F TO SAEZ AGUIRRE AFFIRMATION -
VERIFIED ANSWER TO THIRD-PARTY COMPLAINT OF FORD MOTOR COMPANY,
DATED SEPTEMBER 27, 2016 [483 - 489]**

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INDEX NO. 703632/2017

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**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

VERIFIED ANSWER TO THIRD-
PARTY COMPLAINT

Index No. 9344/2014

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.

FORD MOTOR COMPANY, by its attorneys, AARONSON RAPPAPORT FEINSTEIN

& DEUTSCH, LLP, as and for its Answer to plaintiffs' Complaint, respectfully shows to this Court and alleges upon information and belief:

1. Denies knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph(s) "1" and "2" and refers all questions of law to the Court.

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2. Denies the allegations contained in paragraph(s) "3" in the form alleged except admits that an action under Index No.: 706909/15 was filed.

AS AND FOR THE FIRST CAUSE OF ACTION

3. In response to paragraph "4", repeats each admission or denial contained in paragraphs "1" through "3" herein as though fully set forth hereat.

4. Denies the allegations contained in paragraph(s) "5" as to FORD MOTOR COMPANY and denies knowledge or information sufficient to form a belief as to the truth of the allegations as to the other defendants and refers all questions of law to the Court.

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

5. That the Court lacks personal jurisdiction over the answering defendant.

AS AND FOR THE SECOND AFFIRMATIVE DEFENSE

6. The liability of the answering defendant(s), if any, is limited pursuant to CPLR Article 16.

AS AND FOR THE THIRD AFFIRMATIVE DEFENSE

7. The cause(s) of action set forth in plaintiffs' complaint are barred inasmuch as the action was not instituted within the time period prescribed by all applicable Statute of Limitations.

AS AND FOR THE FOURTH AFFIRMATIVE DEFENSE

8. That the injuries claimed by plaintiffs in the complaint were cause in whole or in part, by the culpable conduct of the plaintiffs which either bars the claims completely or else diminishes the damages by the proportion that such culpable conduct of the plaintiffs bear to the total culpable conduct causing the injuries.

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AS AND FOR THE FIFTH AFFIRMATIVE DEFENSE

9. Plaintiffs' cause of actions are barred by UCC §2.313.

AS AND FOR THE SIXTH AFFIRMATIVE DEFENSE

10. Plaintiffs' cause of actions are barred by UCC §2.314.

AS AND FOR THE SEVENTH AFFIRMATIVE DEFENSE

11. Plaintiffs' cause of actions are barred by UCC §2.315.

AS AND FOR THE EIGHTH AFFIRMATIVE DEFENSE

12. The complaint should be dismissed for failing to name all indispensable parties.

AS AND FOR THE NINTH AFFIRMATIVE DEFENSE

13. The complaint should be dismissed and/or plaintiffs' potential recovery reduced proportionally because the accident and/or plaintiffs' injuries/death were caused by the acts of others who are not named as defendants in this case.

AS AND FOR THE TENTH AFFIRMATIVE DEFENSE

14. The defendant, FORD MOTOR COMPANY is entitled to an offset pursuant to GOL§15-108.

AS AND FOR THE ELEVENTH AFFIRMATIVE DEFENSE

15. The complaint should be dismissed because plaintiffs did not avail themselves of all of the safety restraints available in the vehicle including, but not limited to, the proper use of their safety belt.

**AS AND FOR A COUNTERCLAIM AGAINST THIRD-PARTY PLAINTIFF US TIRES
AND WHEELS OF QUEENS, LLC**

16. That if the third-party plaintiff was caused to sustain damages at the time and place set forth in plaintiffs' Complaint through any carelessness, recklessness, and negligence other than plaintiffs' own, said damages arose in whole or in part from the negligence of third-party

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plaintiff, US TIRES AND WHEELS OF QUEENS, LLC, and if any judgment is recovered herein by the third-party plaintiff against the answering third-party defendant(s), the third-party defendant(s) will be damaged thereby and the answering third-party defendant(s) will be entitled to contribution on the basis of proportionate responsibility in negligence from the third-party plaintiff named above.

WHEREFORE, the answering third-party defendant demands judgment dismissing the Complaint with costs and further demands that the ultimate rights of the answering third-party defendant and the third-party plaintiff name above as between themselves be determined in this action, and that the answering third-party defendant have judgment over and against the third-party plaintiff named above for all or a part of any verdict or judgment which may be obtained against the answering third-party defendant, together with the costs and disbursements of this action.

WHEREFORE, Third-Party Defendant FORD MOTOR COMPANY, demands judgment dismissing the Complaint, together with the costs and disbursements of the within action.

Dated: New York, New York
September 27, 2016

Yours, etc.,

BY: Peter J. Fazio
AARONSON RAPPAPORT FEINSTEIN
& DEUTSCH, LLP
Attorneys for Third-Party Defendant
Office & P.O. Address
600 Third Avenue
New York, New York 10016
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ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

PETER J. FAZIO, being duly sworn, deposes and says:

That I am a member in the firm of attorneys representing the defendant **FORD MOTOR COMPANY.**

That I have read the attached **VERIFIED ANSWER** and the same is true to my own belief, except as to matters alleged on information and belief, and as to those matters, I believe them to be true to the best of my knowledge.

My sources of information are a claims file containing statements, reports and records of investigation, investigators, parties and witnesses, with which I am fully familiar.

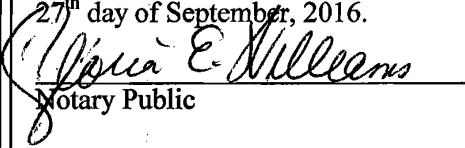
That this verification is made by me because my client does not reside within the county where I maintain my office.



PETER J. FAZIO

Sworn to before me this

27th day of September, 2016.



Notary Public

GLORIA E. WILLIAMS
Notary Public, State of New York
No. 01W15031377
Qualified in Queens County
Commission Expires Aug. 1, 2018

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JAIME OROVIC, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at Westchester County, New York.

That on the 29th day of September, 2016, deponent served the within VERIFIED ANSWER TO THIRD-PARTY COMPLAINT upon:

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Attorneys for Defendant/Third-Party Plaintiff
Wall Street Plaza
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Tel: (212) 376-6400

OMRANI & TAUB, P.C.
Attorneys for Plaintiffs
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(718) 855-1350

CERTAIN & ZILBERG, PLLC
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(212) 687-7800

DLA PIPER LLP (US)
Attorneys for Defendant/Third Party Defendant
THE GOODYEAR TIRE & RUBBER COMPANY
1251 Avenue of the Americas – 27th Floor
New York, New York 10020
(212) 335-4500

MONTFORT HEALY McGUIRE & SALLEY
Attorneys for Plaintiff
JOSE A. AYBAR, JR.
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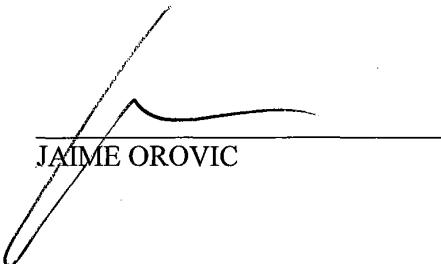
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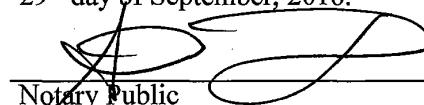
at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.



JAIIME OROVIC

Sworn to before me this

29th day of September, 2016.



Notary Public

ALINA ONEFATER
Notary Public, State of New York
No. 02ON6338965
Qualified in Queens County
Commission Expires March 21, 2020

**EXHIBIT G TO SAEZ AGUIRRE AFFIRMATION -
AFFIDAVIT OF ROBERT PASCARELLA, SWORN TO JANUARY 28, 2019 [490 - 492]**

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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,

**AFFIDAVIT OF
ROBERT PASCARELLA**

Index No. 703632/2017 [E-Filed]

Plaintiffs,

Previously Index No. 9344/2014

- 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.

STATE OF Michigan) :ss:
COUNTY Wayne)

ROBERT PASCARELLA, being duly sworn, deposes and says:

1. My name is Robert Pascarella. I am over the age of 18, have personal knowledge of the matters set forth in this Affidavit unless otherwise stated, and if called as a witness, I

would be competent to testify to the matters in this Affidavit. The facts stated in this Affidavit are true and correct.

2. I am employed with Ford Motor Company ("Ford") as a Design Analysis Engineer. My responsibilities involve conducting investigations of vehicle crashes, in addition to vehicle testing and technical analysis to evaluate claims made regarding contributing factors to those crashes. As a result of my tenure with Ford, I am familiar with Ford's business operations in the United States, and the location of Ford's manufacturing facilities. I am also familiar with the records that Ford maintains concerning the vehicles it builds.

3. Ford is in the business of designing and manufacturing new vehicles and trucks.

4. Ford was incorporated in the State of Delaware and its principal place of business is in Dearborn, Michigan.

5. The Ford vehicle described in the Complaint that forms the basis of this third-party action by U.S. Tires and Wheels of Queens, LLC ("U.S. Tires") was a 2002 Ford Explorer Eddie Bauer with Vehicle Identification Number 1FMDU74WX2ZB89795 (the "Subject Vehicle"). According to Ford's records, the Subject Vehicle was assembled at Ford's St. Louis Assembly Plant in Missouri on or about February 11, 2002. Those same records reflect that the Subject Vehicle was sold on March 11, 2002 to Ford dealer Team Ford Lincoln, located in Steubenville, Ohio, and subsequently purchased by an individual owner who is not the owner alleged in the Complaint.

6. The Subject Vehicle was not originally sold by Ford in the State of New York.

7. The Subject Vehicle was primarily designed by Ford in Michigan, not New York.

8. Ford does not have any Ford Explorer manufacturing plants in the State of New York.

I declare under penalty of perjury under the laws of the State of New York that the

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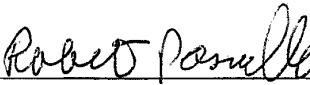
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foregoing is true and correct.

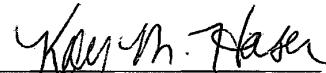
Executed this 28 day of January, 2019, at 10:30 am.

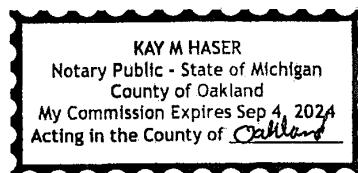

ROBERT PASARELLA
Ford Motor Company

STATE OF Michigan)
:ss:
COUNTY Wayne)

On this 25 day of January, 2019, before me, the undersigned, a notary public in and for said state, personally appeared ROBERT PASARELLA personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Affidavit and acknowledged to me that he executed the same in his capacity, and that by his signature on the within Affidavit, the individual or the person upon behalf of which the individual acted, executed the Affidavit.

Sworn to before me this
28th day of January, 2019


Notary Public



**EXHIBIT H TO SAEZ AGUIRRE AFFIRMATION -
DECISION AND ORDER ON MOTIONS FOR
SUMMARY JUDGMENT, DATED MAY 23, 2018 [493 - 506]**

**FILED: 02/26/2018 INDEX NO: 093612/2017
NYSCRF DOC. NO. 363 RECEIVED NYSCRF: 02/26/2018**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

ALEXANDRU BARBAYANNI,

Plaintiff,

-against-

FORD MOTOR COMPANY, PARAMUS FORD SALE, ALL
AMERICAN FORD OF PARAMUS, ANDREW REINSTEIN,
ROY REINSTEIN and ELIZABETH J. KLAVER,

**DECISION AND ORDER
ON MOTIONS FOR
SUMMARY JUDGMENT**

Index No.: 032616/2017
(Motions #1-4)

Defendants.

Sherri L. Eisenpress, J.

The following papers, numbered 1 to 21, were reviewed in connection with (i) the Notice of Motion (#1) filed by Defendant Elizabeth Klaver("Klaver") for an Order, pursuant to *Civil Practice Law and Rules* § 3212, dismissing the instant negligence action as against said defendant on the ground that she has no liability for the subject accident; (ii) the Notice of Motion (#2) filed by Defendant Ford Motor Company ("Ford") for an Order, pursuant to *Civil Practice Law and Rules* § 3211(A)(8), dismissing the instant action on the grounds that there is no personal jurisdiction over defendant; (iii) Notice of Motion (#3) filed by Defendant All American Ford of Paramus ("All American") for an Order, pursuant to *Civil Practice Law and Rules* § 3211(A)(8), dismissing the instant action on the grounds that there is no personal jurisdiction over defendant; and (iv) Notice of Motion #4 filed by defendants Andrew Reinertsen and Roy Reinertsen (collectively "Reinertsen") for an Order, pursuant to *Civil Practice Law and Rules* § 3212, dismissing the instant negligence action as against said defendants on the ground that they have no liability for the subject accident:

PAPERS

NUMBERED

(Motion #1)

AMENDED NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF
ELIZABETH KLAVER/EXHIBITS "A-D"

1-3

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF ALEXANDRU BARBAYANNI/

4-5

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NYSCRF DOC. NO. 1983

INDEX NO. 70326326/2017

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EXHIBITS "A-E"

AFFIRMATION IN REPLY 6

(Motion #2)

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF MIKE DEYOUNG/EXHIBITS "A-C" 7-8

AFFIRMATION IN OPPOSITION/EXHIBITS "A-I" 9

AFFIRMATION IN REPLY 10

(Motion # 3)

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF RICHARD SELMAN/EXHIBITS "A-G" 11-13

CORRECTED AFFIRMATION IN OPPOSITION/EXHIBITS A-H 14

AFFIRMATION IN REPLY 15

(Motion #4)

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF ANDREW REINERTSEN/EXHIBITS "A-C" 16-18

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF ALEXANDRU BARBAYANNI/EXHIBITS "A-E" 19-20

AFFIRMATION IN REPLY 21

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action is one for personal injuries sustained by plaintiff in a three car motor vehicle accident that occurred on June 17, 2014, on Route 304, at or near its intersection with West Nyack Road, in the Town of Clarkstown, New York. It is alleged that defendant Elizabeth Klaver was the operator of vehicle #1, which was struck in the rear by vehicle #2, owned and operated by defendants Andrew Reinertsen¹ and Roy Reinertsen. The Reinertsen vehicle was then struck in the rear by vehicle #3, which is owned and operated by Plaintiff. It is alleged

¹Both the police report and caption list these defendants' last name as Reinsten, however the affidavit provided in support of Motion #4 lists the defendant's name as Andrew Reinertsen.

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by Plaintiff that at the time of the accident, the lower steering wheel on his 2004 Ford Crown Victoria "locked up, failed, jammed" and/or otherwise caused Plaintiff to be unable to steer the wheel thereby preventing Plaintiff from avoiding a collision with another vehicle.

Plaintiff commenced the instant action by filing a Summons and Complaint on June 15, 2017, through the NYSCEF system. In addition to allegations of negligence in the operation of their vehicles made against the other drivers/owners involved in the accident, Plaintiff also commenced an action against defendants Ford Motor Company, Paramus Ford Sale and All American Ford of Paramus. The causes of action against these defendants include breach of warranty of merchantability and fitness, negligence, strict product liability, and failure to warn and/or failure to properly issue a recall call notice, in connection with the design, manufacture, production, construction, assembly, testing, inspection, display, distribution, sale and repair of the subject 2004 Ford Crown Victoria. Issue was joined as to Defendant Ford by filing of an Answer through the NYSCEF system on July 24, 2017; by Defendant Klaver on August 2, 2017, and by the Reinertsen Defendants on October 24, 2017. Defendant American Ford of Paramus filed an Answer to the Complaint on November 8, 2017, in connection with the filing of its motion to dismiss. Defendants Ford and All American raised the affirmative defense of lack of personal jurisdiction in their Answers.

Although the Court has before it four separate motions, motions #2 and #3 to dismiss, pursuant to CPLR § 3211, raise similar legal issues regarding lack of personal jurisdiction and will therefore be addressed together. Motions #1 and #4 for summary judgment, pursuant to CPLR §3212, on the ground that defendants are not responsible for the accident, also raise similar issues and legal arguments and will thus likewise be addressed together.

Motions #2 and #3 to Dismiss for lack of personal jurisdiction

With regard to personal jurisdiction over defendants Ford and All American, Plaintiff alleges that these defendants "regularly do, or solicit, business in New York." He further

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avers that these defendants receive "substantial revenue from goods and/or services used or consumed, or services rendered in the State of New York."

Defendant Ford, by the timely filing of Motion #2 on September 19, 2017, moves to dismiss the Complaint against it on the ground that Plaintiff has neither general or specific personal jurisdiction over it. Ford contends that it is not subject to general personal jurisdiction under the standards announced by the United States Supreme Court in Daimler AG v. Bauman, 134 S.Ct. 746 (2014) and BNSF Ry. Co. V. Tyrrell, 137 S. Ct. 1549 (2017). Defendant Ford points out that it is incorporated in Delaware, and its principal place of business is in Michigan. Additionally, Ford asserts that it does not engage in servicing of Ford vehicles in New York. It argues that general jurisdiction does not exist because Ford is not "at home," as that is legally defined, in New York.

Defendant Ford also claims that there is no specific jurisdiction and submits the Affidavit of Mike DeYoung, who is a Retail Network Operations Manager in the Marketing Sales and Service Division of Ford in support of this contention. Mr. DeYoung asserts that Plaintiff's Ford Crown Victoria was not primarily designed or manufactured by Ford in New York. It was assembled in Canada and sold by Ford to an independently-owned Ford dealership, Bob Howard Downtown Ford, located in Oklahoma. The vehicle was subsequently purchased by a retail customer in Oklahoma on November 18, 2004. Ford was not involved in the vehicle's relocation to New York: Thus, there is no specific jurisdiction over Ford because any relevant conduct on the part of defendant occurred entirely out of state, Ford did not "purposefully avail" itself of the privileges of and benefits of New York's laws and the litigation does not arise out of defendant's purposefully availed contacts with this State. Put another way, Ford argues that Plaintiff's alleged injuries would have occurred whether or not Ford did business in New York, and thus it cannot be said that Plaintiff's claims "arise out of" Ford activities.

In opposition to Ford's motion to dismiss, Plaintiff contends that Ford consented to general jurisdiction in New York pursuant to CPLR § 301 because it is registered as a foreign

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corporation and it designated a local agent for service of process. Plaintiff relies upon the lower Court cases of Bailen v. Air & Liquid Sys. Corp., 2014 NY Slip Op 32079[U] (Sup. Ct., NY County 2014) and Beach v. Citigroup Alternative Invs. LLC, 12-CV 7717 (PKC)(SDNY Mar.7, 2014). Plaintiff also argues that Ford is subject to specific jurisdiction pursuant to CPLR § 302 because it manufactured a defective part and placed it into the stream of commerce.

Defendant All American also moves to dismiss the Complaint against it on the grounds that there is no jurisdiction over it pursuant to CPLR § 302, that service was not properly made pursuant to CPLR § 306-b and Business Corporation Law § 307 and because Plaintiff's action is time barred by the Statute of Limitations.

Defendant All American contends that it is not subject to New York jurisdiction on the ground that it is incorporated in the State of Delaware, maintains its principal place of business in New Jersey, is not registered as either a domestic or authorized foreign corporation through the Secretary of State and has no connection with the State of New York of any kind. With respect to long-arm jurisdiction, All American asserts that it does not transact any business within New York State, does not supply goods or services of any kind within New York, has no employees, agents, representatives on its behalf in New York, and has not traveled outside the State of New Jersey to sell any vehicles or perform any services or functions. While Plaintiff's complaint appears to allege that the claims against All American arise from service of plaintiff's vehicle in October of 2011 at its facility in New Jersey, Defendant asserts that jurisdiction would not be proper under CPLR § 302(a)(3)(1) because it does not "regularly solicit business or engage in any other persistent course of conduct nor does it derive substantial revenue from goods or services rendered in the State."

Defendant All American also asserts that it was not served with process in the action and only became aware of the action due to receiving, through the United States mail, a copy of the motions made by co-defendants Ford and Klaver. It contends that the affidavit of service only addresses service on the Secretary of State and not the second requirement, to

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wit: that the unauthorized foreign corporation also be served through (i) "registered mail with return receipt requested" or (ii) personally served in its home state of New Jersey. Thus, the failure to comply with the provisions of Business Corporation Law § 307 requires dismissal. Lastly, All American claims that the Statute of Limitations for a breach of warranty claim is four years after the cause of action accrued, which in this case is 2011. With respect to the remaining causes of action, All American claims that because service was not proper, and it is more than three years since the date of the accident, these claims are now barred by the statute of limitations.

In opposition to All American's motion, Plaintiff asserts that it was not until after the accident occurred that Plaintiff came to learn that Ford had issued a safety recall involving certain 2005 through 2011 model year Ford Crown Victoria's with respect to the lower intermediate-shaft corrosion and that he never received such notices from All American, which had replaced the shaft on October 24, 2011. Plaintiff alleges that although All American is not registered with the New York Department of State, it does advertise in New York State by virtue of internet advertising wherein it states that "Our Proud Local New Jersey Ford Dealership serving Mahwah, Ramsey, NJ and Nanuet, NY." Plaintiff argues that All American should have known that his car would be driven in New York and Rockland County based upon Bergen County's proximity.

With regard to the allegation that Plaintiff failed to complete service in compliance with BCL § 307, Plaintiff relies upon the fact that the affidavit specifically states that said service was made pursuant to that section, "which would include a certified mailing." Plaintiff contends that they had arranged for proper service through its process server. Lastly, Plaintiff alleges that the breach of warranty claim arises out of a personal injury, and is thus three years from the date of the injury and not four years from the date of the placement of the defective part.

Legal Discussion

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A plaintiff bears the burden of establishing personal jurisdiction over defendants and must prove that personal jurisdiction is proper under both the Constitution's Due Process clause and under New York's long arm statute. Bernardo v. Barrett, 57 N.Y.2d 1006, 457 N.Y.S.2d 479 (1982); LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 213, 713 N.Y.S.2d 304 (2000). New York's long-arm statute, CPLR § 302(a), states in pertinent part:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. Transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. Commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (ii) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Two types of personal jurisdiction, specific and general, are available against a corporate entity in New York. General jurisdiction is all-purpose jurisdiction to adjudicate disputes regardless of where they took place or whether they bear any relationship to the entity's contacts with the forum state. Goodyear Dunlop Tires Operations. S.A.v. Brown, 131 S.Ct. 2846 (2011). With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014). In Daimler, the Supreme Court specifically rejected the proposition that courts

may exercise general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." *Id.* at 761. Rather, general jurisdiction "permits a court to assert jurisdiction over a foreign corporation 'to hear any and all claims against it' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive' as to render [it] essentially at home in the forum State.' Bauman, 134 S. Ct. at 751.

In a case similar to the matter at bar, Fernandez v. DaimlerChrysler, A.G, 143 A.D.3d 765, 40 N.Y.S.3d 128 (2d Dept. 2016), an action was commenced against a German vehicle manufacturer alleging that the driver lost control of the vehicle due to allegedly defective ball joints and front lower control arms. The complaint was dismissed for lack of personal jurisdiction. *Id.* The Court noted that contrary to plaintiff's contention, exercising general jurisdiction over Daimler does not comport with due process. *Id.* at 131. In the instant matter, neither defendant Ford nor defendant All American, are incorporated in or have their principal place of business in the State of New York. Nor has Plaintiff made any showing whatsoever that either Defendants' contacts are so constant or pervasive so as to render them "at home" in this State.

Additionally, this Court rejects Plaintiff's contention that there exists general jurisdiction over Ford on the ground that it consented to jurisdiction because it is a registered foreign corporation that designated a local agent for service of process. While it appears that some Courts in this State found this to be a basis for jurisdiction before the Supreme Court's decision in Bauman, since then, lower courts who have addressed this issue found that such a determination would offend due process considerations. See Amelious v. Grand Imperial LLC, 64 N.Y.3d 855 (Sup. Ct., New York County, 2017); Wilderness USA, Inc. v. DeAngelo Brothers LLC, 265 F.Supp.3d 301, 312 (W.D.N.Y 2017); Famulari v. Whirlpool Corp., 2017 WL 2470844 (S.D.N.Y 2017); Chatwal Hotels & Resorts LLC v. Dollywood Co., 90 F.Supp.3d 97 (S.D.N.Y. 2015). The Courts in these cases note that registration statutes like New York's do not

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explicitly notify foreign corporations that registration to do business will open the door to unlimited personal jurisdiction in the State; 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 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. For these reasons, this Court rejects this argument and finds that Plaintiff has not demonstrated general personal jurisdiction over the moving defendants.

Specific jurisdiction, sometimes referred to as long-arm jurisdiction, refers to jurisdiction over an individual or entity for the purpose of adjudicating a particular controversy that arises from the entity's contacts with the forum State. See Fischbarg v. Doucet, 9N.Y.3d 375, 849 N.Y.S. 501 (2007). CPLR 302(a) is a "single act statute" and "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." America/International 1994 Venture v. Mau, 146 A.D.3d 40, 52, 42 N.Y.S.3d 188 (2d Dept. 2016). Under New York's long-arm statute, "purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of the law." Id. "Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the totality of the circumstances." Id.

In the instant matter, Plaintiff asserts that defendant Ford is subject to specific jurisdiction because of the "stream of commerce theory" in that a defective part manufactured by Ford was put into the stream of commerce to be distributed throughout the United States and Ford was aware of the possibility of a lawsuit in New York since it issued a recall notice for vehicles that were either originally sold or are currently registered in New York. However, a

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seller's knowledge that its product may be destined for a particular forum is an insufficient basis for that forum to sustain jurisdiction over the seller. Paradise Products Corp. V. Allmark Equipment Co., Inc., 138 A.D.2d 470, 526 N.Y.S.2d 119 (2d Dept. 1988). Moreover, the proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way. Walden v. Fiore, 134 S.Ct. 115, 1123 (2014). The Court finds that Defendant Ford did not purposefully avail itself of the privileges of conducting business in New York so as to confer specific jurisdiction, as Plaintiff points to no further act connected to New York other than placing a product in the stream of commerce. Since Plaintiff has failed to establish personal jurisdiction over Defendant Ford, the complaint as against it must be dismissed.

With respect to Defendant All American, Plaintiff alleges that specific jurisdiction exists based upon its solicitation of business in New York on its website and its proximity to Rockland County resulting in its service of New York residents. For the following reasons, Plaintiff has failed to demonstrate that defendant transacted business in New York so as to establish jurisdiction over it. It is axiomatic that solicitation of business alone will not suffice to establish presence in the State. Cardone v. Jiminy Peak, 245 A.D.2d 1002, 667 N.Y.S.2d (3d Dept. 1997)(defendants activities including advertisements on New York radio stations, televisions stations and print media; billboards; the mailing of promotional literature to certain groups and individuals in New York; and attendance at promotional events deemed insufficient to assert jurisdiction.); Zaveri v. Condor Petroleum Corp., 2009 WL 2461092 (W.D.N.Y. 2009)(fact that company sent promotional materials to New York investors, invited New York residents to Louisiana and solicited investments from New York residents failed to establish defendant conducted business in state.); Holness v. Maritime Overseas Corp. 251 A.D.2d 220, 676 N.Y.S.2d 540 (1st Dept. 1998); Chamberlain v. Jiminy Peak, 176 A.D.2d 1109 575 N.Y.S.2d 410 (3d Dept. 1991). In the instant matter, the existence of defendant's website alone constitutes nothing more than solicitation and is insufficient to confer jurisdiction.

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Nor is there any merit to Plaintiff's contention that because New York residents avail themselves of All American's services, defendant is deemed to have transacted business in New York. In O'Brien v. Hackensack Univ. Med. Ctr., 305 A.D.2d 199, 760 N.Y.S.2d 425 (1st Dept. 2003), the Court noted that treatment of New York residents at defendant hospital does not provide a strong case for finding that defendant transacted business in New York. Moreover, the Court noted that the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred. Id. Likewise, in the instant matter, the situs of the accident is New Jersey and other than the website and proximity to New York, defendant has no other contacts with New York. Since Plaintiff has failed to establish personal jurisdiction over Defendant All American, the action against it must be dismissed.

The Court notes that even if personal jurisdiction was found over defendant All American, the action would still require dismissal for Plaintiff's failure to comply with Business Corporation Law § 307. In addition to service upon the Secretary of State, a Plaintiff must also send the foreign corporation notice of the service and a copy of the process by registered mail with return receipt requested, or by personal delivery. An affidavit of compliance, together with a return receipt or other official proof of service, must be filed within a specified time period. There is no evidence that this was done in the instant case and Plaintiff failed to even show proof of compliance in opposition to the instant motion. Failure to proceed in the precisely delineated sequence set forth in the statute is a jurisdictional defect requiring dismissal. Flannery v. General Motors Corp., 86 N.Y.2d 771, 631 N.Y.S.2d 135 (1995); Van Norden v. Mann Edge Tool Co., 77 A.D.3d 1157, 910 N.Y.S.2d 189 (3d Dept. 2010).

Motions #1 and #4 for summary judgment

Defendants Elizabeth Klaver, Roy Reinertsen and Andrew Reinertsen all move to dismiss the action on the ground that their vehicles were stopped when struck in the rear, and as such, cannot be found liable for the subject accident. In support of her motion, defendant

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Klaver submits an affidavit in which she avers that prior to the accident her vehicle was stopped at the intersection of Route 304 and West Nyack Road for a police vehicle that was sounding its horn. She states that her vehicle was stopped in the left turning lane when she felt an impact to the rear of her vehicle. Andrew Reinersten submits an affidavit in support of his summary judgment motion in which he contends that the vehicle in front of him stopped short due to a police vehicle crossing into the intersection which caused him to come into contact with the Klaver vehicle. He states that after impact, he was stopped and shifting his vehicle into park when the vehicle in back of him struck his vehicle at a high rate of speed. Defendants contend that they were struck in the rear while stopped, and as such, cannot be liable as a matter of law.

In opposition to the summary judgment motions, Plaintiff submits an affidavit that he was traveling approximately 45 mph and maintained a distance of approximately 60-65 feet behind the vehicle in front of him. He contends that he observed the Ford pick-up directly in front of him come to an abrupt and sudden stop so he jammed his brakes and struck that vehicle. He claims that he attempted to swerve in order to avoid the collision with the vehicle in front of him but his steering wheel locked up, preventing him from turning it. Plaintiff further contends that the vehicle owned by defendant Klaver abruptly changed lanes and stopped in front of the middle car immediately prior to the emergency vehicle crossing Route 304. Plaintiff argues that there is a triable issue of fact as to defendants' negligence, or in the alternative, that said motion should be denied as premature as no depositions have been taken.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the

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motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue, Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

It is well-settled that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. See Smith v. Seskin, 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); Harris v. Ryder, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002). The inference of negligence may be rebutted by proof that the accident was caused by the lead vehicle's abrupt change of lanes in front of the rear vehicle, and then slowing down or coming to a sudden stop. Greenidge v. United Parcel Service, 153 A.D.3d 905, 60 N.Y.S.3d 421, 424 (2d Dept. 2017); Reitz v. Seagate Trucking Inc., 71 A.D.3d 975, 898 N.Y.S.2d 173 (2d Dept. 2010); Ortiz v. Hub Truck Rental Corp., 82 A.D.3d 725, 918 N.Y.S.2d 156 (2d Dept. 2011).

When a motion for summary judgment stemming from a rear-end collision is opposed with conflicting affidavits as to how and why the accident occurred, and no discovery has taken place, the motion may be denied as premature, with leave to renew after completion of discovery. See Bernstein v. New York Transit Authority, 153 A.D.3d 897, 61 N.Y.S.3d 113 (2d Dept. 2017); Cardone v. Poidamani, 73 A.D.3d 828, 902 N.Y.S.2d 121 (2d Dept. 2010). "A party should be afforded a reasonable opportunity to conduct discovery prior to a determination of a motion for summary judgment." Okula v. City of New York, 147 A.D.3d 967, 48 N.Y.S.3d

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191 (2d Dept. 2017).

Given the conflicting affidavits submitted as to how the accident occurred, the Court shall deny moving defendants' summary judgment motion without prejudice and with leave to renew after completion of discovery in this matter. Plaintiff and the remaining defendants shall appear for a Preliminary Conference on **Wednesday, June 6, 2018, at 9:45 a.m.** so that discovery may proceed in an expeditious manner.

Accordingly, it is hereby

ORDERED that the Notice of Motion (#1) filed by Defendant Elizabeth J. Klaver is DENIED without prejudice and with leave to renew upon completion of discovery; and it is further

ORDERED that the Notice of Motion (#2) filed by defendant Ford Motor Company is GRANTED, and the complaint dismissed as against this defendant; and it is further

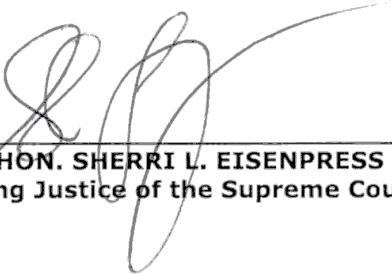
ORDERED that the Notice of Motion (#3) filed by defendant All American Ford of Paramus is GRANTED, and the Complaint dismissed as against this defendant; and it is further

ORDERED that the Notice of Motion (#4) filed by defendants Roy Reinertsen and Andrew Reinertsen is DENIED without prejudice and with leave to renew upon completion of discovery; and it is further

ORDERED that the remaining parties are to appear before the undersigned for a preliminary conference on WEDNESDAY, JUNE 6, 2018, at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion #'s 1 through 4.

Dated: New City, New York
May 23, 2018


HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing

**NOTICE OF CROSS-MOTION, BY DEFENDANT/THIRD-PARTY
PLAINTIFF, FOR AN ORDER GRANTING LEAVE TO AMEND
THE COMPLAINT, DATED MARCH 13, 2019 [507 - 509]**

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NYSCEF DOC. NO. 164

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
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 T.C.,

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X
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.

-----X

PLEASE TAKE NOTICE that upon the affirmation of Adam C. Calvert dated March 13, 2019, and the annexed exhibits, defendant/third-party plaintiff U.S. Tires and Wheels of Queens LLC, will cross-move this court at the Supreme Court, Queens County, Part 12, Courtroom 42, at 88-11 Sutphin Boulevard, Queens, New York, on March 26, 2019 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order:

- (1) Denying third-party defendants Ford and Goodyear's motions to dismiss the third-party complaint for lack of personal jurisdiction; or

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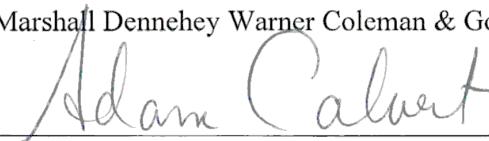
- (2) Granting defendant/third-party plaintiff U.S. Tires' cross-motion to amend the complaint; or
- (3) Granting defendant/third-party plaintiff U.S. Tires' cross-motion for a stay of this action pending resolution of an appeal with the Court of Appeals, together with such other and further belief as the court deems just and proper.

PLEASE TAKE FURTHER NOTICE that any answering papers must be served at least 7 days before the return date pursuant to CPLR § 2214(b).

Dated: New York, New York
March 13, 2019

Marshall Dennehey Warner Coleman & Goggin

By: _____


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**AFFIRMATION OF ADAM C. CALVERT, FOR DEFENDANT/THIRD-PARTY
PLAINTIFF, IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION
TO MOTIONS TO DISMISS THE THIRD-PARTY COMPLAINT,
DATED MARCH 13, 2019 [510 - 539]**

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INDEX NO. 703632/2017
RECEIVED NYSCEF: 03/13/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
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 T.C.,

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X
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.

-----X

Adam C. Calvert, an attorney admitted to practice in the New York State Courts, affirms
the following under penalty of perjury:

1. I am a shareholder at Marshall Dennehey Warner Coleman & Goggin, attorneys for defendant/third-party plaintiff U.S. Tires and Wheels of Queens, LLC, I am familiar with this case, and I submit this affirmation in opposition to third-party defendants Goodyear and Ford's motions to dismiss the third-party complaint for lack of personal jurisdiction, and in support of U.S. Tires'

cross-motion to amend the third-party complaint or grant a stay of this action pending resolution of an appeal to the Court of Appeals.

2. The court should deny Ford and Goodyear's motions to dismiss for lack of personal jurisdiction. The Second Department's *Aybar* decision should be overturned on appeal because it went against over 100 years of precedent from the Court of Appeals and U.S. Supreme Court which held that registration to do business is consent to general personal jurisdiction.¹ The *Aybar* decision is not collateral estoppel on this case because our case involves different claims and parties. Moreover, this court can rule whether there is specific jurisdiction in our case, an issue not reached by the *Aybar* court. If necessary, we ask that the court permit U.S. Tires to amend its third-party complaint to assert specific jurisdiction. Finally, if the court believes that the *Aybar* appeal is binding or instructive on our case, we ask that the court stay this action to allow the Court of Appeals to hear the *Aybar* appeal.

Argument

I. The Second Department's *Aybar* Decision Will be Overturned on Appeal

3. The Second Department's decision in *Aybar v. Aybar* broke with over 100 years of U.S. Supreme Court and New York Court of Appeals precedent. We have filed a motion for leave to appeal with the Court of Appeals and the plaintiffs have filed a motion to reargue with the Second Department and expect that the Court will hear the appeal because the *Aybar* decision turns general personal jurisdiction in New York on its head. Motion for Leave to Appeal (**Exhibit B**); Motion to Reargue (**Exhibit C**).

4. Ever since the Court of Appeals' decision in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), a corporation's registration to do business in New York

¹ *Aybar v. Aybar*, 2019 N.Y. App. Div. LEXIS 444 (**Exhibit A**).

and appointment of an agent for service of process has been a valid basis for general personal jurisdiction. The Second Department's decision to overrule *Bagdon* was based on a flawed reading of a recent U.S. Supreme Court case, *Daimler AG v. Bauman*, 571 U.S. 117 (2014). The Second Department's reading of *Daimler* was flawed because *Daimler* dealt with general personal jurisdiction where there was no consent by registration to do business as there is in our case.

5. There are several ways that a company can be subject to general personal jurisdiction. One is consent. *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982). Jurisdiction by consent has been upheld by the U.S. Supreme Court for nearly 150 years. That line of cases began with *Ex parte Schollenberger*, 96 U.S. 369 (1877). In *Schollenberger*, the U.S. Supreme Court first held that a state legislature may require a foreign corporation to consent to general personal jurisdiction as a condition of being granted the right to do business in that state:

[I]f the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent.

Id. at 377. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), the court affirmed that it had "little doubt" that the appointment of an agent by a foreign corporation for service of process could subject a company to general personal jurisdiction. *Id.* at 95. This principle was reiterated by the U.S. Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011), and in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). *Burnham* upheld personal jurisdiction based on in-state service on a non-resident defendant. The court cited a string of cases, most importantly ones applying the in-state service rule to foreign corporate defendants accepting service by agent, to conclude that the in-state service

rule "remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government." *Id.* at 615-16 (emphasis added).

6. For over 100 years, ever since the Court of Appeals' decision in *Bagdon*, New York state courts have recognized that registration to do business in New York and designation of the Secretary of State for service of process under Business Corporations Law 304(b) & 1304 is tantamount to consent to general personal jurisdiction in New York. *See Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916); *Muollo v. Crestwood Village, Inc.*, 155 A.D.2d 420 (2d Dep't 1989); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76 (3d Dep't 1983); *Chong v. Healthtronics, Inc.*, 2007 U.S. Dist. LEXIS 45956 at *17 (E.D.N.Y. 2007). This precedent has never been overturned until the Second Department's *Aybar* decision.

7. According to the Second Department, this long-standing precedent changed with *Daimler*. That rationale is fundamentally flawed. *Daimler* did not address consent by registration and did not overrule the well-settled precedent that registration to do business in New York carries with it consent to be sued in New York. There was no chance to consider whether there was personal jurisdiction based on consent by registration in *Daimler* because California (the subject state in that case) does not interpret its registration statute as consent to personal jurisdiction like New York. In fact, *Daimler*'s citation to *Perkins*, for the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum," shows that the *Daimler* court was deciding a case where the corporation had not consented to general jurisdiction via a registration statute. *Daimler*, 571 U.S. at 129 (quoting) (emphasis added). The two other general personal jurisdiction cases examined by *Daimler* similarly concerned defendants who were not authorized to do business in the forum state and had not consented to suit. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852 (2011) (stating

that defendants were not registered to do business in North Carolina); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984) (noting that defendant had never been authorized to do business in Texas and never had an agent for service of process in Texas). If the U.S. Supreme Court wanted to overrule the existing precedent of jurisdiction based on consent via registration, it is up to the U.S. Supreme Court to do so explicitly. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (Even if a Supreme Court precedent contains many "infirmities" and rests upon "wobbly, moth-eaten foundations," it remains the "Court's prerogative alone to overrule one of its precedents.").

8. In the same vein, if the Court of Appeals wanted to overrule *Bagdon* and its longstanding precedent on personal jurisdiction, it is up to that Court to do so.

9. Numerous New York State and Federal Courts have upheld consent by registration after *Daimler*, recognizing that *Daimler* only applied where there was no consent by registration. *See Beach v. Citigroup Alternative Invs. LLC*, 2014 U.S. Dist. LEXIS 30032 (S.D.N.Y. 2014) ("Notwithstanding [the limitations on jurisdiction imposed by *Daimler*] a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."); *Serov v. Kerzner Int'l Resorts, Inc.*, 2016 N.Y. Misc. LEXIS 2818 (Sup. Ct., N.Y. Cty. 2016) (finding general jurisdiction over foreign corporation because of registration); *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015); *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., Ltd.*, 131 A.D.3d 259 (1st Dep't 2015).

10. The same rationale has also been accepted in numerous courts across the country post-*Daimler*. A New Jersey federal court upheld consent to personal jurisdiction by registration in a case decided after *Daimler*. *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437-438 (D.N.J. 2015). In *Perrigo Co. v. Merial Ltd.*, 2015 U.S. Dist. LEXIS 45214 (D. Neb. 2015), the court upheld general jurisdiction over a defendant based on its registration to do business in the state, finding that *Daimler* did not overrule the consent by registration caselaw. *See also Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 469 (D. N.J. 2015); *Chalkey v. Smithkline Beecham Corp.*, 2016 U.S. Dist. LEXIS 21462 (E.D. Mo. 2016) (holding that consent to general personal jurisdiction via a registration and appointment of agent for service was still valid after *Daimler*); *Regal Beloit America, Inc. v. Broad Ocean Motor LLC*, 2016 U.S. Dist. LEXIS 85123 (E.D. Mo. 2016) (same); *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O'Malley, J., concurring) (finding that consent to jurisdiction by registration was still valid after *Daimler*).

11. The Second Department's rationale for departing from well-established caselaw and precedent of the Court of Appeals and the U.S. Supreme Court was faulty. It held "that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York." Second Department Decision at 9 (**Exhibit A**). The Second Department then traced the history of general personal jurisdiction caselaw up to *Daimler*, acknowledging that consent by registration was a valid basis for general jurisdiction in New York. The Second Department then stated that following *Daimler*, "personal jurisdiction cannot be asserted against a foreign

corporation based solely on the corporation's continuous and systematic business activity in New York." Second Department Decision at 13 (**Exhibit A**). The problem with this rationale is that *Daimler* only applies to cases where there is no consent by registration. Notably, the Second Department relied on *Daimler*'s reference to the New York Court of Appeals decision, *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917), where *Daimler* said that *Tauza* "should not attract heavy reliance today." Second Department Decision at 13 (**Exhibit A**). But as the Second Department itself noted when explaining *Bogdon* and *Tauza*, *Bogdon* involved a corporation that was registered to do business in New York and the Court of Appeals found general personal jurisdiction was available because of the registration. On the other hand, *Tauza*, decided one year after *Bogdon*, involved a corporation that was not registered to do business in New York. *Tauza* is analogous to *Daimler* because in both cases jurisdiction was not based on the corporation's registration to do business in the state. *Bagdon* is like *Aybar* because both Ford and Goodyear are registered to do business in New York and that consent via registration is the basis for jurisdiction. And *Daimler* did not overrule *Bagdon*.

12. The U.S. Supreme Court issued another personal jurisdiction decision, *BNSF Ry. v. Tyrell*, 137 S. Ct. 1549 (2017), where the court discussed *Daimler*. Notably, the plaintiffs in *Tyrell* argued that the defendant consented to general jurisdiction via registration, but the court did not address it because it was not addressed by the lower court, again showing that the *Daimler* analysis of personal jurisdiction is separate and distinct from consent by registration. *Id.* at 1559.

13. The Second Department's rationale in *Aybar* continues by stating that "asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*."

Second Department Decision at 13 (**Exhibit A**). The Second Department seems to imply that if New York's Business Corporations Law explicitly stated that registration was consent to general personal jurisdiction, the result would be different. The lack of explicit language in the Business Corporations Law does not mean that corporations are not on notice that they are consenting to jurisdiction by registering. *Pennsylvania Fire Ins.*, 243 U.S. at 96 ("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts.") (dealing with consent to jurisdiction by registration). New York courts have consistently recognized that consent is a part of the registration ever since *Bagdon* and corporations are on notice that they consent to general jurisdiction by registering.

14. The last basis for the Second Department's decision is that the Court of Appeals has not cited to *Bagdon* or relied on it since *International Shoe* was decided in 1945 and "this is a strong indicator that its rationale is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and that it no longer holds in the post-*Daimler* landscape." Second Department Decision at 13 (**Exhibit A**). Again, this rationale is misplaced. There has been no reason for the Court of Appeals to issue a decision on the issue until now. Consent by registration has been a valid basis for jurisdiction in New York for over 100 years and should remain so.

15. Registration to do business is voluntary. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (holding that "[a] statute calling for [designation of an agent for service of process in the forum state] is constitutional, and the designation of the agent 'a voluntary act'" (citing *Pennsylvania Fire*, 243 U.S. 93)). Businesses that register also gain certain rights and privileges as part of registration. The trade-off for those privileges is that they are subject to personal jurisdiction in New York. This is "part of the bargain by which [the foreign corporation]

enjoys the business freedom of the State of New York." Practice Commentaries, CPLR 310:8, citing *Neirbo*, 308 U.S. at 175.

16. Ford and Goodyear benefit greatly from the bargain of registration. They are frequent plaintiffs in New York. They extensively market and sell their products in New York. They are large, national corporations that do significant business in New York. They have the resources to litigate cases in New York, which they frequently do, not only as defendants, but as plaintiffs. Yet they complain about the unfairness of being subject to jurisdiction in New York courts when a product they marketed in New York, purchased by a New Yorker, registered to a New Yorker, and allegedly serviced in a New York garage, injures New Yorkers.

17. Conferring general jurisdiction via registration will not open the doors to out-of-state plaintiffs suing Ford and Goodyear in New York in cases that have nothing to do with New York. There was no doubt before *Daimler* that Ford and Goodyear were subject to general jurisdiction in New York, so these fears would have manifested already, but they have not. Even under the consent by registration basis for general personal jurisdiction, a state may constitutionally exercise jurisdiction over non-domiciliary defendants only if it had "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). "Minimum contacts" with the forum state depends on whether the defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant may reasonably foresee the prospect of defending a suit in the forum state if it "purposefully avails itself of the

privilege of conducting activities within the forum State." *Id.* Here, Ford and Goodyear purposefully availed themselves of the privilege by registering to do business in New York.

18. Finally, New York has a substantial interest in this case and should have jurisdiction over Ford and Goodyear. New Yorkers have been killed and injured, allegedly because of Ford and Goodyear's defective products. These products were sold, registered, and extensively advertised in New York. U.S. Tires, a New York garage, allegedly serviced the products and has contribution and indemnity claims against Ford and Goodyear that it should be able to pursue in New York.

19. A holding that Ford and Goodyear are not subject to personal jurisdiction in this case would have disastrous consequences. It would result in one lawsuit against Ford in Michigan or Delaware, another against Goodyear in Ohio, and a third against U.S. Tires in New York. U.S. Tires would also need to prosecute its cross-claims against Ford and Goodyear in some forum. Inconsistent verdicts are almost guaranteed under this scenario. Discovery could not be coordinated between the various actions, resulting in duplicity and wasting judicial resources. See *LaMarca*, 95 N.Y.2d at 219 ("[I]t would be orderly to allow plaintiff to sue all named defendants in New York. A single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy.").

20. Ford and Goodyear cry prejudice at the prospect of litigating this case in New York, apparently blind to the fact that their products, which were sold, registered, and marketed in New York, injured New York residents. Jurisdictional requirements are meant to prevent out-of-state companies from being hauled into court in a state that has no connection with the accident or the defendants. That danger is absent from this case. Ford and Goodyear are large, national corporations that are more than capable of litigating this case in New York. New York has a

substantial interest in seeing that injured New York residents are provided with a forum to sue manufacturers who sell their products in the New York market injuring New Yorkers and that a New York garage that services those products can bring claims against the manufacturers when those products injure others. A finding by this Court in favor of Ford and Goodyear would deprive U.S. Tires of that forum.

II. The *Aybar* Decision is not Collateral Estoppel on this Action

21. Collateral estoppel, or issue preclusion, only applies when: (1) the issue sought to be precluded is identical to a material issue necessarily decided in the first action and decisive of the second action; and (2) there was a full and fair opportunity to contest this issue. *See Jeffreys v. Griffin*, 1 N.Y.3d 34 (2003). Here, the *Aybar* decision does not have collateral estoppel effect on Ford and Goodyear's motions to dismiss in our case. The first element is not satisfied because the issues in the two cases are not identical—the *Aybar* action involved direct claims by the plaintiffs against Ford and Goodyear for products liability and defective design and manufacturing. U.S. Tires was not a party to the *Aybar* action. In contrast, our case involves contribution and indemnity claims by U.S. Tires against Ford and Goodyear and the plaintiff's claims against U.S. Tires for the allegedly negligent installation of the tire. The second element of collateral estoppel is not satisfied because U.S. Tires was not a party to the *Aybar* action and did not have a full and fair opportunity to litigate what is at issue in our case—contribution and indemnity claims against Ford and Goodyear.

A. There is no identity of issues

22. The *Aybar* decision does not meet the first requirement of collateral estoppel—the issues are not identical and the decision in *Aybar* is not decisive of the issues in our action. The identity-of-issues requirement states that “the legal theory in both actions is the same and . . . there

are no significant factual differences between them.” *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (1985). Ford and Goodyear have the burden of establishing the identity of issues. *Id.* at 456.

23. The *Aybar* case involved direct claims by the plaintiffs against Ford and Goodyear for products liability. U.S. Tires was not a party to that action. Our action involves claims by the plaintiffs against U.S. Tires for its alleged negligence in installing and inspecting the tire at issue. U.S. Tires’ third-party action against Ford and Goodyear claim contribution and indemnity arising out of Ford and Goodyear’s liability for the accident, a claim that was absent from the *Aybar* case.

24. This Court previously recognized that the issues in these two cases are not identical. Goodyear moved for a stay of this action while the *Aybar* appeal was pending. This Court denied the motion, saying that the *Aybar* action and this action involve “different claims by different parties.” Order Denying Stay (**Exhibit D**).

25. Courts have consistently found no identity of issues in similar cases. In *Weiss v. Manfredi*, 83 N.Y.2d 974 (1994), the court found that in the prior action to vacate the settlement, the sole issue necessarily decided was that there was no fraud, collusion, mistake or accident to vitiate the settlement, and at issue in the current action for legal malpractice is whether defendant attorneys were negligent in their representation of plaintiff. Because there was no identity of issue, the plaintiff was not collaterally estopped.

26. Whether there is jurisdiction over Ford and Goodyear arising out of U.S. Tires’ contribution and indemnity claim—the issue in our case—was never raised or decided in the *Aybar* action. In *City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124 (2007) the court held that collateral estoppel did not apply because the summary judgment granted to the different corporation in the underlying action only found that the corporation did not owe a duty to the general public and no finding was made for its contractual obligation to the city. Similarly, no

finding was made in the *Aybar* case about jurisdiction over Ford and Goodyear premised on U.S. Tires' third-party claims for contribution and indemnity. *See also Peresluha v. City of New York*, 60 A.D.2d 226 (1st Dep't 1977) (the court concluded that the facts necessary for a finding of negligence are not the same as those required for a finding of malicious prosecution, and, thus, the identity of issues required for collateral estoppel was not present).

B. U.S. Tires did not have a full and fair opportunity to contest the issue

27. In order to determine whether a party had a full and fair opportunity to contest the decision later alleged to be conclusive, the *Schwartz* court enunciated the "realities of litigation" test:

A comprehensive list of the various factors that should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, difference in the applicable law and foreseeability of future litigation.

Schwartz v. Public Administrator of County of Bronx, 24 N.Y.2d 65, 72 (1969).

28. Here, U.S. Tires has not had a full and fair opportunity to argue that there is a basis for personal jurisdiction over Ford and Goodyear arising out of U.S. Tires' contribution and indemnity claims. U.S. Tires was not a party to the *Aybar* action. It was never served with the motions to dismiss. Ford and Goodyear opposed U.S. Tires' attempt to submit papers on the motions to dismiss. Notably, Ford and Goodyear opposed U.S. Tires' motion for leave to appeal to the Court of Appeals, arguing that U.S. Tires has no standing to pursue that appeal and that "U.S. Tires was not and cannot be aggrieved by Ford and Goodyear's motions to dismiss [in the actions currently on appeal]; the resolution of Ford's and Goodyear's jurisdictional challenge

cannot affect U.S. Tires in this case.” Opposition to Motion for Leave to Appeal at 6-8 (**Exhibit E**).

29. Moreover, U.S. Tires had no control over the jurisdictional allegations that would be made in the *Aybar* action as it was not a party.

30. In similar cases, courts have found that there was not a full and fair opportunity to litigate the case. In *Shanley v. Callanan Industries*, 54 N.Y.2d 52 (1981), two separate negligence actions were brought as a result of a head-on automobile collision. In the first action between the two drivers, A and B, the jury found B 100 percent at fault and awarded damages to A. In the second action, B sought damages from C, claiming that a hazardous condition created by C was the cause of the accident. C claimed that the judgment in the first action, which found B 100 percent liable, collaterally estopped B from pursuing the second action against C. The Court disagreed, however, and held that collateral estoppel could not be invoked in this instance. The Court, noting the foreseeability of future litigation, reasoned that all the parties in the A v. B action knew of the pending actions between B and C, because the two actions had been originally joined for trial but were severed immediately prior to the trial. The issue of C’s negligence was not tried in the A v. B action, because it was assumed that B would have the opportunity to litigate his claim against C in the severed action. Thus, the jury’s determination that B was 100 percent at fault as between A and B did not necessarily decide the issue of negligence between B and C. Similarly, the Second Department’s decision in *Aybar* is not determinative of any basis for personal jurisdiction stemming from the separate and distinct claims made by U.S. Tires in our action.

31. Courts have also held that non-parties like U.S. Tires were not in privity with parties to the original action under similar circumstances. New York courts, have identified three general

categories of privity that have been applied to collaterally estop a nonparty in a subsequent suit involving the same issue. Privity will be found if the nonparty:

- (1) ha[s] a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditional or derivative of, the rights of the party to the prior litigation;
- (2) controlled or substantially participated in control of the prior action;
- (3) had its interests represented by the losing party in the prior litigation.

D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 664 (1990); *Evergreen Bank, N.A. v. Dashnaw*, 246 A.D.2d 814 (3d Dep't 1998) ("The concept [of privity] requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation and privity will exist where individuals 'so controlled the conduct of the prior litigation in which they were interested such that the result is res judicata against them.'"); *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008) ("Courts should be cautious about finding nonparty preclusion on the basis that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. A mere whiff of 'tactical maneuvering' will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication.").

32. Here, U.S. Tires did not have privity with the plaintiffs in the *Aybar* action such that the *Aybar* decision should have collateral estoppel effect on this action. Privity requires something like an agency relationship between the parties where the party sought to be bound by the prior decision actually controlled the original party. Here, U.S. Tires has no control over the actions of the plaintiffs in the *Aybar* action. Merely because U.S. Tires submitted papers in support

of the plaintiffs' motion and appeal does not equate to privity. *Ecumenical Task Force of Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency*, 179 A.D.2d 261 (4th Dep't 1992) (if petitioners had been granted amicus curiae status in that litigation in lieu of intervenor status in the previous litigation, the petitioners' claims were not barred by *res judicata* or collateral estoppel).

III. There is Jurisdiction over Ford and Goodyear under Specific Jurisdiction

33. This court can and should rule on whether there is specific jurisdiction over Ford and Goodyear, either via the plaintiff's claims against them or via U.S. Tires' third-party claims. The Second Department in *Aybar* did not consider specific jurisdiction arguments when deciding the appeal. Second Department Decision at 6, fn. 2 (**Exhibit A**).

34. In *Tydings v. Greenfield*, 11 N.Y.3d 195 (2008), the Court of Appeals held that collateral estoppel did not bar relitigation of the alternative basis for the decision. The prior compulsory accounting proceeding against a former trustee in Surrogate's Court could have been based either on the ground that the statute of limitations had run, or on the ground that it had been waived, and the former ground had never been addressed by the Appellate Division. *Tydings* did appeal the first decision against her, and challenged the Surrogate's statute of limitations holding, but was unable to get an appellate ruling on the issue. Thus in *Tydings* there was no full and fair chance to overturn the earlier decision and no collateral estoppel. *See also Franklin Dev. Co., Inc. v. Atl. Mut. Ins. Co.*, 60 A.D.3d 897 (2d Dep't 2009) (although the owner appealed the denial of its motion for summary judgment on the third-party complaint, the issue of whether the stairwell was an area covered by the additional insured clause in the insurance policy was not reached on appeal; even though this case does not present the typical situation where an "alternative basis" for the Supreme Court's ruling is not entitled to preclusive effect, the same rationale as bars the application of collateral estoppel to an "alternative basis" for a ruling applies here); *Gramatan*

Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979) (“there must be proof that the issue in the prior action is identical, *and thus decisive*, of that in issue in the current action.”) (emphasis added). Therefore, this court can consider whether there is jurisdiction over Ford and Goodyear under a specific jurisdiction theory.

35. CPLR 302 deals with specific jurisdiction. It reads:

- (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
 4. owns, uses or possesses any real property situated within the state.

In our case, there is jurisdiction under 302(a)(1) and 302(a)(3)(i) or (ii).

A. Ford and Goodyear are subject to specific jurisdiction under CPLR 302(a)(1)

36. CPLR 302(a)(1) allows for jurisdiction over a foreign corporation if it “transacts any business within the state or contracts anywhere to supply goods or services in the state.”

37. There should be no dispute that Ford and Goodyear transact business in New York and contract to supply goods and services in New York. This requires that the defendant "avails itself of the privilege of conducting activities [in New York], thus invoking the benefits and protections of its laws." *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007); *see also Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014) ("where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)."). Ford and Goodyear sell numerous products throughout New York, including Ford Explorers and the Goodyear Wrangler tires involved in this case.

38. Jurisdiction under 302(a)(1) requires some connection between the claim and the defendant's transaction of business or supply of goods or services in New York. *See Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005); *LaChapelle v. Torres*, 1 F. Supp. 3d 163, 177 (S.D.N.Y. 2014) (CPLR 302(a)(1) requires an "articulable nexus" between the transaction and the claim). This does not require a "causal link" between the claim and the defendant's New York contacts. *Id.* The nexus requirement is "relatively permissive" and does not require causation, but merely "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim." *Licci v. Lebanses Can. Bank, SAL*, 20 N.Y.3d 327, 339 (2012). The claim need only be "in some way arguably connected to the transaction." *Id.* at 340. Presumably, Ford and Goodyear will rely on the fact that the Ford Explorer and the Goodyear tire were not initially sold in New York to argue that the accident is not related to their business in New York. They would be wrong.

39. The connection requirement of 302(a)(1) is satisfied so long as the product is marketed in New York, even if the specific product that caused the injury was not sold in New

York initially. In *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (2016), the Court of Appeals found that 302(a)(1)'s nexus requirement was satisfied where the bank accounts in New York were part of a larger fraud scheme conducted by the defendants that took place elsewhere, just like the sale of the Ford Explorer and Goodyear tire were part of a nationwide marketing for those products. *Id.* at 21-23. See also *Singer v. Walker*, 15 N.Y.2d 443 (1965) (foreign manufacturer was subject to jurisdiction under 302(a)(1) where a New York retailer sold one of its hammers to the plaintiff who was injured in an accident that occurred out-of-state); *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982) (court found jurisdiction under 302(a)(1) where the defendant was an out-of-state manufacturer who made a defective product sold to the plaintiff through a New York retailer); *Emi Christian Music Grp. v. MP3tunes, LLC*, 840 F.3d 69, 2016 U.S. App. LEXIS 19236 at * 38-39 (2d Cir. 2016) (evidence of the intent to market a product nationwide sufficient for minimum contacts in New York).

40. In *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W.Va. 2016), Ford made this same argument regarding the nexus requirement for specific jurisdiction under a similar long-arm statute in West Virginia. In *McGraw*, "Ford contends that because the Ford Explorer was manufactured in Kentucky, sold to a dealer in Florida, and entered West Virginia via a third party, Ford's asserted activities in West Virginia do not have anything to do with the West Virginia claim." *Id.* at 342. The court rejected this argument, saying:

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

Id. at 343. Ford had this same argument rejected in *Rhodehouse v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 167780 (E.D.Ca. 2016), a case where it argued that there was no nexus for specific jurisdiction over a California resident injured by a Ford vehicle registered in California because the vehicle was manufactured in Kentucky and sold to an independently-owned dealer in Canada. The court rejected Ford's argument, relying on Ford's extensive sales and marketing in the state and that the vehicle was registered in the state and injured a resident of the state. *Id.* at * 11.

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

B. Ford and Goodyear are subject to specific jurisdiction under CPLR 302(a)(3)

42. The court also has specific jurisdiction in this case under CPLR 302(a)(3).

43. The first requirement of CPLR 302(a)(3) is that the defendant "commits a tortious act without the state causing injury to person or property within the state."

44. Here, Ford and Goodyear committed tortious acts without the state—they manufactured and designed the products outside of New York.

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

46. Traditionally, in the case of personal injury or property damage, whether the injury occurred "within the state" is determined by the location of the accident. *McGowan v. Smith*, 52 N.Y.2d 268 (1981). The courts have consistently held that pain and suffering or discovery of damages in New York after the injury occurs in another state will not suffice. *Id.* On this question, however, the Court of Appeals has indicated that it is open for a reconsideration of this "first injury" rule. In *Ingraham v. Carroll*, 90 N.Y.2d 592 (1997), the court addressed the question of jurisdiction under CPLR 302(a)(3) over a Vermont physician who examined the plaintiff in Vermont, but continued to send instructions to her New York physicians. The court decided the question under CPLR 302(a)(3)(ii), by "assuming, without deciding, that the alleged tortious conduct in Vermont caused injury within New York." *Id.* at 597. The dissenting opinion that the majority's choice not to affirm the lower court's ruling that the place of injury was New York signaled the court's willingness to reconsider the place of injury rule in "a more propitious and

better assembled case, that may be otherwise determinative of outcome and contributive to the dispositional analysis and developing jurisprudence." *Id.* at 604. This is that case.

47. CPLR 302(a)(3) was enacted precisely to prevent the untenable situation Ford and Goodyear propose: allowing national manufacturers to avoid the jurisdiction of New York courts where a New York resident is injured by a product marketed in New York and serviced by a New York garage that attempts to assert claims for contribution and indemnity against the manufacturers. When CPLR 302 was amended in 1966 to add CPLR 302(a)(3), the legislature did so in response to the Court of Appeals' determination in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443 (1965), which held that CPLR 302(a)(2) did not encompass products liability actions where the plaintiff was injured by a product manufactured outside New York. L. 1966, ch. 590, effective September 1, 1966; Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 339-344. The amendment was meant to be broad enough to provide legal redress to New York residents who are injured by foreign tortfeasors and yet, not so broad as to burden unfairly nonresidents, whose connection with the state is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York. See Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 340-344. Denying jurisdiction under CPLR 302(a)(3) in our case would subvert the purpose of the statute.

48. Other cases support this reading of CPLR 302(a)(3)—finding that the “original event” (i.e., the injury) happened in New York even if the accident happened elsewhere. In *Distefano v. Carozzi North America*, 286 F.3d 81 (2d Cir. 2001), the court found that the place of injury was New York under CPLR 302(a)(3). In *Distefano*, the plaintiff brought a wrongful termination claim. He worked in New York for a Rhode Island company. The decision to fire

him was made outside of New York. He was fired during a meeting that took place in New Jersey. The court found that the “original event” (losing his employment) took place in New York despite the other acts occurring in other states. Here, the same rationale applies. The “original injury” was in New York—the sale, registration, and ownership of the Ford Explorer and Goodyear tire and servicing of them at U.S. Tires in Queens, even if the resulting accident happened in Virginia.

49. Moreover, even if the plaintiffs’ injuries arose in Virginia, the same cannot be said of U.S. Tires’ claims against Ford and Goodyear. U.S. Tires’ claims against them would stem from a judgment by the plaintiffs against U.S. Tires in New York. Thus, the “injury” to U.S. Tires would be in New York. Moreover, the underlying event—U.S. Tires’ servicing of the tire and vehicle at its garage in Queens—also happened in New York. A garage that regularly sells and services the allegedly defective products should be able to recover against the manufacturers in the state where the work was done.

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

i. **There is jurisdiction under 302(a)(3)(i)**

51. Subsection 302(a)(3)(i) requires that the tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state."

52. There should be no dispute that this subsection is satisfied. Ford and Goodyear engage in regular business in the state and derive substantial revenue from goods sold in the state.

53. Jurisdiction under this section does not require the same quantity of contacts required for general jurisdiction under CPLR 301. *See Ingraham v. Carroll*, 90 N.Y.2d 592, 597

(1997). Just because the sales in New York might be only a small percentage of the defendant's total sales does not mean that it does not "derive substantial revenue" under this section. *Allen v. Canadian General Electric Co., Ltd.*, 65 A.D.2d 39 (3d Dep't 1978), *aff'd*, 50 N.Y.2d 935. Rather, this subsection is intended to apply to defendants "'who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere.'" *Ingraham*, 90 N.Y.2d at 597, *citing* 12th Ann Report of NY Jud Conf, at 343.

54. Ford and Goodyear engage in regular business in New York and derive substantial revenue from goods sold in New York; therefore, jurisdiction is proper under CPLR 302(a)(3)(i).

ii. There is jurisdiction under 302(a)(3)(ii)

55. Jurisdiction is also proper under CPLR 302(a)(3)(ii), which requires that the defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

56. Again, there should be no dispute that Ford and Goodyear "derives substantial revenue from interstate or international commerce."

57. Ford and Goodyear may argue that the other portion of this subsection is not satisfied—that they "expect or should reasonably expect the act to have consequences in the state"—because the Ford Explorer and Goodyear tire were not shipped to New York initially.

58. Courts have consistently held that "the place where delivery or transfer of title occurs is, under the terms of 302 (a)(3)(ii), not relevant to whether the out-of-state act was tortious with foreseeable in-state consequences." *Dingeldey v. VMI-EPE-Holland B.V.*, 2016 U.S. Dist. LEXIS 138041 (W.D.N.Y. 2016) (finding jurisdiction under 302(a)(3)(ii) over manufacturer from Netherlands). In *Darrow v. Deutschland*, 119 A.D.3d 1142 (3d Dep't 2014), the court found jurisdiction under CPLR 302(a)(3)(ii) over a German manufacturer that sold a product in New

York and other states via a distributor. This "rendered it likely that its products would be sold in New York" and the defendant should have "reasonably expected a manufacturing defect to have consequences in the state." *Id.* at 1144.

59. In *LaMarca v. Pak-Mor Manufacturing Co.*, 95 N.Y.2d 210 (2000), the Court of Appeals found jurisdiction under 302(a)(3)(ii), rejecting a similar argument focused on the point of the initial sale of the product. The plaintiff was a New York resident that was injured by a defective product. The defendant-manufacturer was a Texas corporation and the product was manufactured in Virginia. The defendant had no property or presence in New York, although it did advertise and sell products in New York. The defendant focused on the fact that title for the product was passed to a distributor in Virginia to argue that they could not have reasonably expected consequences in New York. The court rejected that argument because the defendant marketed the product in New York and knew that its products would be sold in New York. See also *Darienzo v. Wise Shoe Stores, Inc.*, 74 A.D.2d 342 (2d Dep't 1980) (jurisdiction under 302(a)(3)(ii) over foreign manufacturer because it knew that some of its products would be sold in New York stores and therefore it "did or should have reasonably expected forum consequences to arise in New York."); *Napolitano v Mastic Bicycles & Fitness Co.*, 279 A.D.2d 461, 462 (2d Dep't 2001) (holding that a non-domiciliary may be subject to suit if "the sale of one of its products arises from the efforts of the manufacturer or distributor to serve directly the market for its product in other countries or States, and its allegedly defective merchandise has been a source of injury.").

60. Therefore, Ford and Goodyear should have reasonably expected that these products could result in injury or consequences in New York based on their marketing and sale of the products in New York in general and regular servicing and sales of those products at garages in New York like U.S. Tires. See *Alexander & Alexander Services Inc.*, 720 F.Supp. 26 (S.D.N.Y.

1989) (British underwriters alleged to have subscribed to insurance policies at issue in direct action were "doing business" in New York within meaning of New York long-arm statute in a manner sufficient to make assertion of jurisdiction consistent with due process over third-party claims for indemnification and contribution; administrative department of underwriters' London organization maintained an office in New York and administered a substantial fund held in trust as security for policies issued to American insureds).

C. Specific jurisdiction in this case does not violate due process

61. In addition to compliance with CPLR 302, the exercise of jurisdiction must also comply with federal due process requirements. *See Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000).

62. A state may constitutionally exercise jurisdiction over non-domiciliary defendants provided they had "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). "Minimum contacts" with the forum state depends on whether the defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant may reasonably foresee the prospect of defending a suit in the forum state if it "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.*

63. In *LaMarca*, the Court of Appeals found that due process requirements were satisfied where the defendant-manufacturer was incorporated in another state and did not have any direct New York connections other than a New York distributor. The court relied on the fact that the defendant was a United States corporation, fully familiar with New York law, adding that "New

York has an interest in providing a convenient forum for [the plaintiff], a New York resident who was injured in New York and may be entitled to relief under New York law." *LaMarca*, 95 N.Y.2d at 218. The court then said the following, which applies especially well to Ford and Goodyear:

When a company of [defendant's] size and scope profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in this State. Considering that [defendant's] long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm. In all, we conclude that asserting jurisdiction over [defendant] in New York would not offend traditional notions of fair play and substantial justice.

Id. at 218-19; *see also Darienzo*, 74 A.D.2d 342 (due process was satisfied because product manufacturer placed the product in the stream of commerce with the expectation that they will be purchased in New York).

64. The U.S. Supreme Court has stated that jurisdiction in similar cases comport with due process requirements. *Ashai Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" while also "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World-Wide Volkswagen*, 444 U. S. at 297 ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.").

65. In this case, finding that the New York courts have jurisdiction over Ford and Goodyear does not violate due process. They marketed and sold their products in New York and therefore they should reasonably expect the products defects to have consequences in New York.

IV. If Necessary, U.S. Tires should be given Leave to Amend its Complaint to Assert Specific Jurisdiction

66. Both Ford and Goodyear argue that specific jurisdiction was not alleged as a basis for jurisdiction in U.S. Tires' third-party complaint. While not necessary under the liberal pleading standards, if the court so requires, we ask that it permit U.S. Tires to amend its third-party complaint to assert specific jurisdiction.

67. CPLR 3025(b) states that a party may amend its pleadings at any time with leave of the court. It also states that leave for the amendment shall be freely given. U.S. Tires needs only to show that there is no prejudice resulting from the amendment. *Silvin v. Karwoski*, 242 A.D.2d 945 (4th Dep't 1997) (plaintiff in action for personal injury sustained in auto accident with intoxicated driver was properly allowed to amend to seek punitive damages because defendant admitted her intoxication; moreover, prejudice is not found in the mere exposure to greater liability); *Girardin v. Town of Hempstead*, 209 A.D.2d 668 (2d Dep't 1994) (defendants were entitled to amend their answers to include the affirmative defense of res judicata, a defense that was not available at the time of joinder of issue because the Workers' Compensation determinations on the plaintiffs' claims had not yet been made).

68. Here, there is no prejudice to Ford or Goodyear. There has been almost no discovery in this case. Moreover, there was no need to allege specific jurisdiction in the original third-party complaint because at that time there was an order stating that Ford and Goodyear were subject to general personal jurisdiction in New York in the related actions.

69. A copy of the proposed Amended Third-Party Summons and Complaint is attached as **Exhibit F**.

V. In the Alternative, the Court should Order a Stay until the Appeal is Decided

70. This Court should find that the Second Department's *Aybar* decision is not binding on the present motions to dismiss for the reasons detailed above. However, if the Court believes that the *Aybar* decision is determinative of this motion we ask that the Court stay this case until the *Aybar* appeal can be heard by the Court of Appeals.

71. In the *Aybar* action, the plaintiffs have filed a motion for leave to reargue and in the alternative grant leave to appeal to the Court of Appeals. Plaintiff's Motion (**Exhibit C**). U.S. Tires has also filed a motion for leave to appeal with the Court of Appeals. U.S. Tires' Motion (**Exhibit B**). The Second Department admittedly overturned over 100 years of precedent in its decision and it is the only appellate court in the state to do so. We strongly believe that the Court of Appeals will hear the case given its need to opine on the issue.

72. This Court may stay this case under CPLR 2201. Under CPLR 2201, "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." *El Greco, Inc., v. Cohn*, 139 A.D.2d 615 (2d Dep't 1988) (court properly ordered stay of action pending outcome of earlier commercial federal action where federal action involved similar issues and virtually identical parties); *Goodridge v. Fernandez*, 121 A.D.2d 942 (1st Dep't 1986) (stay granted on the basis of a prior federal action which involved the same parties and issues); *Channel Master Corp. v. JFD Electronics*, 26 A.D.2d 961 (3d Dep't 1966) (rather than grant the motion to dismiss, the court ordered the stay of a complicated state action where a similar action was pending in federal court);

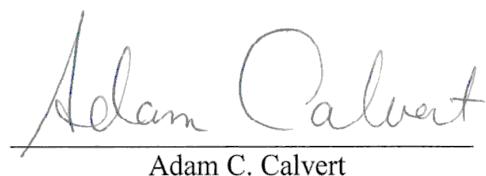
Salerno v. Salerno, 154 A.D.2d 430 (2d Dep't 1989) (stays are addressed to sole discretion of trial court and should be granted only if there exists some articulable reason for the stay).

Conclusion

73. The court should deny Ford and Goodyear's motions to dismiss for lack of personal jurisdiction. The Second Department's *Aybar* decision should be overturned on appeal because it went against over 100 years of precedent from the Court of Appeals and U.S. Supreme Court which held that registration to do business is consent to general personal jurisdiction. The *Aybar* decision is not collateral estoppel on this case because our case involves different claims and parties. Moreover, this court can rule whether there is specific jurisdiction in our case, an issue not reached by the *Aybar* court. If necessary, we ask that the court permit U.S. Tires to amend its third-party complaint to assert specific jurisdiction. Finally, if the court believes that the *Aybar* appeal is binding or instructive on our case, we ask that the court stay this action to allow the Court of Appeals to hear the *Aybar* appeal.

WHEREFORE, the court should issue an order denying Ford and Goodyear's motions to dismiss for lack of personal jurisdiction, granting U.S. Tire's cross-motion to amend the complaint, and in the alternative, staying this action pending resolution of the *Aybar* appeal, together with such other and further relief as the court deems just and proper.

Dated: New York, New York
March 13, 2019



Adam C. Calvert

EXHIBIT A TO CALVERT AFFIRMATION -
APPELLATE DIVISION, SECOND DEPARTMENT DECISION,
DATED JANUARY 23, 2019, WITH NOTICE OF ENTRY [540 - 557]

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INDEX NO. 703632/2017

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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,

X
ORDER WITH NOTICE OF ENTRY

Index No. 703632/2017

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; GOOD YEAR DUNLOP TIRES
NORTH AMERICA,LTD; and FORD MOTOR
COMPANY,

Third-Party Defendants.

X

PLEASE TAKE NOTICE the within is a true copy of the Opinion & Order signed by
the Clerk of the Court, Aprilanne Agostino, dated January 23, 2019, which was entered with the
Supreme Court of the State of New York Appellate Division, Second Judicial Department on
January 23, 2019.

Dated: New York, New York
January 23, 2019

FILED: QUEENS COUNTY CLERK 03/13/2019 03:47 PM

NYSCEF DOC. NO. 166

INDEX NO. 703632/2017

RECEIVED NYSCEF: 03/13/2019

Yours, etc.

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D57109
C/htr

AD3d

Argued - March 26, 2018

JOHN M. LEVENTHAL, J.P.
SANDRA L. SGROI
HECTOR D. LASALLE
VALERIE BRATHWAITE NELSON, JJ.

2016-06194
2016-07397

OPINION & ORDER

Anna Aybar, et al., plaintiffs-respondents, v Jose A. Aybar, Jr., et al., defendants, Ford Motor Company, et al., appellants; U.S. Tires and Wheels of Queens, LLC, nonparty-respondent.

(Index No. 706909/15)

APPEAL by the defendant Ford Motor Company, in an action to recover damages for personal injuries and wrongful death, from an order of the Supreme Court (Thomas D. Raffaele, J.), entered May 31, 2016, in Queens County, and SEPARATE APPEAL by the defendant Goodyear Tire & Rubber Co. from an order of the same court, also entered May 31, 2016. The first order denied the motion of the defendant Ford Motor Company pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction. The second order denied the motion of the defendant Goodyear Tire & Rubber Co., pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction.

Aaronson Rappaport Feinstein & Deutsch, LLP (Eliot J. Zucker, Peter J. Fazio, and Hogan Lovells US LLP, New York, NY [Sean Marotta], of counsel), for appellant Ford Motor Company, and DLA Piper LLP, New York, NY (Kevin W. Rethore of counsel), for appellant Goodyear Tire & Rubber Co. (one brief filed).

Omroni & Taub, P.C. (Parker Waichman, LLP, Port Washington, NY [Jay L. T. Breakstone and Jessica L. Richman], of counsel), for plaintiffs-respondents.

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Marshall Dennehey Warner Coleman & Goggin, P.C., New York, NY (Adam C. Calvert of counsel), for nonparty-respondent.

BRATHWAITE NELSON, J.

We consider on these appeals whether, following the United States Supreme Court decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not.

I.

This action arises from a July 1, 2012, automobile accident that occurred on an interstate highway in Virginia. The defendant Jose A. Aybar, Jr., a New York resident, was operating a 2002 Ford Explorer that was registered in New York when one of its tires allegedly failed, causing the vehicle to become unstable and overturn and roll multiple times. Three of the six passengers died as a result of the accident and the other three were injured. The plaintiffs are the surviving passengers and the representatives of the deceased passengers' estates. They allege, among other things, that the defendant Ford Motor Company (hereinafter Ford) negligently manufactured and designed the Ford Explorer, and that the defendant Goodyear Tire & Rubber Co. (hereinafter Goodyear) negligently manufactured and designed the faulty tire.

Ford is incorporated in Delaware, with its principal place of business in Michigan, and Goodyear is incorporated in, and has its principal place of business in, Ohio. The complaint alleges that at all relevant times both corporations were registered to do business in New York, and that each, in fact, conducted business in New York and derived substantial revenue from such business.

Ford moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground that the Supreme Court lacked personal jurisdiction over it. In support of its motion, Ford submitted evidence that the subject vehicle was manufactured in Missouri and sold to a dealership in Ohio in March 2002, from where it was sold to an individual not involved in this lawsuit, and that the vehicle was not designed in New York. Ford also submitted evidence that it did not have any Ford Explorer manufacturing plants in New York, and it did not directly engage in the servicing of Ford vehicles in New York, which is done exclusively by independent dealers.

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Aybar purchased the subject vehicle and tire in 2011 from a third party in New York.

In opposition to the motion, the plaintiffs argued that Ford was subject to general jurisdiction in New York because Ford maintained a substantial and continuous presence in New York. To support this proposition, the plaintiffs pointed to “hundreds” of Ford dealerships employing numerous New York residents, and they submitted evidence that Ford operated a stamping (manufacturing) plant in Hamburg, New York, which employed approximately 600 people and for which Ford had received incentive packages and tax credits from New York State. In reply, Ford submitted evidence that it had 62 plants and franchise agreements with 11,980 dealerships worldwide, and argued that its economic contacts with New York were not so substantial as compared to its contacts elsewhere so as to render Ford “at home” in New York.

Goodyear also moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground of lack of personal jurisdiction. In support of its motion, Goodyear submitted evidence that the subject tire was designed in Ohio, manufactured in Tennessee in 2002, and tested and inspected outside of New York. Goodyear asserted that it had no way of tracking the sale or ownership of a given tire over its service life, but could identify that the subject class of tire was sold as original equipment for certain Isuzu and Ford vehicles, and as a replacement tire. Goodyear additionally submitted evidence that it operated a chemical plant in New York and that it was a member of a limited liability company which owned and operated a tire manufacturing plant in New York, but that neither plant manufactured the subject tire, and that Goodyear did not specifically direct advertising of the subject tire at New York residents.

In opposition to Goodyear’s motion, the plaintiffs argued that Goodyear was subject to general jurisdiction in New York because its business affiliations within New York were so pervasive or continuous and systematic as to render it essentially “at home” in New York State. The plaintiffs submitted evidence that Goodyear had numerous tire and auto service center storefront locations in New York, from which the plaintiffs argued it could be inferred that Goodyear employed hundreds, possibly thousands, of New York residents. In reply, Goodyear submitted evidence that it had plants, service centers, and other properties worldwide. It argued that it employed “a tremendous number of people” worldwide, and that its economic contacts with New York were not so substantial as compared with its contacts elsewhere so as to render Goodyear “at home” in New York.

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Nonparty U.S. Tires and Wheels of Queens, LLC (hereinafter U.S. Tires), was a defendant in a separate action brought by the plaintiffs arising from the same accident. At the time of the motions to dismiss of Ford and Goodyear, there was a pending motion to consolidate the two actions. U.S. Tires submitted opposition papers to the subject motions, and argued that both Ford and Goodyear had consented to general jurisdiction in New York by registering to do business with the New York Secretary of State and designating an agent for service of process in New York. U.S. Tires noted that it was a New York corporation with its principal place of business in New York, and, thus, if Ford and Goodyear were to succeed on their motions, the result would be three separate lawsuits, all involving the same accident, which, U.S. Tires contended, would likely result in inconsistent verdicts, duplication of discovery, and waste of judicial resources.

In response to U.S. Tires's opposition, Ford argued that the opposition was untimely, U.S. Tires lacked standing to oppose the motion, and, on the merits, Ford's compulsory registration to do business in New York and appointment of the Secretary of State as its agent for service of process did not constitute consent to general jurisdiction in New York. Goodyear advanced similar arguments in response to U.S. Tires's opposition.

In separate orders, each entered May 31, 2016, the Supreme Court, Queens County (hereinafter the motion court), denied the motions, concluding that Ford and Goodyear were each subject to general jurisdiction in New York. The motion court found that the activities of both Ford and Goodyear in New York were so continuous and systematic that both Ford and Goodyear are essentially at home here. The motion court also found that both Ford and Goodyear had otherwise consented to general jurisdiction in New York by each registering to do business in New York as a foreign corporation and designating a local agent for service of process. With regard to Ford's activities in New York, the motion court pointed to the facts that Aybar purchased the vehicle in New York and primarily used it in New York, Ford has an organization of facilities in New York engaged in day-to-day activities, and Ford has many franchises across New York. With regard to Goodyear, the motion court relied upon the facts that Goodyear had operated numerous stores in New York since approximately 1924 and had employed thousands of workers in those stores, and it has an organization of facilities in New York engaged in day-to-day activities. Ford and Goodyear appeal.¹

¹We note that the motion court did not rule on the merits of the issue of whether U.S. Tires could properly oppose the motions of Ford and Goodyear. On their appeals, neither Ford nor Goodyear

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II.

It is fundamental that a court must acquire personal jurisdiction over a defendant before it can render a judgment against that defendant (*see Burnham v Superior Court of Cal., County of Marin*, 495 US 604, 608; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 702). A defendant may consent to a court's exercise of personal jurisdiction (*see National Equipment Rental, Ltd. v Szukhent*, 375 US 311, 316), or waive the right to object to it (*see CPLR 3211[e]*; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US at 703; *Iacovangelo v Shepherd*, 5 NY3d 184, 186), but when a defendant has objected to the court's exercise of personal jurisdiction, the plaintiff bears the burden of coming forward with sufficient evidence to prove jurisdiction (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914).

Under modern jurisprudence, a court may assert general all-purpose jurisdiction or specific conduct-linked jurisdiction over a particular defendant (*see Daimler AG v Bauman*, 571 US at 122; *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915). "A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State" (*Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct 1773, 1780; *see Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US at 919). "Specific jurisdiction, on the other hand, 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 Dunlop Tires Operations, S. A. v Brown*, 564 US at 919 [internal quotation marks and brackets omitted]; *see Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct at 1780; *Daimler AG v Bauman*, 571 US at 127).

Here, in opposing the motions of Ford and Goodyear, the plaintiffs asserted that New York courts have general jurisdiction over each defendant. The plaintiffs did not assert that the court could exercise specific jurisdiction over these defendants in this action, and, thus, we do not consider whether jurisdiction might be exercised over them pursuant to New York's long-arm jurisdiction

raise this issue. We therefore assume, without deciding, that U.S. Tires has standing to oppose the motions and that its opposition was not untimely.

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statute² (*see* CPLR 302).

General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise “such jurisdiction over persons, property, or status as might have been exercised heretofore.” Prior to the United States Supreme Court’s decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation was amenable to suit in New York under CPLR 301 if it had engaged in “such a continuous and systematic course of ‘doing business’ here that a finding of its ‘presence’ in this jurisdiction [was] warranted” (*Landoil Resources. Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33, quoting *Laufers v Ostrow*, 55 NY2d 305, 309-310). The parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction would be consistent with New York law. The disagreement lies in whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*.

In *Goodyear Dunlop Tires Operations, S. A. v Brown*, the Supreme Court addressed the distinction between general and specific jurisdiction, and stated that a court is authorized to exercise general jurisdiction over a foreign corporation when the corporation’s affiliations with the state “are so ‘continuous and systematic’ as to render them essentially at home in the forum State” (564 US at 919, quoting *International Shoe Co. v Washington*, 326 US 310, 317). In *Daimler*, the Court limited the scope of general jurisdiction to that definition, and rejected a standard that would allow the exercise of general jurisdiction in every state in which a corporation is engaged in a substantial, continuous, and systematic course of business (571 US at 137). The Court instructed that, with respect to corporations, the paradigm bases for general jurisdiction are the place of incorporation and principal place of business (*see id.*). Although the Court did not limit the exercise of general jurisdiction to those two forums, it left open only the possibility of an “exceptional case” where a corporate defendant’s operations in another state were “so substantial and of such a nature as to render the corporation at home in that State” (*id.* at 139 n 19; *see BNSF Ry Co. v Tyrrell*, _____ US _____, 137 S Ct 1549, 1558).

Neither Ford nor Goodyear is incorporated in New York or has its principal place of business here. Thus, New York courts can exercise general jurisdiction over each defendant only if the plaintiffs have established that its affiliations with New York are so continuous and systematic

²The arguments of nonparty U.S. Tires that specific jurisdiction is present in this case are not properly before this Court since they were not raised before the motion court.

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as to render it essentially “at home” here.

Since *Daimler*, the Supreme Court has reiterated that, standing alone, mere “in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum State]” (*BNSF Ry Co. v Tyrrell*, ____ US at ____, 137 S Ct at 1559). To determine whether a foreign corporate defendant’s affiliations with the state are so continuous and systematic as to render it essentially at home, *Daimler* advised that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts,” but “instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them” (*Daimler AG v Bauman*, 571 US at 139 n 20; *see BNSF Ry Co. v Tyrrell*, ____ US at _____, 137 S Ct at 1559).

The *Daimler* Court suggested that *Perkins v Benguet Consol. Mining Co.* (342 US 437) exemplified the “exceptional case” in which a corporate defendant’s operations in the forum state were so substantial and of such a nature as to render the corporation “at home” in that state (*see Daimler AG v Bauman*, 571 US at 129). In *Perkins*, the defendant was incorporated in the Philippine Islands, where it owned and operated certain mines (342 US at 439). Its operations were completely halted during the Japanese occupation of the Islands in World War II. During that interim, the president of the company, who was also the general manager and principal stockholder, returned to his home in Ohio, where he maintained an office and conducted the corporation’s affairs (*see id.* at 447-448). The Supreme Court held that Ohio courts could exercise general jurisdiction over the corporation without offending due process (*see id.* at 448). The Supreme Court later noted that “Ohio was the corporation’s principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State” (*Keeton v Hustler Magazine, Inc.*, 465 US 770, 779 n 11, *see Daimler AG v Bauman*, 571 US at 130).

A.

The plaintiffs argue that New York courts have general jurisdiction over Ford because Ford has “become woven into the fabric of New York state domestic activity.” They point to the facts that Ford has been authorized to do business in New York since 1920, it operates numerous facilities in New York, it owns property in New York and spends at least \$150 million to maintain the property, it employs significant numbers of New York residents, it contracts with hundreds of dealerships in New York to sell its products under the Ford brand name, and it has frequently been

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a litigant in New York courts.

Under the strictures of *Daimler*, Ford's contacts with New York are insufficient to permit the assertion of general jurisdiction over claims that are unrelated to any activity occurring in New York. Ford concedes that it has extensive commercial activities in New York, but it notes that it has extensive commercial activities throughout the country and worldwide. Indeed, while the plaintiffs point to Ford's one factory in New York, employing approximately 600 people, and Ford's contracts with "hundreds" of dealerships in the state, Ford presented evidence that it has 62 plants, employing about 187,000 people, and 11,980 franchise agreements with dealerships worldwide. Appraising the magnitude of Ford's activities in New York in the context of the entirety of Ford's activities worldwide, it cannot be said that Ford is at home in New York.

B.

The plaintiffs contend that Goodyear's presence in New York is special, as it has conducted business in New York for nearly a century, it has owned and operated a chemical plant here since the 1940's, as well as a tire manufacturing plant, it has availed itself of New York's courts, and it has leased and subleased real estate in New York, maintained a network of dealers and service centers, and employed thousands of people in New York since 1924. Like Ford, Goodyear concedes that it has extensive commercial activity in New York, but it points to the evidence that it has 50 manufacturing plants worldwide and it operates approximately 1,200 retail outlets for the sale of its tires worldwide. Appraising Goodyear's activities in their entirety, Goodyear also is not at home in New York such that New York courts might exercise general jurisdiction over any claim brought against it.

III.

The plaintiffs also argue that Ford and Goodyear each consented to the jurisdiction of New York courts for all purposes, including this suit, by registering to do business in New York and appointing an agent for service of process. The plaintiffs do not rely on any particular business registration statute in making this argument. Before the motion court, U.S. Tires, which raised this argument, relied only on CPLR 301. Nevertheless, as relevant to these defendants, we note that Business Corporation Law § 1301(a) provides that "[a] foreign corporation shall not do business in this state until it has been authorized to do so." Business Corporation Law § 304(b) provides, inter alia, that no foreign corporation may be authorized to do business in New York unless in its

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application for authority, it designates the secretary of state as the agent upon whom process against the corporation may be served. Similarly, Business Corporation Law § 1304(a)(6) requires a foreign corporation, in its application for authority to do business in New York, to designate the secretary of state as its agent upon whom process against it may be served and an address to which process received by the Secretary of State is to be mailed.

New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect. There has been longstanding judicial construction, however, by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction (*see e.g. Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432, 436-437; *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d 433, 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d 747, 749 [Sup Ct, Albany County 1972]; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d 623, 624 [Sup Ct, Monroe County 1971]; *Carlton Props. v 328 Props.*, 208 Misc 776 [Sup Ct, Nassau County 1955]; *Devlin v Webster*, 188 Misc 891 [Sup Ct, NY County 1946], aff'd 272 App Div 793; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d 461, 464-467 [SD NY][listing numerous federal cases finding consent by registration]; cf. *Muollo v Crestwood Vil.*, 155 AD2d 420, 421). We hold that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.³

In New York, the theory of consent by registration originates in the 1916 opinion of Judge Cardozo in *Bagdon v Philadelphia & Reading Coal & Iron Co.* (217 NY 432). There, the Court of Appeals held that a foreign corporation could be sued in New York upon a cause of action

³The parties observe that post *Daimler*, some New York lawmakers have proposed amending Business Corporation Law § 1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation (*see* 2015 NY Senate-Assembly Bill S4846, A6714). No such changes in the law have been effected to date, and we decline the appellants' invitation to opine on the constitutionality of any such possible amendment.

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that had no relation to the corporation's New York activities because the corporation had consented to the jurisdiction of New York by obtaining authorization to do business here and appointing an agent for service of process in New York. *Bagdon* must be understood within the historical context in which it was decided.

At the time *Bagdon* was decided, *in personam* jurisdiction was still largely limited by the conceptual structure of *Pennoyer v Neff* (95 US 714). In *Pennoyer*, decided shortly after the enactment of the Fourteenth Amendment, the United States Supreme Court held that a court's jurisdiction was restricted by its territorial limits or geographic bounds (*see id.* at 720), and, thus, no state could exercise jurisdiction over persons or property outside of its territory (*see id.* at 722). "*Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there" (*Shaffer v Heitner*, 433 US 186, 199). To complicate matters, under the 19th century view, a corporation could have "no legal existence" outside of its state of incorporation (*Bank of Augusta v Earle*, 38 US 519, 588), and, thus, could be sued only in the state of incorporation, no matter how extensive its business in another state (*see Brown v Lockheed Martin Corp.*, 814 F3d 619, 631).

"In time, however, that strict territorial approach yielded to a less rigid understanding" (*Daimler AG v Bauman*, 571 US at 126). States enacted statutes requiring the appointment by foreign corporations of agents upon whom process could be served "primarily to subject them to the jurisdiction of [the] local courts in controversies growing out of transactions within the [S]tate" (*Morris & Co. v Skandinavia Ins. Co.*, 279 US 405, 409). The business registration statutes conditioned a corporation's authority to do business in a state on its designation of an appointed agent within the state to accept service. "Pointing to the acceptance of service by an in-state agent appointed by the corporation, a state could tenably argue that the corporation had voluntarily consented to jurisdiction there and that, notwithstanding *Earle*, it was 'present' in the state because it maintained an agent there" (*Brown v Lockheed Martin Corp.*, 814 F3d at 632). In addition, federal jurisprudence evolved such that a foreign corporation could be subject to the jurisdiction of a state's courts if the corporation was doing business within the state and service was made in the state upon some duly authorized officer or agent who was representing the corporation in its business (*see St. Louis Southwestern R. Co. of Tex. v Alexander*, 227 US 218, 226; *Herndon-Carter Co. v James N. Norris, Son & Co.*, 224 US 496, 499; *Peterson v Chicago, R. I. & P.R. Co.*, 205 US 364, 390).

Turning back to the Court of Appeals' decision in *Bagdon*, there, a New York

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resident sued a Pennsylvania corporation for an alleged breach of contract that occurred in Pennsylvania. The defendant corporation was registered to do business in New York and had appointed an agent for the service of process in New York (*see Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY at 433). The defendant conceded the presence of an agent in New York, but argued that the scope of the agency of the person appointed to accept service of process in its behalf must be limited to actions which arose out of the business transacted in New York (*see id.* at 433-434). The Court of Appeals rejected the defendant's argument and found that the defendant could properly be sued in New York on the cause of action, even though it did not arise from the defendant's activities in New York. The Court reasoned that by obtaining a certificate from New York to do business here, the defendant had entered into a binding contract with New York. In exchange for the right to do business in New York, the defendant had filed a stipulation in the office of the secretary of state designating a person upon whom process may be served within the state (*see id.* at 436). The Court found that this person was a "true agent" of the defendant, and the stipulation was a "true contract" with New York (*id.*). The Court held that the actions in which this agent was to represent the corporation were not limited, and, as long as New York had subject matter jurisdiction over the action, service on the agent would give jurisdiction of the person (*see id.* at 437). The Court further explained that the agent was in the service of the corporation engaged in business in New York, and that the agent's "presence" brought the corporation within the jurisdiction of New York (*id.* at 439).

One year after *Bagdon* was decided, the Court of Appeals extended this reasoning to a corporation that apparently was unlicensed in New York, but which was doing regular business here. In *Tauza v Susquehanna Coal Co.*, the Court held that New York courts had jurisdiction over a foreign corporation that was doing business in New York and which had been served with process through a managing agent in its New York office, and that the court's jurisdiction "[did not] fail because the cause of action sued upon [had] no relation in its origin to the business here transacted" (220 NY 259, 268). The Court stated that "[t]he essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action" (*id.* at 268-269).

Twenty-three years after *Bagdon*, the Supreme Court of the United States interpreted a successor New York registration statute in accordance with *Bagdon*, and found that the defendant had consented to be sued in the courts of New York by designating an agent in New York for the

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service of process (*see Neirbo Co. v Bethlehem Shipbuilding Corp.*, 308 US 165, 174-175). The Court observed that the statute calling for such a designation was constitutional, and the designation of the agent was “a voluntary act” (*id.* at 175, quoting *Pennsylvania Fire Ins. Co. v Gold Issue Mining & Milling Co.*, 243 US 93, 96).

New York courts continued to be guided by the requirement that a defendant must be found to be “present” in the state in order to exercise jurisdiction over the defendant in accordance with federal due process (*see Simonson v International Bank*, 14 NY2d 281, 285). By registering to do business in New York and appointing an agent for the service of process, a foreign corporation was, in effect, consenting to be found within New York (*see Pohlers v Exeter Mfg. Co.*, 293 NY 274, 280 [“A designation of a public officer upon whom service may be made has the same effect as a voluntary consent”]).

In 1945, the United States Supreme Court decided *International Shoe Co. v State of Washington* (326 US 310), which altered our *in personam* jurisdiction jurisprudence. *International Shoe* extended the analysis beyond physical presence and authorized a state court to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (*id.* at 316, quoting *Milliken v Meyer*, 311 US 457, 463; *see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 923). “Following *International Shoe*, ‘the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction’” (*Daimler AG v Bauman*, 571 US at 126, quoting *Shaffer v Heitner*, 433 US at 204).

After *International Shoe*, courts began to differentiate between general all-purpose jurisdiction and specific case-linked jurisdiction (*see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US at 919). In New York, in 1962, the Legislature enacted CPLR 302 to effect specific jurisdiction, and CPLR 301 to ensure that the general jurisdiction historically exercised in New York was not thought to be limited by the enactment of CPLR 302 (*see* Vincent C. Alexander, Practice Commentaries, *McKinney’s Cons Laws of NY*, Book 7B, CPLR 301 at 7 [2010 ed]). In the interim between *International Shoe* and *Daimler*, where jurisdiction has been predicated on CPLR 301, the prevailing logic has continued to be that there is no need to establish a connection between the cause of action at issue and the foreign defendant’s business activities within the State, “because the

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authority of the New York courts is based solely upon the fact that the defendant is ‘engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of its “presence” in this jurisdiction’” (*McGowan v Smith*, 52 NY2d 268, 272, quoting *Simonson v International Bank*, 14 NY2d at 285; *accord Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33). Some courts have continued to find that by registering to do business in New York and designating an agent for service of process, a foreign corporation has constructively consented to general in personam jurisdiction in New York in exchange for the privilege of doing business here (see *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d at 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d at 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d at 749; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d at 624; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d at 464-467).

As discussed above, following the United States Supreme Court’s decision in *Daimler*, personal jurisdiction cannot be asserted against a foreign corporation based solely on the corporation’s continuous and systematic business activity in New York. The consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has consented to be found in New York. *Daimler* made clear, however, that general jurisdiction cannot be exercised solely on such presence (see *Daimler AG v Bauman*, 571 US at 137-138). The Supreme Court expressly cautioned that cases such as *Tauza v Susquehanna Coal Co.* (220 NY 259) which uphold the exercise of general jurisdiction based on the presence of a local office, “should not attract heavy reliance today” (*Daimler AG v Bauman*, 571 US at 138 n 18). As other courts have observed, it appears that every state in the Union has enacted a registration statute that requires foreign corporations to register to do business and appoint an in-state agent for service of process (see *Genuine Parts Co. v Cepec*, 137 A3d 123, 143; *Brown v Lockheed Martin Corp.*, 814 F3d at 640; see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343, 1363 n 109 [listing statutes]). We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be “unacceptably grasping” under *Daimler* (*Daimler AG v Bauman*, 571 US at 138).

The Court of Appeals does not appear to have cited to *Bagdon* or relied upon its

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consent-by-registration theory since *International Shoe* was decided. We think that this is a strong indicator that its rationale is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and that it no longer holds in the post-*Daimler* landscape. We conclude that a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York.

IV.

The plaintiffs contend in the alternative that the motions should be denied on the ground that additional discovery is needed because facts essential to justify opposition may exist but cannot now be stated (*cf.* CPLR 3211[d]). The plaintiffs have not alleged any facts that would support personal jurisdiction and thus have failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exists here (*see Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1045; *Mejia-Haffner v Killington Ltd.*, 119 AD3d 912, 915).

Accordingly, the Supreme Court should have granted the separate motions of Ford and Goodyear to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction.

The orders entered May 31, 2016, are reversed, on the law, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

LEVENTHAL, J.P., SGROI and LASALLE, JJ., concur.

ORDERED that the orders entered May 31, 2016, are reversed, on the law, with costs, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

ENTER:

Aprilanne Agostino
Clerk of the Court

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No.: 703632/2017

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.

ORDER WITH NOTICE OF ENTRY

AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP

Third-Party Defendant
FORD MOTOR COMPANY
Office and Post Address
600 Third Avenue
New York, NY 10016
212-593-6700

To: ALL PARTIES

**EXHIBIT B TO CALVERT AFFIRMATION -
MOTION FOR LEAVE TO APPEAL, DATED FEBRUARY 22, 2019 [558 - 615]**

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Queens County Clerk's Index No. 706909/15
Appellate Division–Second Department Docket Nos. 2016-06194 and 2016-07397

Court of Appeals
of the
State of New York

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs-Respondents,

– against –

JOSE A. AYBAR, JR. and “JOHN DOES 1 THRU 30,”

Defendants,

– and –

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Respondents.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Appellant.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

-----X

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR,
as legal guardian on behalf of K.C., an infant over the age of
fourteen (14) years, JESENIA AYBAR, as Administratrix of the
ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as
Administratrix of the ESTATE OF T.C., a deceased infant
under the age of fourteen (14) years and ANNA AYBAR, as
Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs-Respondents,

-against-

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

-and-

FORD MOTOR COMPANY and THE GOODYEAR
TIRE & RUBBER CO.,

Defendants-Respondents,

-----X

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Appellant.

-----X

PLEASE TAKE NOTICE, that upon the brief of Adam C. Calvert and the
attached papers in this action, non-party appellant U.S. Tires and Wheels of Queens,
LLC will move this Court, pursuant to CPLR 5602(a) and 22 NYCRR 500.22 at
Court of Appeals Hall, 20 Eagle Street, Albany, New York, on March 11, 2019, for
an order granting U.S. Tires leave to appeal from a decision of the Appellate

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Division, Second Department, dated January 23, 2019, which granted Ford Motor Company and Goodyear Tire & Rubber Co.'s motions to dismiss for lack of personal jurisdiction.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR 500.11(a), this motion will be submitted on the papers without oral argument or personal appearance.

Dated: New York, New York
February 22, 2019

Marshall Dennehey Warner
Coleman & Goggin



Adam C. Calvert
Attorney for Non-Party Appellant
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File No.: 40318.00121

To: Parker Waichman, LLP
Appellate Counsel for Plaintiffs
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QUESTION PRESENTED

1. Whether consent by registration and appointment of an agent for service of process is still a valid basis for general personal jurisdiction in New York after the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014)?

Answer: Yes. *Daimler* did not deal with consent by registration and it should remain a valid basis for general personal jurisdiction as it has for over 100 years.

PROCEDURAL HISTORY, TIMELINESS, AND JURISDICTION

This is an appeal of a decision of the Appellate Division, Second Department, which reversed a decision of the Queens County Supreme Court that denied Ford Motor Company and Goodyear Tire & Rubber Company's motions to dismiss for lack of personal jurisdiction.

The Second Department's decision was issued on January 23, 2019 and was served with notice of entry on the same day by regular mail. This motion, which is being served and filed within 35 days of January 23, 2019, is therefore timely. CPLR 5513 & 2103.

This Court has jurisdiction over this motion and appeal pursuant to CPLR 5602 because this is a proceeding originating in the Supreme Court and the Appellate Division's order finally determines the action and is not appealable as of right.

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DOCUMENTS ACCOMPANYING THIS MOTION

The following documents are attached to this motion:

Exhibit A – Notice of Entry and Copy of the Appellate Division, Second Department's January 23, 2019 Order

Exhibit B – Decision and Order of the Honorable Thomas D. Raffaele, dated May 25, 2016, with Notice of Entry

ARGUMENT

The Second Department's decision wrongly changed over 100 years of personal jurisdiction precedent from this Court and the U.S. Supreme Court when it decided that Ford and Goodyear were not subject to personal jurisdiction based on their registration to do business in New York and appointment of an agent for service of process with the Secretary of State.

Ever since this Court's decision in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), a corporation's registration to do business in New York and appointment of an agent for service of process has always been a valid basis for general personal jurisdiction. The Second Department's decision to overrule *Bagdon* was based on a recent U.S. Supreme Court case, *Daimler AG v. Bauman*, 571 U.S. 117 (2014). But *Daimler* dealt with general personal jurisdiction where there was no consent by registration to do business, and because of that fact it is inapplicable to our case.

This Court should hear this appeal because it involves issues of novel and public importance and presents a conflict with prior decisions of this Court and among the Appellate Divisions. 22 NYCRR 500.22(b)(4). The Second Department expressly overruled this Court's decision in *Bagdon* based on an incorrect reading of the U.S. Supreme Court's decision in *Daimler*. The Second Department's ruling also created a conflict among the Appellate Divisions, as all other Appellate

Divisions still recognize registration to do business as consent to general personal jurisdiction. Moreover, this is a novel issue and of great public importance. The Second Department's decision changes over 100 years of personal jurisdiction jurisprudence and now calls in to question countless cases pending in the New York State Courts where jurisdiction is predicated on registration to do business.

FACTS AND DECISIONS BELOW

The plaintiffs are a family from New York. They were driving back to New York from Disney World when one of the Goodyear tires on their Ford Explorer blew while traveling through Virginia. R.21.¹ The Ford Explorer ran off the road, killing three passengers and injuring three other passengers and the driver. R.21. The plaintiffs claim that the accident happened because of a defective design in the Ford Explorer, which was purchased and registered in New York. R.8-9. They also claim that the accident happened because of a defective Goodyear tire on the vehicle. R.21. The Goodyear tire and the Ford Explorer were allegedly serviced at U.S. Tires, a garage in Queens, New York. The passenger-plaintiffs sued Ford and Goodyear in Queens County Supreme Court in this action. R.44-71. The driver-plaintiff sued Goodyear in Queens County Supreme Court in another action, from which there was a related motion and appeal. All plaintiffs sued U.S. Tires in Queens County Supreme Court in a third action in which U.S. Tires commenced a third-party action

¹ Record citations are to the record on the appeal below, which is provided along with this motion.

against Ford and Goodyear for contribution and indemnity for their role in causing the accident.

Ford and Goodyear moved to dismiss the direct complaints against them for lack of personal jurisdiction. R.27-43, 75-92. They argued that there was no general personal jurisdiction because under the recent U.S. Supreme Court case *Daimler AG v. Bauman*, 571 U.S. 117 (2014), general personal jurisdiction is limited to states where a corporation is "at home," which Ford and Goodyear argued are limited to a corporation's state of incorporation and principal place of business. R.27-43, 75-92. Ford's principal place of business is Michigan and it is incorporated in Delaware. R.72-74. The Ford Explorer was assembled in Missouri and shipped to a dealer in Ohio. R.72-74. Goodyear's principal place of business and state of incorporation are Ohio, the tire was designed in Ohio, and the tire was manufactured in Tennessee. R.119-21. Goodyear knows nothing about the chain of custody of the tire, not even where it was shipped to initially after it was manufactured. R.119-21. In opposition, the plaintiffs argued that Ford has hundreds of dealerships in New York and a manufacturing plant in New York. Ford Explorers were extensively marketed in New York. And the Ford Explorer at issue was sold, registered, and used primarily in New York. R.122-35. Similarly, Goodyear owns and operates hundreds of service centers throughout New York, it has been the exclusive provider of tires to the New York City Transit Authority since 1987, it has been the exclusive provider of tires

to New York State agencies since at least 2010, and it has at least one manufacturing facility in New York. R.152-204.

As a separate argument, the plaintiffs and U.S. Tires argued that Ford and Goodyear consented to jurisdiction by registering to do business in New York and appointing an agent for service of process. R.205-07.

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied Ford and Goodyear's motions in separate, but substantially identical, orders. R.5-26 and **Exhibit B**. The court found that there was general personal jurisdiction over Ford and Goodyear because its "activities with the State of New York have been so continuous and systematic that the company is essentially at home here." R.13, 24. It also found that there was general personal jurisdiction because Ford and Goodyear were registered foreign corporations that designated an agent for service of process, thereby consenting to jurisdiction. R.13-15, 25-26.

Ford and Goodyear appealed the orders to the Appellate Division, Second Department. The Second Department found that there was no general personal jurisdiction under the *Daimler* "at home" standard, which essentially limits general personal jurisdiction to the state of incorporation and principal place of business when there is no consent to jurisdiction by registration to do business. The Second Department also held that there was no general personal jurisdiction via Ford and

Goodyear's registration to do business in New York and appointment of an agent for service of process. Second Department Decision (**Exhibit A**).

In reaching this decision, the Second Department overturned over 100 years of precedent from this Court and the U.S. Supreme Court, which held that a corporation was subject to the general personal jurisdiction of a state by registering to do business and appointing an agent for service of process.² The Second Department's decision was based on an incorrect reading of *Daimler*. *Daimler* dealt with general personal jurisdiction in the absence of consent by registration. It did not overturn the longstanding precedent that registration to do business was a valid basis for general personal jurisdiction.

POINT I—CONSENT BY REGISTRATION HAS BEEN RECOGNIZED AS A VALID BASIS FOR GENERAL PERSONAL JURISDICTION FOR OVER 100 YEARS

There are two types of personal jurisdiction: general and specific. Specific jurisdiction is based on the case's relationship to the state, such as the injury occurring in the state. General jurisdiction allows a company to be sued in the state on any cause of action, regardless of the relationship of the facts to the state. See *Daimler*, 571 U.S. at 127.

² The Second Department did not consider the specific jurisdiction arguments made by U.S. Tires in its brief, saying that these arguments were not before the motion court. Second Department Decision at 6, fn. 2 (**Exhibit A**); U.S. Tires Brief at 19-32. However, the specific jurisdiction argument was made to the Supreme Court, although it found that there was no specific personal jurisdiction under CPLR 302(a)(1) & (3) because the Goodyear tire and Ford Explorer were manufactured out of state and the injuries were sustained out-of-state. R.10, 22, 122-35, 152-204.

There are several ways that a company can be subject to general personal jurisdiction. One is consent. *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982). Jurisdiction by consent has been upheld by the U.S. Supreme Court for nearly 150 years. That line of cases began with *Ex parte Schollenberger*, 96 U.S. 369 (1877). In *Schollenberger*, the U.S. Supreme Court first held that a state legislature may require a foreign corporation to consent to general personal jurisdiction as a condition of being granted the right to do business in that state:

[I]f the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent.

Id. at 377. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), the court affirmed that it had "little doubt" that the appointment of an agent by a foreign corporation for service of process could subject it to general personal jurisdiction. *Id.* at 95. This principle was recently reiterated by the U.S. Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011), citing *Compagnie*, and in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). *Burnham* upheld personal jurisdiction based on in-state service on a non-resident defendant. The court cited a string of cases, most importantly ones applying the in-state service rule to foreign corporate defendants accepting service by agent,

to conclude that the in-state service rule "remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government." *Id.* at 615-16 (emphasis added).

For over 100 years, ever since this Court's decision in *Bagdon*, New York state courts have recognized that registration to do business in New York and designation of the Secretary of State for service of process under Business Corporations Law 304(b) & 1304 is tantamount to consent to personal jurisdiction in New York. *See Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916); *Muollo v. Crestwood Village, Inc.*, 155 A.D.2d 420 (2d Dep't 1989); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76 (3d Dep't 1983); *Chong v. Healthtronics, Inc.*, 2007 U.S. Dist. LEXIS 45956 at *17 (E.D.N.Y. 2007). This precedent has never been overturned until the Second Department's decision in this case.

POINT II—THE SECOND DEPARTMENT'S DECISION TO OVERTURN THIS PRECEDENT WAS BASED ON A FLAWED READING OF *DAIMLER*

According to the Second Department, this long-standing precedent changed with *Daimler*. That rationale is fundamentally flawed. *Daimler* did not address consent by registration and did not overrule the well-settled precedent that registration to do business in New York carries with it consent to be sued in New York. There was no chance to consider whether there was personal jurisdiction based on consent by registration in *Daimler* because California (the subject state in

that case) does not interpret its registration statute as consent to personal jurisdiction like New York. In fact, *Daimler*'s citation to *Perkins*, for the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum," shows that the *Daimler* court was deciding a case where the corporation had not consented to general jurisdiction via a registration statute. *Daimler*, 571 U.S. at 129 (quoting) (emphasis added). The two other general personal jurisdiction cases examined by *Daimler* similarly concerned defendants who were not authorized to do business in the forum state and had not consented to suit. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852 (2011) (stating that defendants were not registered to do business in North Carolina); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984) (noting that defendant had never been authorized to do business in Texas and never had an agent for service of process in Texas). If the U.S. Supreme Court wanted to overrule the existing precedent of jurisdiction based on consent via registration, it is up to the U.S. Supreme Court to do so explicitly. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (Even if a Supreme Court precedent contains

many "infirmities" and rests upon "wobbly, moth-eaten foundations," it remains the "Court's prerogative alone to overrule one of its precedents.").

In the same vein, if this Court wanted to overrule *Bagdon* and its longstanding precedent on personal jurisdiction, it is up to this Court to do so.

Numerous New York State and Federal Courts have upheld consent by registration after *Daimler*, recognizing that *Daimler* only applied where there was no consent by registration. *See Beach v. Citigroup Alternative Invs. LLC*, 2014 U.S. Dist. LEXIS 30032 (S.D.N.Y. 2014) ("Notwithstanding [the limitations on jurisdiction imposed by *Daimler*] a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."); *Serov v. Kerzner Int'l Resorts, Inc.*, 2016 N.Y. Misc. LEXIS 2818 (Sup. Ct., N.Y. Cty. 2016) (finding general jurisdiction over foreign corporation because of registration); *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015); *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., Ltd.*, 131 A.D.3d 259 (1st Dep't 2015).

The same rationale has also been accepted in numerous courts across the country post-*Daimler*. A New Jersey federal court upheld consent to personal jurisdiction by registration in a case decided after *Daimler*. *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437-438 (D.N.J. 2015). In *Perrigo Co. v. Merial Ltd.*, 2015 U.S. Dist. LEXIS 45214 (D. Neb. 2015), the court upheld general

jurisdiction over a defendant based on its registration to do business in the state, finding that *Daimler* did not overrule the consent by registration caselaw. *See also Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 469 (D. N.J. 2015); *Chalkey v. Smithkline Beecham Corp.*, 2016 U.S. Dist. LEXIS 21462 (E.D. Mo. 2016) (holding that consent to general personal jurisdiction via a registration and appointment of agent for service was still valid after *Daimler*); *Regal Beloit America, Inc. v. Broad Ocean Motor LLC*, 2016 U.S. Dist. LEXIS 85123 (E.D. Mo. 2016) (same); *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O'Malley, J., concurring) (finding that consent to jurisdiction by registration was still valid after *Daimler*).

The Second Department's rationale for departing from well-established caselaw and precedent of this Court and the U.S. Supreme Court was faulty. It held "that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York." Second Department Decision at 9 (**Exhibit A**). The Second Department then traced the history of general personal jurisdiction caselaw up to *Daimler*, acknowledging that consent by registration was a valid basis for general jurisdiction in New York. The Second

Department then stated that following *Daimler*, “personal jurisdiction cannot be asserted against a foreign corporation based solely on the corporation’s continuous and systematic business activity in New York.” Second Department Decision at 13 (**Exhibit A**). The problem with this rationale is that *Daimler* only applies to cases where there is no consent by registration. Notably, the Second Department relied on *Daimler*’s reference to the New York Court of Appeals decision, *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917), where *Daimler* said that *Tauza* “should not attract heavy reliance today.” Second Department Decision at 13 (**Exhibit A**). But as the Second Department itself noted when explaining *Bogdon* and *Tauza*, *Bogdon* involved a corporation that was registered to do business in New York and this Court found general personal jurisdiction was available because of the registration. On the other hand, *Tauza*, decided one year after *Bogdon*, involved a corporation that was not registered to do business in New York. *Tauza* is analogous to *Daimler* because in both cases jurisdiction was not based on the corporation’s registration to do business in the state. *Bagdon* is like our case because both Ford and Goodyear are registered to do business in New York and that consent via registration is the basis for jurisdiction. And *Daimler* did not overrule *Bagdon*.

The U.S. Supreme Court issued another personal jurisdiction decision, *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017), where the court discussed *Daimler*. Notably, the plaintiffs in *Tyrell* tried to argue that the defendant consented to general

jurisdiction via registration and the court did not address it because it was not addressed by the lower court, again showing that the *Daimler* analysis of personal jurisdiction is separate and distinct from consent by registration. *Id.* at 1559.

The Second Department's rationale continues by stating that "asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*." Second Department Decision at 13 (**Exhibit A**). The Second Department seems to imply that if New York's Business Corporations Law explicitly stated that registration was consent to general personal jurisdiction, the result would be different. The lack of explicit language in the Business Corporations Law does not mean that corporations are not on notice that they are consenting to jurisdiction by registering. *Pennsylvania Fire Ins.*, 243 U.S. at 96 ("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts.") (dealing with consent to jurisdiction by registration). New York courts have consistently recognized that consent is a part of the registration ever since *Bagdon* and corporations are on notice that they consent to general jurisdiction by registering.

The last basis for the Second Department's decision is that this Court has not cited to *Bagdon* or relied on it since *International Shoe* was decided in 1945 and

“this is a strong indicator that its rationale is confined to that era, which was dominated by *Pennoyer*’s territorial thinking, and that it no longer holds in the post-*Daimler* landscape.” Second Department Decision at 13 (**Exhibit A**). Again, this rationale is misplaced. There has been no reason for this Court to issue a decision on the issue until now. Consent by registration has been a valid basis for jurisdiction in New York for over 100 years and should remain so.

POINT III—CONSENT BY REGISTRATION SHOULD REMAIN A VALID BASIS FOR GENERAL PERSONAL JURISDICTION IN NEW YORK

Registration to do business is voluntary. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (holding that “[a] statute calling for [designation of an agent for service of process in the forum state] is constitutional, and the designation of the agent ‘a voluntary act’” (citing *Pennsylvania Fire*, 243 U.S. 93)). Businesses that register also gain certain rights and privileges as part of registration. The trade-off for those privileges is that they are subject to personal jurisdiction in New York. This is “part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York.” Practice Commentaries, CPLR 310:8, citing *Neirbo*, 308 U.S. at 175.

Ford and Goodyear benefit greatly from the bargain of registration. They are frequent plaintiffs in New York. They extensively market and sell their products in New York. They are large, national corporations that do significant business in New York. They have the resources to litigate cases in New York, which they frequently

do, not only as defendants, but as plaintiffs. Yet they complain about the unfairness of being subject to jurisdiction in New York courts when a product they marketed in New York, purchased by a New Yorker, and registered by a New Yorker injures New Yorkers.

Conferring general jurisdiction via registration will not open the doors to out-of-state plaintiffs suing Ford and Goodyear in New York in cases that have nothing to do with New York. There was no doubt before *Daimler* that Ford and Goodyear were subject to general jurisdiction in New York, so these fears would have manifested already, but they have not. Even under the consent by registration basis for general personal jurisdiction, a state may constitutionally exercise jurisdiction over non-domiciliary defendants only if it had "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). "Minimum contacts" with the forum state depends on whether the defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant may reasonably foresee the prospect of defending a suit in the forum state if it "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* Here, Ford and Goodyear

purposefully availed themselves of the privilege by registering to do business in New York.

In *LaMarca*, this Court found that due process requirements were satisfied where the defendant-manufacturer was incorporated in another state and did not have any direct New York connections other than a New York distributor. The court relied on the fact that the defendant was a United States corporation, fully familiar with New York law, adding that "New York has an interest in providing a convenient forum for [the plaintiff], a New York resident who was injured in New York and may be entitled to relief under New York law." *LaMarca*, 95 N.Y.2d at 218. The court then said the following, which applies especially well to Ford and Goodyear:

When a company of [defendant's] size and scope profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in this State. Considering that [defendant's] long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm. In all, we conclude that asserting jurisdiction over [defendant] in New York would not offend traditional notions of fair play and substantial justice.

Id. at 218-19; *see also Darienzo*, 74 A.D.2d 342 (due process was satisfied because product manufacturer placed the product in the stream of commerce with the expectation that they will be purchased in New York).

The U.S. Supreme Court has stated that jurisdiction in similar cases comport with due process requirements. *Ashai Metal Industry Co. v. Superior Court of Cal.*,

Solano Cty., 480 U. S. 102, 112 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" while also "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World-Wide Volkswagen*, 444 U. S. at 297 ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.").

In this case, finding that the New York courts have jurisdiction over Ford and Goodyear does not violate due process. They marketed and sold the products in New York and therefore they should reasonably expect the products defects to have consequences in New York.

Finally, New York has a substantial interest in this case and should have jurisdiction over Ford and Goodyear. New Yorkers have been killed and injured, allegedly because of Ford and Goodyear's defective products. These products were sold, registered, and extensively advertised in New York. U.S. Tires, a New York

garage, is also a defendant and has contribution and indemnity claims against Ford and Goodyear that it should be able to pursue in New York.

If this Court agrees with Ford and Goodyear and holds that they are not subject to personal jurisdiction in this case that decision would have disastrous consequences. It would result in one lawsuit against Ford in Michigan or Delaware, another against Goodyear in Ohio, and a third against U.S. Tires in New York. U.S. Tires would also need to prosecute its cross-claims against Ford and Goodyear in some forum. Inconsistent verdicts are almost guaranteed under this scenario. Discovery could not be coordinated between the various actions, resulting in duplicity and wasting judicial resources. *See LaMarca*, 95 N.Y.2d at 219 (“[I]t would be orderly to allow plaintiff to sue all named defendants in New York. A single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy.”).

Ford and Goodyear cry prejudice at the prospect of litigating this case in New York, apparently blind to the fact that their products, which were sold, registered, and marketed in New York, injured New York residents. Jurisdictional requirements are meant to prevent out-of-state companies from being hauled into court in a state that has no connection with the accident or the defendants. That danger is absent from this case. Ford and Goodyear are large, national corporations that are more than capable of litigating this case in New York. New York has a substantial interest

in seeing that injured New York residents are provided with a forum to sue manufacturers who sell their products in the New York market injuring New Yorkers. A finding by this Court in favor of Ford and Goodyear would deprive the plaintiffs of that forum.

CONCLUSION

This Court should hear this appeal because it involves issues of novel and public importance and presents a conflict with prior decisions of this Court and among the Appellate Divisions. 22 NYCRR 500.22(b)(4). The Second Department expressly overruled this Court's decision in *Bagdon* based on an incorrect reading of the U.S. Supreme Court's decision in *Daimler*. The Second Department's ruling also created a conflict among the Appellate Divisions, as all other Appellate Divisions still recognize registration to do business as consent to general personal jurisdiction. Moreover, this is a novel issue and of great public importance. The Second Department's decision changes over 100 years of personal jurisdiction jurisprudence and now calls in to question countless cases pending in the New York State Courts where jurisdiction is predicated on registration to do business.

WHEREFORE, this Court should grant U.S. Tire's motion pursuant to CPLR 5602(a) and 22 NYCRR 500.22, granting it leave to appeal from a decision of the Appellate Division, Second Department, dated January 23, 2019, which granted Ford Motor Company and Goodyear Tire & Rubber Co.'s motions to dismiss for

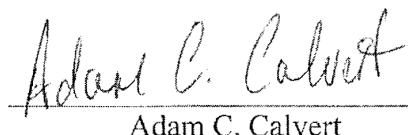
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lack of personal jurisdiction, together with such other relief as this Court deems just and proper.

Dated: New York, New York
February 22, 2019



Adam C. Calvert

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COURT OF APPEALS
STATE OF NEW YORK

-----X

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR,
as legal guardian on behalf of K.C., an infant over the age of
fourteen (14) years, JESENIA AYBAR, as Administratrix of the
ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as
Administratrix of the ESTATE OF T.C., a deceased infant
under the age of fourteen (14) years and ANNA AYBAR, as
Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

CORPORATE
DISCLOSURE
STATEMENT

Plaintiffs-Respondents,

-against-

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

-and-

FORD MOTOR COMPANY and THE GOODYEAR
TIRE & RUBBER CO.,

Defendants-Respondents,

-----X

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Appellant.

-----X

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court
of Appeals, counsel for Non-Party Appellant U.S. Tires and Wheels of Queens, LLC
certifies that it has no corporate parents, subsidiaries or affiliates.

Dated: New York, New York
 February 22, 2019

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EXHIBIT A

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF QUEENS

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA
 AYBAR, as legal guardian on behalf of K.C., an infant **ORDER WITH NOTICE OF ENTRY**
 over the age of fourteen (14) years; JESENIA
 AYBAR, as Administratrix of the ESTATE OF Index No. 706909/2015
 NOELIA OLIVERAS, JESENIA AYBAR, as
 Administratrix of the ESTATE OF T.C., a deceased
 infant under the age of fourteen (14) years, and ANNA
 AYBAR, as Administratrix of the ESTATE OF
 CRYSTAL CRUZ-AYBAR

Plaintiffs,

- against -

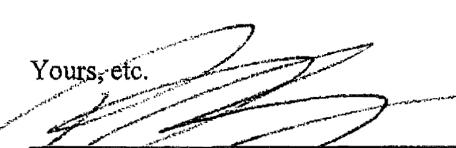
JOSE A. AYBAR, JR., FORD MOTOR COMPANY,
 THE GOODYEAR TIRE & RUBBER CO., and
 "JOHN DOES 1 THRU 30"

Defendants.

PLEASE TAKE NOTICE the within is a true copy of the Opinion & Order signed by
 the Clerk of the Court, Aprilanne Agostino, dated January 23, 2019, which was entered with the
 Supreme Court of the State of New York Appellate Division, Second Judicial Department on
 January 23, 2019.

Dated: New York, New York
 January 23, 2019

Yours, etc.


 BY: PETER J. FAZIO
 AARONSON RAPPAPORT FEINSTEIN &
 DEUTSCH, LLP

Attorneys for Defendants

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To: OMRANI & TAUB, P.C.
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Supreme Court of the State of New York
 Appellate Division: Second Judicial Department

D57109
 C/htr

AD3d

Argued - March 26, 2018

JOHN M. LEVENTHAL, J.P.
 SANDRA L. SGROI
 HECTOR D. LASALLE
 VALERIE BRATHWAITE NELSON, JJ.

2016-06194
 2016-07397

OPINION & ORDER

Anna Aybar, et al., plaintiffs-respondents, v Jose A. Aybar, Jr., et al., defendants, Ford Motor Company, et al., appellants; U.S. Tires and Wheels of Queens, LLC, nonparty-respondent.

(Index No. 706909/15)

APPEAL by the defendant Ford Motor Company, in an action to recover damages for personal injuries and wrongful death, from an order of the Supreme Court (Thomas D. Raffaele, J.), entered May 31, 2016, in Queens County, and SEPARATE APPEAL by the defendant Goodyear Tire & Rubber Co. from an order of the same court, also entered May 31, 2016. The first order denied the motion of the defendant Ford Motor Company pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction. The second order denied the motion of the defendant Goodyear Tire & Rubber Co., pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction.

Aaronson Rappaport Feinstein & Deutsch, LLP (Eliot J. Zucker, Peter J. Fazio, and Hogan Lovells US LLP, New York, NY [Sean Marotta], of counsel), for appellant Ford Motor Company, and DLA Piper LLP, New York, NY (Kevin W. Rethore of counsel), for appellant Goodyear Tire & Rubber Co. (one brief filed).

Omrani & Taub, P.C. (Parker Waichman, LLP, Port Washington, NY [Jay L. T. Breakstone and Jessica L. Richman], of counsel), for plaintiffs-respondents.

January 23, 2019

AYBAR v AYBAR

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Marshall Dennehey Warner Coleman & Goggin, P.C., New York, NY (Adam C. Calvert of counsel), for nonparty-respondent.

BRATHWAITE NELSON, J.

We consider on these appeals whether, following the United States Supreme Court decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not.

I.

This action arises from a July 1, 2012, automobile accident that occurred on an interstate highway in Virginia. The defendant Jose A. Aybar, Jr., a New York resident, was operating a 2002 Ford Explorer that was registered in New York when one of its tires allegedly failed, causing the vehicle to become unstable and overturn and roll multiple times. Three of the six passengers died as a result of the accident and the other three were injured. The plaintiffs are the surviving passengers and the representatives of the deceased passengers' estates. They allege, among other things, that the defendant Ford Motor Company (hereinafter Ford) negligently manufactured and designed the Ford Explorer, and that the defendant Goodyear Tire & Rubber Co. (hereinafter Goodyear) negligently manufactured and designed the faulty tire.

Ford is incorporated in Delaware, with its principal place of business in Michigan, and Goodyear is incorporated in, and has its principal place of business in, Ohio. The complaint alleges that at all relevant times both corporations were registered to do business in New York, and that each, in fact, conducted business in New York and derived substantial revenue from such business.

Ford moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground that the Supreme Court lacked personal jurisdiction over it. In support of its motion, Ford submitted evidence that the subject vehicle was manufactured in Missouri and sold to a dealership in Ohio in March 2002, from where it was sold to an individual not involved in this lawsuit, and that the vehicle was not designed in New York. Ford also submitted evidence that it did not have any Ford Explorer manufacturing plants in New York, and it did not directly engage in the servicing of Ford vehicles in New York, which is done exclusively by independent dealers.

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Aybar purchased the subject vehicle and tire in 2011 from a third party in New York.

In opposition to the motion, the plaintiffs argued that Ford was subject to general jurisdiction in New York because Ford maintained a substantial and continuous presence in New York. To support this proposition, the plaintiffs pointed to “hundreds” of Ford dealerships employing numerous New York residents, and they submitted evidence that Ford operated a stamping (manufacturing) plant in Hamburg, New York, which employed approximately 600 people and for which Ford had received incentive packages and tax credits from New York State. In reply, Ford submitted evidence that it had 62 plants and franchise agreements with 11,980 dealerships worldwide, and argued that its economic contacts with New York were not so substantial as compared to its contacts elsewhere so as to render Ford “at home” in New York.

Goodyear also moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground of lack of personal jurisdiction. In support of its motion, Goodyear submitted evidence that the subject tire was designed in Ohio, manufactured in Tennessee in 2002, and tested and inspected outside of New York. Goodyear asserted that it had no way of tracking the sale or ownership of a given tire over its service life, but could identify that the subject class of tire was sold as original equipment for certain Isuzu and Ford vehicles, and as a replacement tire. Goodyear additionally submitted evidence that it operated a chemical plant in New York and that it was a member of a limited liability company which owned and operated a tire manufacturing plant in New York, but that neither plant manufactured the subject tire, and that Goodyear did not specifically direct advertising of the subject tire at New York residents.

In opposition to Goodyear’s motion, the plaintiffs argued that Goodyear was subject to general jurisdiction in New York because its business affiliations within New York were so pervasive or continuous and systematic as to render it essentially “at home” in New York State. The plaintiffs submitted evidence that Goodyear had numerous tire and auto service center storefront locations in New York, from which the plaintiffs argued it could be inferred that Goodyear employed hundreds, possibly thousands, of New York residents. In reply, Goodyear submitted evidence that it had plants, service centers, and other properties worldwide. It argued that it employed “a tremendous number of people” worldwide, and that its economic contacts with New York were not so substantial as compared with its contacts elsewhere so as to render Goodyear “at home” in New York.

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Nonparty U.S. Tires and Wheels of Queens, LLC (hereinafter U.S. Tires), was a defendant in a separate action brought by the plaintiffs arising from the same accident. At the time of the motions to dismiss of Ford and Goodyear, there was a pending motion to consolidate the two actions. U.S. Tires submitted opposition papers to the subject motions, and argued that both Ford and Goodyear had consented to general jurisdiction in New York by registering to do business with the New York Secretary of State and designating an agent for service of process in New York. U.S. Tires noted that it was a New York corporation with its principal place of business in New York, and, thus, if Ford and Goodyear were to succeed on their motions, the result would be three separate lawsuits, all involving the same accident, which, U.S. Tires contended, would likely result in inconsistent verdicts, duplication of discovery, and waste of judicial resources.

In response to U.S. Tires's opposition, Ford argued that the opposition was untimely, U.S. Tires lacked standing to oppose the motion, and, on the merits, Ford's compulsory registration to do business in New York and appointment of the Secretary of State as its agent for service of process did not constitute consent to general jurisdiction in New York. Goodyear advanced similar arguments in response to U.S. Tires's opposition.

In separate orders, each entered May 31, 2016, the Supreme Court, Queens County (hereinafter the motion court), denied the motions, concluding that Ford and Goodyear were each subject to general jurisdiction in New York. The motion court found that the activities of both Ford and Goodyear in New York were so continuous and systematic that both Ford and Goodyear are essentially at home here. The motion court also found that both Ford and Goodyear had otherwise consented to general jurisdiction in New York by each registering to do business in New York as a foreign corporation and designating a local agent for service of process. With regard to Ford's activities in New York, the motion court pointed to the facts that Aybar purchased the vehicle in New York and primarily used it in New York, Ford has an organization of facilities in New York engaged in day-to-day activities, and Ford has many franchises across New York. With regard to Goodyear, the motion court relied upon the facts that Goodyear had operated numerous stores in New York since approximately 1924 and had employed thousands of workers in those stores, and it has an organization of facilities in New York engaged in day-to-day activities. Ford and Goodyear appeal.¹

¹We note that the motion court did not rule on the merits of the issue of whether U.S. Tires could properly oppose the motions of Ford and Goodyear. On their appeals, neither Ford nor Goodyear

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II.

It is fundamental that a court must acquire personal jurisdiction over a defendant before it can render a judgment against that defendant (*see Burnham v Superior Court of Cal., County of Marin*, 495 US 604, 608; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 702). A defendant may consent to a court's exercise of personal jurisdiction (*see National Equipment Rental, Ltd. v Szukheni*, 375 US 311, 316), or waive the right to object to it (*see CPLR 3211[e]*; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US at 703; *Iacovangelo v Shepherd*, 5 NY3d 184, 186), but when a defendant has objected to the court's exercise of personal jurisdiction, the plaintiff bears the burden of coming forward with sufficient evidence to prove jurisdiction (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914).

Under modern jurisprudence, a court may assert general all-purpose jurisdiction or specific conduct-linked jurisdiction over a particular defendant (*see Daimler AG v Bauman*, 571 US at 122; *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915). "A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State" (*Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct 1773, 1780; *see Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US at 919). "Specific jurisdiction, on the other hand, 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 Dunlop Tires Operations, S. A. v Brown*, 564 US at 919 [internal quotation marks and brackets omitted]; *see Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct at 1780; *Daimler AG v Bauman*, 571 US at 127).

Here, in opposing the motions of Ford and Goodyear, the plaintiffs asserted that New York courts have general jurisdiction over each defendant. The plaintiffs did not assert that the court could exercise specific jurisdiction over these defendants in this action, and, thus, we do not consider whether jurisdiction might be exercised over them pursuant to New York's long-arm jurisdiction

raise this issue. We therefore assume, without deciding, that U.S. Tires has standing to oppose the motions and that its opposition was not untimely.

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statute² (*see* CPLR 302).

General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise “such jurisdiction over persons, property, or status as might have been exercised heretofore.” Prior to the United States Supreme Court’s decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation was amenable to suit in New York under CPLR 301 if it had engaged in “such a continuous and systematic course of ‘doing business’ here that a finding of its ‘presence’ in this jurisdiction [was] warranted” (*Landoil Resources. Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33, quoting *Laufser v Ostrow*, 55 NY2d 305, 309-310). The parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction would be consistent with New York law. The disagreement lies in whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*.

In *Goodyear Dunlop Tires Operations, S. A. v Brown*, the Supreme Court addressed the distinction between general and specific jurisdiction, and stated that a court is authorized to exercise general jurisdiction over a foreign corporation when the corporation’s affiliations with the state “are so ‘continuous and systematic’ as to render them essentially at home in the forum State” (564 US at 919, quoting *International Shoe Co. v Washington*, 326 US 310, 317). In *Daimler*, the Court limited the scope of general jurisdiction to that definition, and rejected a standard that would allow the exercise of general jurisdiction in every state in which a corporation is engaged in a substantial, continuous, and systematic course of business (571 US at 137). The Court instructed that, with respect to corporations, the paradigm bases for general jurisdiction are the place of incorporation and principal place of business (*see id.*). Although the Court did not limit the exercise of general jurisdiction to those two forums, it left open only the possibility of an “exceptional case” where a corporate defendant’s operations in another state were “so substantial and of such a nature as to render the corporation at home in that State” (*id.* at 139 n 19; *see BNSF Ry Co. v Tyrrell*, _____ US _____, 137 S Ct 1549, 1558).

Neither Ford nor Goodyear is incorporated in New York or has its principal place of business here. Thus, New York courts can exercise general jurisdiction over each defendant only if the plaintiffs have established that its affiliations with New York are so continuous and systematic

²The arguments of nonparty U.S. Tires that specific jurisdiction is present in this case are not properly before this Court since they were not raised before the motion court.

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as to render it essentially “at home” here.

Since *Daimler*, the Supreme Court has reiterated that, standing alone, mere “in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum State]” (*BNSF Ry Co. v Tyrrell*, ____ US at ____, 137 S Ct at 1559). To determine whether a foreign corporate defendant’s affiliations with the state are so continuous and systematic as to render it essentially at home, *Daimler* advised that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts,” but “instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them” (*Daimler AG v Bauman*, 571 US at 139 n 20; *see BNSF Ry Co. v Tyrrell*, ____ US at ____, 137 S Ct at 1559).

The *Daimler* Court suggested that *Perkins v Benguet Consol. Mining Co.* (342 US 437) exemplified the “exceptional case” in which a corporate defendant’s operations in the forum state were so substantial and of such a nature as to render the corporation “at home” in that state (*see Daimler AG v Bauman*, 571 US at 129). In *Perkins*, the defendant was incorporated in the Philippine Islands, where it owned and operated certain mines (342 US at 439). Its operations were completely halted during the Japanese occupation of the Islands in World War II. During that interim, the president of the company, who was also the general manager and principal stockholder, returned to his home in Ohio, where he maintained an office and conducted the corporation’s affairs (*see id.* at 447-448). The Supreme Court held that Ohio courts could exercise general jurisdiction over the corporation without offending due process (*see id.* at 448). The Supreme Court later noted that “Ohio was the corporation’s principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State” (*Keeton v Hustler Magazine, Inc.*, 465 US 770, 779 n 11, *see Daimler AG v Bauman*, 571 US at 130).

A.

The plaintiffs argue that New York courts have general jurisdiction over Ford because Ford has “become woven into the fabric of New York state domestic activity.” They point to the facts that Ford has been authorized to do business in New York since 1920, it operates numerous facilities in New York, it owns property in New York and spends at least \$150 million to maintain the property, it employs significant numbers of New York residents, it contracts with hundreds of dealerships in New York to sell its products under the Ford brand name, and it has frequently been

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a litigant in New York courts.

Under the strictures of *Daimler*, Ford's contacts with New York are insufficient to permit the assertion of general jurisdiction over claims that are unrelated to any activity occurring in New York. Ford concedes that it has extensive commercial activities in New York, but it notes that it has extensive commercial activities throughout the country and worldwide. Indeed, while the plaintiffs point to Ford's one factory in New York, employing approximately 600 people, and Ford's contracts with "hundreds" of dealerships in the state, Ford presented evidence that it has 62 plants, employing about 187,000 people, and 11,980 franchise agreements with dealerships worldwide. Appraising the magnitude of Ford's activities in New York in the context of the entirety of Ford's activities worldwide, it cannot be said that Ford is at home in New York.

B.

The plaintiffs contend that Goodyear's presence in New York is special, as it has conducted business in New York for nearly a century, it has owned and operated a chemical plant here since the 1940's, as well as a tire manufacturing plant, it has availed itself of New York's courts, and it has leased and subleased real estate in New York, maintained a network of dealers and service centers, and employed thousands of people in New York since 1924. Like Ford, Goodyear concedes that it has extensive commercial activity in New York, but it points to the evidence that it has 50 manufacturing plants worldwide and it operates approximately 1,200 retail outlets for the sale of its tires worldwide. Appraising Goodyear's activities in their entirety, Goodyear also is not at home in New York such that New York courts might exercise general jurisdiction over any claim brought against it.

III.

The plaintiffs also argue that Ford and Goodyear each consented to the jurisdiction of New York courts for all purposes, including this suit, by registering to do business in New York and appointing an agent for service of process. The plaintiffs do not rely on any particular business registration statute in making this argument. Before the motion court, U.S. Tires, which raised this argument, relied only on CPLR 301. Nevertheless, as relevant to these defendants, we note that Business Corporation Law § 1301(a) provides that "[a] foreign corporation shall not do business in this state until it has been authorized to do so." Business Corporation Law § 304(b) provides, inter alia, that no foreign corporation may be authorized to do business in New York unless in its

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application for authority, it designates the secretary of state as the agent upon whom process against the corporation may be served. Similarly, Business Corporation Law § 1304(a)(6) requires a foreign corporation, in its application for authority to do business in New York, to designate the secretary of state as its agent upon whom process against it may be served and an address to which process received by the Secretary of State is to be mailed.

New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect. There has been longstanding judicial construction, however, by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction (*see e.g. Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432, 436-437; *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d 433, 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d 747, 749 [Sup Ct, Albany County 1972]; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d 623, 624 [Sup Ct, Monroe County 1971]; *Carlton Props. v 328 Props.*, 208 Misc 776 [Sup Ct, Nassau County 1955]; *Devlin v Webster*, 188 Misc 891 [Sup Ct, NY County 1946], *affd* 272 App Div 793; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d 461, 464-467 [SD NY] [listing numerous federal cases finding consent by registration]; *cf. Muollo v Crestwood Vil.*, 155 AD2d 420, 421). We hold that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.³

In New York, the theory of consent by registration originates in the 1916 opinion of Judge Cardozo in *Bagdon v Philadelphia & Reading Coal & Iron Co.* (217 NY 432). There, the Court of Appeals held that a foreign corporation could be sued in New York upon a cause of action

³The parties observe that post *Daimler*, some New York lawmakers have proposed amending Business Corporation Law § 1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation (*see* 2015 NY Senate-Assembly Bill S4846, A6714). No such changes in the law have been effected to date, and we decline the appellants' invitation to opine on the constitutionality of any such possible amendment.

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that had no relation to the corporation's New York activities because the corporation had consented to the jurisdiction of New York by obtaining authorization to do business here and appointing an agent for service of process in New York. *Bagdon* must be understood within the historical context in which it was decided.

At the time *Bagdon* was decided, *in personam* jurisdiction was still largely limited by the conceptual structure of *Pennoyer v Neff* (95 US 714). In *Pennoyer*, decided shortly after the enactment of the Fourteenth Amendment, the United States Supreme Court held that a court's jurisdiction was restricted by its territorial limits or geographic bounds (*see id.* at 720), and, thus, no state could exercise jurisdiction over persons or property outside of its territory (*see id.* at 722). "*Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there" (*Shaffer v Heitner*, 433 US 186, 199). To complicate matters, under the 19th century view, a corporation could have "no legal existence" outside of its state of incorporation (*Bank of Augusta v Earle*, 38 US 519, 588), and, thus, could be sued only in the state of incorporation, no matter how extensive its business in another state (*see Brown v Lockheed Martin Corp.*, 814 F3d 619, 631).

"In time, however, that strict territorial approach yielded to a less rigid understanding" (*Daimler AG v Bauman*, 571 US at 126). States enacted statutes requiring the appointment by foreign corporations of agents upon whom process could be served "primarily to subject them to the jurisdiction of [the] local courts in controversies growing out of transactions within the [S]tate" (*Morris & Co. v Skandinavia Ins. Co.*, 279 US 405, 409). The business registration statutes conditioned a corporation's authority to do business in a state on its designation of an appointed agent within the state to accept service. "Pointing to the acceptance of service by an in-state agent appointed by the corporation, a state could tenably argue that the corporation had voluntarily consented to jurisdiction there and that, notwithstanding *Earle*, it was 'present' in the state because it maintained an agent there" (*Brown v Lockheed Martin Corp.*, 814 F3d at 632). In addition, federal jurisprudence evolved such that a foreign corporation could be subject to the jurisdiction of a state's courts if the corporation was doing business within the state and service was made in the state upon some duly authorized officer or agent who was representing the corporation in its business (*see St. Louis Southwestern R. Co. of Tex. v Alexander*, 227 US 218, 226; *Herndon-Carter Co. v James N. Norris, Son & Co.*, 224 US 496, 499; *Peterson v Chicago, R. I. & P.R. Co.*, 205 US 364, 390).

Turning back to the Court of Appeals' decision in *Bagdon*, there, a New York

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resident sued a Pennsylvania corporation for an alleged breach of contract that occurred in Pennsylvania. The defendant corporation was registered to do business in New York and had appointed an agent for the service of process in New York (*see Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY at 433). The defendant conceded the presence of an agent in New York, but argued that the scope of the agency of the person appointed to accept service of process in its behalf must be limited to actions which arose out of the business transacted in New York (*see id.* at 433-434). The Court of Appeals rejected the defendant's argument and found that the defendant could properly be sued in New York on the cause of action, even though it did not arise from the defendant's activities in New York. The Court reasoned that by obtaining a certificate from New York to do business here, the defendant had entered into a binding contract with New York. In exchange for the right to do business in New York, the defendant had filed a stipulation in the office of the secretary of state designating a person upon whom process may be served within the state (*see id.* at 436). The Court found that this person was a "true agent" of the defendant, and the stipulation was a "true contract" with New York (*id.*). The Court held that the actions in which this agent was to represent the corporation were not limited, and, as long as New York had subject matter jurisdiction over the action, service on the agent would give jurisdiction of the person (*see id.* at 437). The Court further explained that the agent was in the service of the corporation engaged in business in New York, and that the agent's "presence" brought the corporation within the jurisdiction of New York (*id.* at 439).

One year after *Bagdon* was decided, the Court of Appeals extended this reasoning to a corporation that apparently was unlicensed in New York, but which was doing regular business here. In *Tauza v Susquehanna Coal Co.*, the Court held that New York courts had jurisdiction over a foreign corporation that was doing business in New York and which had been served with process through a managing agent in its New York office, and that the court's jurisdiction "[did not] fail because the cause of action sued upon [had] no relation in its origin to the business here transacted" (220 NY 259, 268). The Court stated that "[t]he essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action" (*id.* at 268-269).

Twenty-three years after *Bagdon*, the Supreme Court of the United States interpreted a successor New York registration statute in accordance with *Bagdon*, and found that the defendant had consented to be sued in the courts of New York by designating an agent in New York for the

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service of process (*see Neirbo Co. v Bethlehem Shipbuilding Corp.*, 308 US 165, 174-175). The Court observed that the statute calling for such a designation was constitutional, and the designation of the agent was “a voluntary act” (*id.* at 175, quoting *Pennsylvania Fire Ins. Co. v Gold Issue Mining & Milling Co.*, 243 US 93, 96).

New York courts continued to be guided by the requirement that a defendant must be found to be “present” in the state in order to exercise jurisdiction over the defendant in accordance with federal due process (*see Simonson v International Bank*, 14 NY2d 281, 285). By registering to do business in New York and appointing an agent for the service of process, a foreign corporation was, in effect, consenting to be found within New York (*see Pohlers v Exeter Mfg. Co.*, 293 NY 274, 280 [“A designation of a public officer upon whom service may be made has the same effect as a voluntary consent”]).

In 1945, the United States Supreme Court decided *International Shoe Co. v State of Washington* (326 US 310), which altered our *in personam* jurisdiction jurisprudence. *International Shoe* extended the analysis beyond physical presence and authorized a state court to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (*id.* at 316, quoting *Milliken v Meyer*, 311 US 457, 463; *see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 923). “Following *International Shoe*, ‘the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction’” (*Daimler AG v Bauman*, 571 US at 126, quoting *Shaffer v Heitner*, 433 US at 204).

After *International Shoe*, courts began to differentiate between general all-purpose jurisdiction and specific case-linked jurisdiction (*see Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US at 919). In New York, in 1962, the Legislature enacted CPLR 302 to effect specific jurisdiction, and CPLR 301 to ensure that the general jurisdiction historically exercised in New York was not thought to be limited by the enactment of CPLR 302 (*see* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 301 at 7 [2010 ed]). In the interim between *International Shoe* and *Daimler*, where jurisdiction has been predicated on CPLR 301, the prevailing logic has continued to be that there is no need to establish a connection between the cause of action at issue and the foreign defendant’s business activities within the State, “because the

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authority of the New York courts is based solely upon the fact that the defendant is ‘engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of its “presence” in this jurisdiction’” (*McGowan v Smith*, 52 NY2d 268, 272, quoting *Simonson v International Bank*, 14 NY2d at 285; *accord Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33). Some courts have continued to find that by registering to do business in New York and designating an agent for service of process, a foreign corporation has constructively consented to general in personam jurisdiction in New York in exchange for the privilege of doing business here (see *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d at 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d at 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d at 749; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d at 624; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d at 464-467).

As discussed above, following the United States Supreme Court’s decision in *Daimler*, personal jurisdiction cannot be asserted against a foreign corporation based solely on the corporation’s continuous and systematic business activity in New York. The consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has consented to be found in New York. *Daimler* made clear, however, that general jurisdiction cannot be exercised solely on such presence (see *Daimler AG v Bauman*, 571 US at 137-138). The Supreme Court expressly cautioned that cases such as *Tauza v Susquehanna Coal Co.* (220 NY 259) which uphold the exercise of general jurisdiction based on the presence of a local office, “should not attract heavy reliance today” (*Daimler AG v Bauman*, 571 US at 138 n 18). As other courts have observed, it appears that every state in the Union has enacted a registration statute that requires foreign corporations to register to do business and appoint an in-state agent for service of process (see *Genuine Parts Co. v Cepec*, 137 A3d 123, 143; *Brown v Lockheed Martin Corp.*, 814 F3d at 640; see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343, 1363 n 109 [listing statutes]). We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be “unacceptably grasping” under *Daimler* (*Daimler AG v Bauman*, 571 US at 138).

The Court of Appeals does not appear to have cited to *Bagdon* or relied upon its

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consent-by-registration theory since *International Shoe* was decided. We think that this is a strong indicator that its rationale is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and that it no longer holds in the post-*Daimler* landscape. We conclude that a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York.

IV.

The plaintiffs contend in the alternative that the motions should be denied on the ground that additional discovery is needed because facts essential to justify opposition may exist but cannot now be stated (*cf. CPLR 3211[d]*). The plaintiffs have not alleged any facts that would support personal jurisdiction and thus have failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exists here (*see Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1045; *Mejia-Haffner v Killington Ltd.*, 119 AD3d 912, 915).

Accordingly, the Supreme Court should have granted the separate motions of Ford and Goodyear to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction.

The orders entered May 31, 2016, are reversed, on the law, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

LEVENTHAL, J.P., SGROI and LASALLE, JJ., concur.

ORDERED that the orders entered May 31, 2016, are reversed, on the law, with costs, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

ENTER:

Aprilanne Agostino
 Clerk of the Court

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No: 706909/2015

ANNA AYBAR, ORLANDO GONZALEZ,
JESENIA AYBAR, as legal guardian on
behalf of K.C., an infant over the age of
fourteen (14) years; JESENIA AYBAR, as
Administratrix of the ESTATE OF NOELIA
OLIVERAS, JESENIA AYBAR, as
Administratrix of the ESTATE OF T.C., a
deceased infant under the age of fourteen (14)
years, and ANNA AYBAR, as Administratrix
of the ESTATE OF CRYSTAL CRUZ-
AYBAR

Plaintiffs,

- against -

JOSE A. AYBAR, JR., FORD MOTOR
COMPANY, THE GOODYEAR TIRE &
RUBBER CO., and "JOHN DOES 1 THRU
30"

Defendants.

ORDER WITH NOTICE OF ENTRY

AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
Attorneys for Defendant
FORD MOTOR COMPANY
Office and Post Address
600 Third Avenue
New York, NY 10016
212-593-6700

To: ALL PARTIES

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EXHIBIT B

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**DECISION AND ORDER OF THE HONORABLE THOMAS D. RAFFAELE,
DATED MAY 25, 2016, APPEALED FROM, WITH NOTICE OF ENTRY
(MOTION SEQ. 1) [5-15]**

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

ANNA AYBAR, ORLANDO GONZALES, JESENIA AYBAR, as legal guardian on behalf of KEYLA CABRAL, an infant over the age of fourteen (14) years; JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of The ESTATE OF TIFFANY CABRAL, a deceased infant Under the age of fourteen (14) years, and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

- against -

JOSE A AYBAR, JR., FORD MOTOR COMPANY,
THE GOODYEAR TIRE & RUBBER CO., and
"JOHN DOES 1 THRU 30".

Defendants.

Index No. 706909/2015

**ORDER WITH
NOTICE OF ENTRY**

PLEASE TAKE NOTICE, that the within is a true copy of an Order dated May 25, 2016 duly entered in the office of the clerk on May 31, 2016, regarding motion by defendant FORD MOTOR COMPANY.

Dated: New York, New York
June 9, 2016

Yours, etc.

OMRANI & TAUB, P.C.
By: Michael A. Taub, Esq.
Attorney(s) for Plaintiff
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(212) 599-5550

To: AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
Attorney(s) for Defendant
FORD MOTOR COMPANY
600 Third Avenue
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cc: DLA Piper LLP (US)
Attorney(s) for Defendant
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(212) 335-4500

MONTFORT HEALY McGUIRE & SALLEY
Attorney(s) for Defendant
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File No.: 13-22884

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Short Form Order
 NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13
 Justice

X

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA
 AYBAR, as legal guardian on behalf of Index
 K.C., an infant over the age of fourteen Number:
 (14) years; JESENIA AYBAR, as Administratrix 706909/2015 of
 the ESTATE OF NOELIA OLIVERAS, JESENIA
 AYBAR, as Administratrix of the ESTATE OF Motion
 T.C., a deceased infant under the age of Date: 12/9/15
 fourteen (14) years, and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL Motion Seq. No. 1
 CRUZ-AYBAR,

Plaintiffs,

-against-

JOSE A. AYBAR, JR., FORD MOTOR COMPANY,
 THE GOODYEAR TIRE & RUBBER CO., and
 "JOHN DOES 1 THRU 30"

Defendants.

FILED
 MAY 31 2016
 COUNTY CLERK
 QUEENS COUNTY

X

The following papers numbered 1 to 9 read on this motion by defendant, Ford Motor Company, for an order, pursuant to CPLR Section 3211(A)(8), dismissing plaintiffs' verified complaint, in its entirety as against Ford Motor Company, (Ford), on the grounds that there is no personal jurisdiction and directing the Clerk of the Court to enter judgment accordingly on behalf of Ford Motor Company and granting such other and further relief as this court deems just and proper.

Papers
 Numbered

Notice of Motion - Affidavits - Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-9

Defendant, Ford's motion to dismiss is denied in its entirety for the reasons stated herein.

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The essential argument proffered by defendant, Ford is that Ford is not subject to personal jurisdiction in New York under the long-arm statute; since Ford neither committed a tort in New York, because the Explorer was built and designed outside the state and that defendant did not cause injury in the state because the subject accident which caused the death of three of the seven passengers traveling in the Ford 2002 Explorer occurred in the state of Virginia. Defendant Ford relies on the recent seminal case of *Daimler A.G. v Bauman*, 134 S.Ct. 746, 762 [2014] which articulated a new standard of presence jurisdiction, according to CPLR Section 301. This new standard is whether the foreign corporation's affiliations with the state are so "continuous and systematic" as to render it essentially "at home" in the forum state.

A review of the complaint shows that plaintiffs' causes of action against defendant, Ford sound in negligence, products liability, strict product liability and wrongful death (see Verified Complaint, dated June 30, 2015). The complaint specifically alleges that on July 1, 2012, while co-defendant owner and operator was driving his used 2002 Ford Explorer in Virginia, the vehicle became "unstable following the failure of the rear driver's side subject 'Goodyear Wrangler AP tire' thereby causing and/or allowing and otherwise resulting in said subject motor vehicle losing stability and control, and to overturn and roll over multiple times" (*id* at paragraph 43). Plaintiffs further allege that the 2002 Explorer had "certain defective, unsafe, and defective condition(s) in the design, manufacture, fabrication and/or assembly" (*id* at paragraph 20).

On July 1, 2012, as defendant Jose Aybar operated the Ford Explorer northbound on Interstate Highway 85 in the County of Brunswick, Virginia, the vehicle became unstable because of the failure of the Wrangler tire, and the vehicle rolled over several times. Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar and Tiffany Cabral passengers in the vehicle, were injured and/or killed. On or about July 1, 2012 this action for, *inter alia*, negligence, products liability and wrongful death ensued.

As stated above, defendant Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, relying on *Daimler A.G. v Bauman*, 134 S Ct. 746 [2014]). For the reasons set forth herein, this court finds that Ford's reliance on *Daimler A.G. v Bauman* is misplaced.

It is undisputed that the 2002 Ford Explorer was purchased

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in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed with the Department of Motor Vehicles in New York State. The vehicle was traveling through Virginia on the route back to New York when the accident occurred. Moreover, Ford maintains a continuous and substantial presence in New York. It owns property in New York (see Exhibit 1 to opposition, \$150 million dollars invested by Ford to upgrade its Hamburg, New York plant). It has hundreds of dealerships selling Ford products under its brand name in New York. Since 1920, Ford has been registered with the New York State Department of State as an active foreign business corporation.

Defendant, Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, relying on *Daimler AG v Bauman*, 134 S Ct. 746 [2014]). In *Bauman*, Argentinian residents brought an action against Daimler, A.G., a German corporation, under the Alien Tort Statute and the Torture Victims Protection Act, alleging that its wholly-owned Argentinian subsidiary helped state security forces to kidnap, detain, torture, and kill the plaintiffs or their relatives during Argentina's "Dirty War." The United States Supreme Court held that due process did not permit the exercise of general jurisdiction over the parent corporation, which had a subsidiary operating in California. The Supreme Court drew a distinction between specific jurisdiction and general jurisdiction. Specific jurisdiction concerns adjudicatory authority where the suit arises out of or relates to the defendant's contacts with the forum.

General jurisdiction in substance concerns adjudicatory authority in cases arising anywhere, and "[t]he paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business ***." (*Daimler AG v Bauman, supra*, 749.) Another forum may assert general jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. (*Daimler AG v Bauman, supra*.) General jurisdiction requires affiliations so continuous and systematic as to make the foreign corporation essentially at home in the forum state, i.e., similar to a domestic enterprise in that state. (*Daimler*

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AG v Bauman, supra.)

In determining whether a court of New York has personal jurisdiction over a non-domiciliary, a two-step analysis must be employed. First, the court must inquire whether there is a statute which confers jurisdiction over the non-domiciliary, and, second, the court must inquire whether the exercise of jurisdiction meets due process standards. (See *Darrow v Deutschland*, 119 AD3d 1142; *Andrew Greenberg, Inc. v Sirtech Canada, Ltd.*, 79 AD3d 1419.)

In the case at bar, CPLR 302, "Personal jurisdiction by acts of non-domiciliaries," New York State's long arm statute, does not provide a basis for the assertion of *in personam* jurisdiction over defendant Ford. CPLR 302 (a)(3) provides for the exercise of jurisdiction over a foreign defendant who commits a tortious act outside the state which causes the injury within the state. This statute does not apply to the case at bar.

CPLR 301 reads in relevant part: "Jurisdiction over persons, property or status," is New York's statute for general jurisdiction, and it provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." A foreign corporation is subject to the jurisdiction of New York courts under CPLR 301 "if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted." (*Landoil Res. Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 [internal quotation marks and citations omitted]). In view of defendant Ford's extensive activities in this state since approximately 1920, a finding of "a continuous and systematic course of doing business" in New York can easily be made. "Even if this statutory standard is met, however, the Due Process Clause of the 14th Amendment limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (*Hood v Ascent Med. Corp.*, 2016 WL 1366920 [SDNY] [internal quotation marks and citations omitted]; see, *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S.Ct. 2846. [HN 5: "foreign subsidiaries of United States tire manufacturer were not subject to

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general jurisdiction in North Carolina courts in action arising from a bus accident in France allegedly caused by a tire that was manufactured and sold abroad, although some of the tires made abroad by the foreign subsidiaries had reached North Carolina through the stream of commerce".) There are New York State appellate cases decided after Bauman which have found a lack of general jurisdiction over the defendants. (See, *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.*, 131 AD3d 259; *D & R Glob. Selections, S.L. v Pineiro*, 128 AD3d 486; *Magdalena v Lins*, 123 AD3d 600.)

This court has concluded that neither *Goodyear Dunlop Tires Operations, S.A. v Brown* (*supra*), nor *Daimler A.G. v Bauman* (*supra*), nor the New York State appellate cases require the dismissal of the case at bar. In *Goodyear Dunlop Tires Operations, S.A. v. Brown* (*supra*), the estates of two minor North Carolina residents who died in a bus accident that occurred in France brought an action in a North Carolina state court against several subsidiaries of a United States tire manufacturer, including subsidiaries organized and operating in Luxembourg, Turkey, and France. The United States Supreme Court held that the North Carolina court lacked both specific and general jurisdiction over the foreign subsidiaries. The foreign subsidiaries were not registered to do business in North Carolina; had no place of business, employees, or bank accounts there; did not design, manufacture, or advertise their products in North Carolina; and did not solicit business in the state or sell or ship tires to North Carolina customers. The plaintiffs tried to argue that the North Carolina court had jurisdiction because "a small percentage of their [the subsidiaries'] tires were distributed in North Carolina by other Goodyear USA affiliates" (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2848), and The North Carolina Court of Appeals decided that the state court had general jurisdiction over the foreign subsidiaries, whose tires had reached North Carolina through the stream of commerce. The United States Supreme Court reversed with an opinion that stated "[c]onfusing or blending general and specific jurisdictional inquiries," the North Carolina courts had erroneously found jurisdiction (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.) In reference to the tenuous relationship between the foreign subsidiaries and North

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Carolina, the Supreme Court stated: "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction." (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.)

In sharp contrast, plaintiff Aybar has alleged without contradiction, *inter alia*, that the 2002 Ford Explorer was purchased in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed in New York. Ford has an organization of facilities in this state engaged in day-to-day activities. Ford also has many franchises across the state. Defendant Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts. Parenthetically, this court notes that in *Goodyear Dunlop Tires Operations, S.A. v Brown, (supra)*, the parent corporation, which operated plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.

The New York State appellate cases decided after *Bauman* which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar because of the level of Ford's activities within New York. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co. (supra, 264)*, the Appellate Division, First Department, held that "under *Daimler*, New York does not have general jurisdiction over Mega's worldwide operations," the Mega International Commercial Bank Company being an international banking corporation, organized under the laws of Taiwan, with its principal place of business located there, and having 128 branches worldwide, only one of which was in New York. But the court found that there was jurisdiction (as discussed below, apparently not general jurisdiction) to compel compliance with information subpoenas arising from the bank's registration with the Superintendent of the Department of Financial Services and filing of a written instrument appointing the superintendent as an agent for service of process. "Mega consented to the necessary regulatory oversight in return for permission to operate in New York, and therefore is subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas

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***." (*B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.*, *supra*, 265 [internal quotation marks and citation omitted].) In *D & R Glob. Selections, S.L. v Pineiro* (*supra*), the Appellate Division, First Department held that the New York court did not have general jurisdiction pursuant to CPLR 301 or specific jurisdiction pursuant to CPLR 302 over a Spanish winery, but the appellate court mentioned only the winery's visits to this state to promote its products as a contact with New York. In *Magdalena v Lins* (*supra*), the Appellate Division, First Department held that the New York court had no jurisdiction over the defendants, mentioning only an apartment in this state which a defendant owned but did not live in (his daughters did) as the only contact with New York.

In view of the foregoing, this court finds that defendant Ford's activities with the State of New York have been so continuous and systematic that the company is essentially at home here. (See, *Daimler A.G. v Bauman*, *supra*.)

There is another reason for finding general jurisdiction over defendant Ford. In New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process. (See, *Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432.) "[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York." (Alexander, Practice Commentaries, *McKinney's Con. Law of NY*, Book 7B, C301:6[c], p21.) After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes. (See, Alexander, 2015 Practice Commentaries, *McKinney's Con. Law of NY*, Book 7B, C301:8[c].) There is no New York state court appellate authority directly on point. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.* (*supra*), the appellate court relied on Banking Law §200 which provides in substance that, inter alia, no foreign banking corporation shall conduct business in this state unless it filed with the

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Superintendent of Banking a written instrument appointing him as its agent "upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state ***." (Emphasis added.) Banking Law §200 concerns a limited jurisdiction, while other state registration statutes have been interpreted as a conferring general jurisdiction over a foreign corporation. The court notes parenthetically Alexander's observation that "[i]t would have been helpful if the [Mega] court had clarified how the suit at issue - a special proceeding to enforce an information subpoena- arose out of a transaction with the New York branch." (Alexander, Practice Commentaries [2015], McKinney's Cons Laws of NY, Book 7B, p5.)

Other registration and/or appointment statutes, e.g., Business Corp. Law §§304 and 1304, have been interpreted as conferring general jurisdiction over foreign corporations. (See, e.g., *Doubet LLC v Trustees of Columbia Univ. in City of New York*, 99 AD3d 433; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173; *Bailen v Air & Liquid Systems Corp.*, 2013 WL 1369452 [N.Y.Sup].) Bauman does not expressly address general jurisdiction based on such statutes, but the case's implication for such jurisdiction has become a matter of controversy. This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives Bauman. "When,*** the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions." (*Acorda Therapeutics, Inc. v Mylan Pharm. Inc.*, 78 F Supp 3d 572, 591 [D. Del. 2015], aff'd on other grounds,, 2016 WL 1077048 [Mar. 18, 2016].) In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so.

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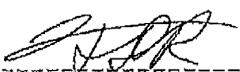
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The instant motion lacks merit. This court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.

Dated: May 25, 2016



Thomas D. Raffaele, J.S.C.

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**EXHIBIT C TO CALVERT AFFIRMATION -
MOTION TO REARGUE, DATED FEBRUARY 22, 2019 [616 - 667]**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----- X

ANNA AYBAR, et al.,

Plaintiffs-Respondents,

-against-

NOTICE OF MOTION

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

Docket #s

2016-06194 and

2016-07397

-and-

FORD MOTOR COMPANY and THE GOODYEAR
TIRE & RUBBER CO.,

Action #1

Defendants-Appellants.

U.S. TIRES AND WHEELS OF QUEENS, LLC,
Non-Party Respondent.

----- X

JOSE AYBAR,

Plaintiff-Respondent,

Docket #

2016-07396

-against-

Action #2

THE GOODYEAR TIRE & RUBBER CO.,

Defendant-Appellant,

-and-

GOODYEAR DUNLOP TIRE NORTH AMERICA, LTD.,
Defendant.

----- X

SIRS / MADAMS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Jay L.T. Breakstone, Esq., dated February 22, 2019, and all other papers and proceedings heretofore had or to be had herein, plaintiffs-respondents will move this Court at a term thereof, to be held at 9:30 o'clock A.M. on the 18th day of March, 2019, at the courthouse, 45 Monroe Place, Brooklyn, New York, or as soon thereafter as counsel can be heard, for an order granting reargument of the within appeal, or in the alternative, granting leave to appeal to the Court of Appeals, pursuant to CPLR 5602; and

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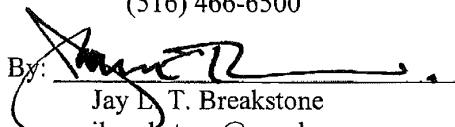
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for such other and further and different relief as to the Court may seem just and proper within the premises.

*Dated: Port Washington, New York
February 22, 2019*

Yours, etc.,

PARKER WAICHMAN LLP
Attorneys for Plaintiffs-Respondents
Six Harbor Park Drive
Port Washington, New York 11050
(516) 466-6500

By: 
Jay L. T. Breakstone
jbreakstone@yourlawyer.com

Jay L. T. Breakstone,
Jessica L. Richman,
Of Counsel.

To: All attorneys on attached service sheet

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

X

ANNA AYBAR, et al.,

Plaintiffs-Respondents,

-against-

AFFIRMATION

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

Docket #s
2016-06194 and
2016-07397

-and-

FORD MOTOR COMPANY and THE GOODYEAR
TIRE & RUBBER CO.,

Defendants-Appellants.

Action #1

U.S. TIRES AND WHEELS OF QUEENS, LLC,
Non-Party Respondent.

X

JOSE AYBAR,

Plaintiff-Respondent,

Docket #
2016-07396

-against-

Action #2

THE GOODYEAR TIRE & RUBBER CO.,

Defendant-Appellant,

-and-

GOODYEAR DUNLOP TIRE NORTH AMERICA, LTD.,
Defendant.

X

JAY L. T. BREAKSTONE, an attorney duly admitted to practice before the courts of the State of New York, affirms, upon penalty of perjury, as follows:

INTRODUCTION

1. I am appellate counsel to and associated with Parker Waichman LLP, attorneys for plaintiffs-respondents ["plaintiffs"] Anna and Jose Aybar in this consolidated appeal, and am fully familiar with the facts and circumstances of this matter as they pertain to the application at bar.

2. This affirmation is submitted in support of plaintiffs' application for an order granting reargument of the within appeal or, in the alternative, permission to appeal to the Court of Appeals pursuant to CPLR 5602.

PRELIMINARY STATEMENT

3. On January 23, 2019, the Court reversed the denial by Supreme Court of the separate motions of defendant-respondents [“*defendants*”] Ford Motor Company [“*Ford*”] and Goodyear Tire and Rubber Co. [“*Goodyear*”] to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction, and granted both motions on this basis instead. *Aybar v. Aybar, et al.*, --- NYS3d ---, 2019 WL 288307 [Dockets Nos. 2016-06194, 07397, 2d Dep’t, January 23, 2019], annexed at Exhibit “A”; the Decision and Order below is annexed at Exhibit “B” and appears at 2016 N.Y. Slip Op. 31139(U), 2016 WL 3389890 [Index No. 707909/2015, Sup. Ct., Queens Co., May 31, 2016] and 2016 N.Y. Slip Op. 31138(U), 2016 WL 3389889 [Index No. 706909/2015, Sup. Ct., Queens Co., May 31, 2016].

4. In doing so, the Court improperly ignored plaintiffs’ argument that this case turns on *consent* jurisdiction, which is *contractual* in nature, and therefore no constitutional due process considerations are implicated whatsoever. In addition, the Court seemingly ignored the fact that the United States Supreme Court expressly did not reach or alter general personal jurisdiction by consent in both *Daimler, A.G. v. Bauman*, ___ US ___, 134 S Ct 746 [2014] and *BNSF Ry. Co. v. Tyrrell*, ___ US ___, 137 S Ct 1549 [2017].

5. In reversing the court below, the Court also improperly discarded the ruling of the Court of Appeals in *Bagdon v. Phil. and Reading C. & I. Co.*, 217 NY 432 [1916], and the United States Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 US 165 [1939], both of which should have controlled its decision in the interpretation of the significance of registration

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under the New York registration statute and New York case law, resulting in an affirmation of the decision below. As then Chief Judge Cardozo wrote years after his opinion in *Bagdon*, “Not lightly vacated is the verdict of quiescent years.” *Coler v. Corn Exchange Bank*, 250 NY 136 [1928] (additional citations omitted). Additionally, as in *Coler*, where a due process objection was raised challenging the enforcement of a statute of longstanding and unequivocal significance, it was not for this Court to discard over a century of precedent in answering the question to the contrary.

6. Indeed, just yesterday, the Court of Appeals held yet again that where the issue to be decided falls squarely within longstanding and settled precedent, such established precedents are not lightly to be set aside, and it is for the Legislature to correct any alleged misinterpretation by the courts of the State. *Hinton v. Village of Pulaski*, -- NY3d ---, 2019 NY Slip Op 01261 at *2, 2019 WL 722292 (February 21, 2019). A copy of the *Hinton* slip opinion issued by the Court of Appeals is annexed at Exhibit “C”.

7. Specifically, the Court of Appeals stated in *Hinton* that where an

identical question has been long since resolved by this Court, the [...] case involves the application of settled precedent – not statutory interpretation (*see Matter of State Farm Mut. Auto Ins. Co. v. Fitzgerald*, 25 NY 3d 799, 819-820 [2015] [noting that an ‘extraordinary and compelling justification is needed to overturn precedents involving statutory interpretation’ because, ‘if the precedent or precedents have misinterpreted the legislative intention embodied in a statute, the Legislature’s competency to correct the misinterpretation is readily at hand’] [internal citation, quotation marks, and brackets omitted]; *Matter of Eckart*, 39 NY 2d 493, 499-500 [1976] [‘Generally, once the courts have interpreted a statute any change in the rule will be left to the Legislature, particularly where the courts’ interpretation is a long-standing one’]; *Heyert v. Orange & Rockland Util.*, 17 NY 2d 352, 360 [1966] [noting that ‘established precedents are not lightly to be set aside’ because ‘the remedy (is) ordinarily with the Legislature’] [internal citation and quotation marks omitted]; *see also People v. Taylor*, 9 NY 3d 129, 148 [2007] [‘Stare decisis is deeply rooted in the precept that we are bound by a rule of law—not the personalities that interpret the law’]). We see no compelling reason to overrule our longstanding precedent.

Hinton, 2019 NY Slip Op 01261, at *2.

**FORD AND GOODYEAR KNOWINGLY
AND VOLUNTARILY CONSENTED
TO GENERAL PERSONAL JURISDICTION
IN NEW YORK BY REGISTERING
TO CONDUCT BUSINESS HERE**

8. The Court justified intentionally discarding the longstanding precedent of *Bagdon*, ironically, by the quiescence of the Court of Appeals on the issue of consent by jurisdiction after the issue had been settled for decades. *See Aybar*, 2019 WL 288307 at *8 (“The Court of Appeals does not appear to have cited to *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided. We think this is a strong indicator that its rationale is confined to that era”). *Compare Hinton*, --- N.E.3d ---, 2019 WL 722292, at *2, 2019 NY Slip Op. 01261, at *2. This was incorrect, and outside the scope of its power to overrule precedents set by the Court of Appeals and the Supreme Court of the United States.

9. Supreme Court held, and plaintiffs argued, that Goodyear and Ford had consented to general jurisdiction in New York because “[i]n New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here,” (R 14, 26). Supreme Court found that both Goodyear and Ford had been on notice prior to the time they first registered as a foreign corporation in New York State and designated the Secretary of State as their agent for service of process that “[i]n New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process.” (R 13, 25) Furthermore, Supreme Court noted that “[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff’s cause of action need not have arisen out of any business

conducted by the foreign corporation in New York.”” (R 13 [quoting Alexander, *Practice Commentaries*, McKinnney’s Cons Laws of NY, Book 7B, CPLR C301:6[c] at 21]).

10. The court below was correct, as was Judge Cardozo in *Bagdon*. There was no reason for this Court to discard the rule in *Bagdon*, for even the United States Supreme Court, upon which this Court relied, had not done so. Rigidity is not the same as precedent and where the latter must change, the former cannot prevent that change from occurring. However, absent any compelling legal rationale, Cardozo’s rule holds true: “[I]n the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs.” Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at 111. In reversing, the Court needlessly disregarded the holdings of the Court of Appeals, the weight of myriad courts which followed those holdings, and the recognition of those holdings by the United States Supreme Court. Precipitously, the Court decided of its own volition to change New York law, and hold that it was now meaningless that, in fact, Goodyear and Ford had knowingly and voluntarily consented to general personal jurisdiction in this state under longstanding and undisturbed Court of Appeals jurisprudence, CPLR 301 and Business Corporation Law §§ 304 and 1304. (R 13-15, 25-26)

11. The Court did not write on a clean slate when it discarded rulings by which it was, as a matter of law, bound. The court below, bound in the same manner by the same laws, correctly recognized the effect of those laws on this case. “In New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process.” (R 9, citing *Bagdon*, 217 NY at 436) In *Bagdon*, the Court of Appeals definitively spoke on the issue and its *voluntary*

and *contractual* nature, through Judge Cardozo, a principle recognized as such by the United States Supreme Court in *Neirbo* ("the scope and meaning of such a designation *as part of the bargain* by which [a foreign corporation] enjoys the business freedom of the State of New York") as having been "authoritatively determined[.]" *Neirbo*, 308 US at 175 [emphasis added].

'The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. ... The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.'

Id. (citing and quoting with approval, *Bagdon*, 217 NY at 436-37; *see also Roger v. A. H. Bull & Co.*, 170 F2d 664, 665 [2d Cir 1948] ("Here, as in the *Neirbo* case, the corporation by filing the certificate consented to make itself amenable to process in the state courts through service upon its designated agent.")].

12. In *Bagdon*, Judge Cardozo recited, and then rejected, the same faulty reasoning argued by a defendant foreign corporation that defendant corporations successfully resurrected here: "The defendant concedes that it is engaged in business in New York. It concedes that its appointment of an agent has never been revoked. It insists, however, that his agency must be limited to actions which arise out of the business transacted in New York. It says that any other construction would do violence to its rights under the federal Constitution." 217 NY at 433-434.

Judge Cardozo contradicted this argument, accepted by this Court in its decision, directly:

when a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted. ... We think there is nothing to the contrary either in the decision of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution.

Bagdon, 217 NY 438-439. The Court of Appeals further underscored the *voluntary* nature of this registration and designation by considering the consequences to a foreign corporation who does *not* register and designate an agent for service of process.

"[T]he corporation may withhold its stipulation and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege, it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract."

Id. (emphasis added)

13. The court below agreed with this characterization as did the United States Supreme Court in *Neirbo*. 308 US at 175. Such a voluntary, actual consent by registration and designation is "a true consent" rather than an imputed or implied one; the difference "between a fact and a fiction[.]" *Bagdon*, 217 NY at 437; *Pohlers v. Exeter Mfg. Co.*, 293 NY 274, 280 [1944]. Ford and Goodyear were simply incorrect when they argued that "Ford and Goodyear's supposed 'consent' to general jurisdiction is a fiction." (Appellant's Br. at 33). In New York, *until today*, it has never been as such.

14. Moreover, this is the same covenant that domestic corporations make with the state and its citizens, standing the test of time. Goodyear registered as a foreign corporation in New York State in 1956 and, accordingly, was on notice for forty years *after* the Court of Appeals decided *Bagdon* that registration and designation of the Secretary of State as its agent for service of process is interpreted by New York's courts as constituting consent to general personal jurisdiction. Conversely, Ford first registered with the New York State Department of State as an active foreign business corporation in 1920, a mere four years after Judge Cardozo issued the landmark *Bagdon* opinion. (R. 12) Since registering nearly a century ago, Ford has never revoked that consent or sought to withdraw its authorization; so too has Goodyear never revoked its consent

or sought to withdraw its authorization since first registering over sixty years ago. See, e.g., *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F Supp 2d 461, 466 [SDNY 2008] (“In maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.”)

15. In sum, Goodyear and Ford consented to submitting to general personal jurisdiction knowingly, and voluntarily, with full notice through *Bagdon* and the consistent jurisprudence of New York courts interpreting the state’s registration and designation statutes. They made this bargain with the people of this State in order to secure the benefit of being able to sue to enforce their business contracts and further their business interests here. There was no error below when the court read Ford’s and Goodyear’s voluntary acts of registration precisely as such acts as had been read in *Bagdon* -- as a voluntary consent to general personal jurisdiction in New York. The decision should have been affirmed.

**THE UNITED STATES SUPREME COURT
DID NOT INTEND FOR DAIMLER AND BNSF
TO ABROGATE JURISDICTION BY CONSENT
UNDER NEW YORK LAW**

16. There have been only three personal jurisdiction decisions by the United States Supreme Court that bear upon general personal jurisdiction by consent: *Neirbo*, *Pennsylvania Fire*, and *BNSF*. The two decisions that dealt squarely with the consent issue, *Neirbo* and *Pennsylvania Fire*, came down firmly in support of *Bagdon*. *BNSF* not only implied that consent was still a valid basis for general personal jurisdiction, but expressly did not reach this issue as it had not been raised in the court below.

17. Thus, although *Daimler* and *BNSF* have reshaped much of general jurisdiction jurisprudence, resulting in no little consternation, confusion, and controversy, the

United States Supreme Court *has chosen not to disturb the principle of general personal jurisdiction by consent on constitutional, or any other, grounds.* To the contrary, the Court has either implied that the concept of consent to jurisdiction remains valid, or has explicitly stated that it was not ruling on the question. Consequently, this Court chose to fill a void which did not exist when it decided to act contrary to longstanding, undisturbed, and binding precedent.

18. In *Daimler*, the Court quoted its opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 (2011), stating that its “1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum.*” *Daimler*, 134 S Ct. at 755-756 [quoting *Goodyear*, 564 US at 928] [emphasis added]. In this one instance in which the Court mentioned consent to jurisdiction, it carefully and purposefully *distinguished* it from the circumstances presented in *Daimler*. Not only does *Daimler* not say *anything* about overruling or abrogating *Bagdon*, but what the Court does suggests the contrary: that *Bagdon* and consent to general personal jurisdiction under New York State law survives to this day, untouched by *Daimler* or *Goodyear*.

19. More recently, in the *BNSF* opinion, the Court’s “hands off” approach to general jurisdiction by consent was both implicit and express. First, continuing to write for the Court in this area, Justice Ginsburg carefully noted that “*absent consent*, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.” *BNSF*, 137 S Ct at 1556 (emphasis added). Following this implicit recognition that consent remains a valid basis for the exercise of personal jurisdiction, Justice Ginsburg expressly stated that because the Montana Supreme Court did *not* address the argument that BNSF has consented to personal jurisdiction in Montana, “we do not reach it.” *Id.* at 1559.

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20. In consideration of *Daimler*, BNSF, and New York's own jurisprudence, Supreme Court "agree[d] with those courts that hold that general jurisdiction based on consent through registration and appointment survives [*Daimler*.]" (R 9 and cases cited therein) "When, ... the basis for jurisdiction is the voluntary compliance with a state's registration statute, *which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts*, the corporation can have no uncertainty as to the jurisdictional consequences of its actions." *Id.*, citing *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F Supp 3d 572, 591 [D Del 2015], *aff'd on other grounds*, 817 F 3d 755 [D C Cir 2016] (emphasis added).

21. The Court's reliance on what it perceived to be rules of construction offers no support for its decision either. *Hinton*, --- N.E.3d ---, 2019 WL 722292, at *2, 2019 NY Slip Op. 01261, at *2 (where an "identical question has been long since resolved by this Court, the [...] case involves the application of settled precedent – not statutory interpretation") [internal quotations and additional citations omitted]. *Quiescence* and silence are not the same thing as contradiction. The rule is that no precedent should be overruled in the absence of an *explicit* statement by a higher court to that effect. Even federal courts first look to how *state* courts as to how they have *interpreted their own state registration statutes* in order to determine whether a corporation's compliance with the statute grants the court personal jurisdiction over that corporation. *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 US 213, 215-216 [1921] (clarifying holding in *Pennsylvania Fire* that when foreign corporation appoints agent for service of process, court will properly construe appointment as extending to suits respecting business transacted by such foreign corporation elsewhere if "state law either expressly or by local construction gives to the appointment a larger scope" [emphasis added]).

22. In addition to these principles of construction, the Court disregarded the longstanding interpretation of New York's registration and designation statutes by local courts, both trial and appellate; controlling and persuasive. In New York, for over a century, from *Bagdon* to *Brown v. Lockheed Martin Corp.*, 814 F 3d 619, 640 [2d Cir 2016] (concluding that New York's registration statute has been construed to confer general jurisdiction), courts tasked with interpreting New York's registration and designation statutes¹ overwhelmingly have held that they confer general personal jurisdiction over foreign corporations who enter into the contract with the state to allow themselves to be haled into New York state courts in exchange for the privilege of doing the same. *See, e.g., STX Panocean*, 560 F 3d at 131 [collecting many cases in which New York courts have held that registration under N.Y. Business Corporation Law § 1304 subjects foreign companies to personal jurisdiction in New York]; *Muollo v. Crestwood Vill., Inc.*, 155 AD 2d 420, 421 [2d Dep't 1989] ("It is true that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304" [citations omitted] ... the statute imposes no limitation upon this appointment; the Secretary of State may receive process for any purpose.").

23. Because the doctrine of jurisdiction by consent remains valid and in force in New York after *Daimler* and *BNSF*, the Court erred by not following the "prudent course" of applying prior Supreme Court and Court of Appeals precedent that had not been expressly

¹ A key distinguishing feature of *Brown v. Lockheed Martin Corp.* is that the Connecticut statute being considered by the Court had *neither* any explicit mention of consent to general personal jurisdiction *nor was there local Connecticut precedent interpreting the Connecticut statute to confer such jurisdiction by consent*. 814 F.3d at 629 ("[W]e find it prudent—*in the absence of a controlling interpretation by the Connecticut Supreme Court*, or a clearer legislative mandate than Connecticut law now provides—to decline to construe the state's registration and agent-appointment statutes as embodying actual consent....") [emphasis added].

overruled. The denials of Goodyear's and Ford's motions to dismiss below were the result of a correct and faithful application of New York law, and should have been affirmed.

**IF REGARGUMENT IS DENIED,
LEAVE TO APPEAL
SHOULD BE GRANTED**

24. If permitted to stand in its present form, the decision of the Court is at odds not only with decisions of this department, but with the Court of Appeals and the United States Supreme Court. There simply is no constitutional requirement that would dictate the panel's precipitous reversal of longstanding Court of Appeals' authority. If anything, that responsibility belongs *solely* to the Court of Appeals.

25. The effect of the Court's rewriting of judicial precedent in this state will affect every court at every level. It will also, necessarily, thrust New York into the on-going national discussion by other courts of personal jurisdiction following *Daimler*, notwithstanding the fact that this state's jurisdiction by consent is not linked to a coercive foreign corporation registration scenario. As discussed by plaintiff, New York does not require a foreign corporation to register and appoint an agent for the service of process before doing business in this state. In the final analysis, it would be improper and less than helpful to have New York's answer to these seminal questions of personal jurisdiction and due process made by a court whose decision binds only those courts in its own department. If the rule sought to be challenged is the rule made by the Court of Appeals in 1916, then it should be the Court of Appeals again that speaks to the rule on behalf of the state more than a century after its pronouncement.

26. In the event that reargument is denied, or is granted and the decision of the Court is unchanged, then plaintiffs would request that leave be granted to appeal to the Court of Appeals pursuant to CPLR 5602(a). The issues presented in this case merit review by the Court of

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Appeals as discussed above, especially in creating a conflict with Court of Appeals precedent, and without such review, will adversely affect the administration of justice in this department and throughout the State. In addition, plaintiffs expressly reserve the right, should leave be denied, to make direct application to the Court of Appeals, as of right, pursuant to CPLR 5601(b)(1), in addition to any other ground for leave available under law.

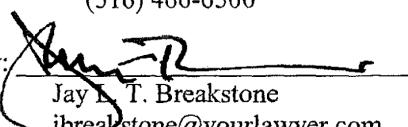
WHEREFORE, plaintiffs-appellants respectfully request that the relief requested be granted in all respects; and for such other and further and different relief as is just and proper within the premises.

Dated: Port Washington, New York
February 22, 2019

Respectfully submitted,

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EXHIBIT A

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2016 WL 3389889 (N.Y.Sup.), 2016 N.Y. Slip Op. 31138(U) (Trial Order)

Supreme Court, New York.

Queens County

****1** Anna AYBAR, Orlando Gonzalez, Jesenia Aybar, as legal guardian on behalf of Keyla Cabral, an infant over the age of fourteen (14) years, Yesenia Aybar, as Administratrix of the Estate of Noelia Olivaras, Jesenia Aybar, as Administratrix of the Estate of Tiffany Cabral, a deceased infant under the age of fourteen (14) years, and Anna Aybar, as Administratrix of the Estate of Crystal Cruz-Aybar, Plaintiffs,

v.

Jose A. AYBAR, Jr., Ford Motor Company, The Goodyear Tire & Rubber Co., and "John Does 1 through 30", Defendants.

No. 706909/2015.

May 31, 2016.

Short Form Order

Thomas D. Raffaele, Judge.

*1 Motion Date January 13, 2016

Sequence No. 2

The following papers numbered 1 to 9 read on this motion by defendant Goodyear Tire & Rubber Co. for an order pursuant to CPLR 321 1(a)(8) dismissing the complaint against it.

Papers Numbered

Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2-3
Reply Affidavits	4-9
Memoranda of Law	

****2** Upon the foregoing papers it is ordered that the motion is denied.

There are two related cases pending in the New York State Supreme Court, County of Queens: (1) *Aybar v. The Goodyear Tire & Rubber Company*, Index No. 706908/15 and (2) *Aybar v. Aybar*, Index No. 706909/15). Defendant Goodyear has submitted similar motions in both cases for the purpose of challenging basis jurisdiction. The Ford Motor Company has also submitted a similar motion challenging basis jurisdiction in *Aybar v. Aybar*, Index No. 706909/15.

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The plaintiffs in this action allege the following: In 2011, defendant Jose A. Aybar, Jr. (Jose), a resident of New York State, purchased a Ford Explorer motor vehicle equipped with a Goodyear Wrangler AP Tire. The Goodyear Tire & Rubber Co. (Goodyear), a foreign corporation registered with the New York State Department of State, manufactured the Wrangler tire. On July 1, 2012, as Jose operated the Ford Explorer northbound on Interstate Highway 85 in the County of Brunswick, Virginia, the vehicle became unstable because of the failure of the Wrangler tire, and the vehicle rolled over several times. Anna Aybar, Orlando Gonzalez, Kayla Cabral, and Noelia Oliveras, Crystal N. Cruz-Aybar, and Tiffany Cabral passengers in the vehicle, were injured and/or killed. On or about July 1, 2015, this action for, inter alia, negligence and products liability ensued.

The plaintiffs' attorney, relying on an internet search, further alleges: "Goodyear has maintained a substantial and continuous presence in New York since approximately 1924. It owns real property in New York. It owns and operates nearly one hundred storefront tire and auto service center stores located in every major city and throughout New York State, and it employs thousands of New York State residents at those stores. It also distributes its tires for sale at hundreds of additional locations throughout New York State." Defendant Goodyear does not deny these allegations.

Goodyear alleges the following: It is an Ohio corporation with its principal place of business located on East Market Street, Akron, Ohio. Goodyear manufactured the tire used on Jose's car in Union City, Tennessee in 2002, and at some point after the company first sold the tire, Jose acquired it and brought the used tire to New York where a party unrelated to Goodyear inspected it and installed it approximately two weeks before the accident.

Defendant Goodyear has moved to dismiss the complaint against it for lack of in personam jurisdiction, relying on *Daimler AG v Bauman* (134 S Ct. 746 [2014]). In *Bauman*, Argentinian residents brought an action against Daimler, A.G., a German ***³ corporation, under the Alien Tort Statute and the Torture Victims Protection Act, alleging that its wholly-owned Argentinian subsidiary helped state security forces to kidnap, detain, torture, and kill the plaintiffs or their relatives during Argentina's "Dirty War." The United States Supreme Court held that due process did not permit the exercise of general jurisdiction over the parent corporation, which had a subsidiary operating in California. The Supreme Court drew a distinction between specific jurisdiction and general jurisdiction. Specific jurisdiction concerns adjudicatory authority where the suit arises out of or relates to the defendant's contacts with the forum. General jurisdiction in substance concerns adjudicatory authority in cases arising anywhere, and "[t]he paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business ***." (*Daimler AG v Bauman, supra*, 749.) Another forum may assert general jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. (*Daimler AG v Bauman, supra*.) General jurisdiction requires affiliations so continuous and systematic as to make the foreign corporation essentially at home in the forum state, i.e., similar to a domestic enterprise in that state. (*Daimler AG v Bauman, supra*.)

*2 In determining whether a court of New York has personal jurisdiction over a non-domiciliary, a two-step analysis must be employed. First, the court must inquire whether there is a statute which confers jurisdiction over the non-domiciliary, and, second, the court must inquire whether the exercise of jurisdiction meets due process standards. (See, *Darrow v Deutschland*, 119 AD3d 1142; *Andrew Greenberg, Inc. v Sirtech Canada, Ltd.*, 79 AD3d 1419.)

In the case at bar, CPLR 302, "Personal jurisdiction by acts of non-domiciliaries," New York State's long arm statute, does not provide a basis for the assertion of in personam jurisdiction over defendant Goodyear,

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and *Bauman's* effect on the statute need not be considered here. CPLR 302 applies to "a cause of action arising from any of the acts enumerated in this section." Goodyear manufactured and sold the tire out of state, and the plaintiffs sustained injury out-of state. (See, CPLR 302 (a)(1) and(3); *Jacobs v 201 Stephenson Corp.*, -AD3d-, -NYS3d- 2016 WL 1355693.)

CPLR 301, "Jurisdiction over persons, property or status," is New York's statute for general jurisdiction, and it provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." A foreign corporation is subject to the jurisdiction of New York courts under CPLR 301 "if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted." (*Landoil Res. Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 [internal quotation marks and citations omitted].) **4 In view of defendant Goodyear's extensive activities in this state since approximately 1924, a finding of "a continuous and systematic course of doing business" in New York can easily be made. "Even if this statutory standard is met, however, the Due Process Clause of the 14th Amendment limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (*Hood v Ascent Med. Corp.*, 2016 WL 1366920 [SDNY] [internal quotation marks and citations omitted]; see, *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S.Ct. 2846. [HN 5: "foreign subsidiaries of United States tire manufacturer were not subject to general jurisdiction in North Carolina courts in action arising from bus accident in France allegedly caused by tire that was manufactured and sold abroad, although some of the tires made abroad by the foreign subsidiaries had reached North Carolina through the stream of commerce".]) There are New York State appellate cases decided after *Bauman* which have found a lack of general jurisdiction over the defendants. (See, *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.*, 131 AD3d 259; *D & R Glob. Selections, S.L. v Pineiro*, 128 AD3d 486; *Magdalena v Lins*, 123 AD3d 600.)

This court has concluded that neither *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, nor *Daimler A. G. v. Bauman (supra)*, nor the New York State appellate cases require the dismissal of the case at bar. In *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, the estates of two minor North Carolina residents who died in a bus accident that occurred in France brought an action in a North Carolina state court against several subsidiaries of a United States tire manufacturer, including subsidiaries organized and operating in Luxembourg, Turkey, and France. The United States Supreme Court held that the North Carolina court lacked both specific and general jurisdiction over the foreign subsidiaries. The foreign subsidiaries were not registered to do business in North Carolina; had no place of business, employees, or bank accounts there; did not design, manufacture, or advertise their products in North Carolina; and did not solicit business in the state or sell or ship tires to North Carolina customers. The plaintiffs tried to argue that the North Carolina court had jurisdiction because "a small percentage of their [the subsidiaries'] tires were distributed in North Carolina by other Goodyear USA affiliates" (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2848), and The North Carolina Court of Appeals decided that the state court had general jurisdiction over the foreign subsidiaries, whose tires had reached North Carolina through the stream of commerce. The United States Supreme Court reversed with an opinion that stated "[c]onfusing or blending general and specific jurisdictional inquiries," the North Carolina courts had erroneously found jurisdiction (*Goodyear Dunlop Tires Operations, S.A. v. Brown, supra*, 2851.) In reference to the tenuous relationship between the foreign subsidiaries and North Carolina, the Supreme Court stated: "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the **5 exercise of general jurisdiction." (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.) In sharp contrast, the plaintiffs here have alleged without contradiction, inter alia, that defendant Goodyear has operated numerous stores in this state since approximately 1924 and has employed thousands of workers in those stores. Goodyear has an organization of facilities in this state engaged in day-to-day activities. Defendant Goodyear's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction

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of this state's courts. This court notes that in *Goodyear Dunlop Tires Operations, S.A. v Brown, (supra)*, the parent corporation, which operated plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.

*3 The New York State appellate cases decided after *Bauman* which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar because of the level of Goodyear's activities within New York. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co. (supra, 264)*, the Appellate Division, First Department, held that "under *Daimler*, New York does not have general jurisdiction over Mega's worldwide operations," the Mega International Commercial Bank Company being an international banking corporation, organized under the laws of Taiwan, with its principal place of business located there, and having 128 branches worldwide, only one of which was in New York. But the court found that there was jurisdiction (as discussed below, apparently not general jurisdiction) to compel compliance with information subpoenas arising from the bank's registration with the Superintendent of the Department of Financial Services and filing of a written instrument appointing the superintendent as an agent for service of process. "Mega consented to the necessary regulatory oversight in return for permission to operate in New York, and therefore is subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas ***." (*B & M Kingstone, LLC v Mega Int'l Commercial Bank Co., supra*, 265 [internal quotation marks and citation omitted].) In *D & R Glob. Selections, S.L. v Pineiro (supra)*, the Appellate Division, First Department held that the New York court did not have general jurisdiction pursuant to CPLR 301 or specific jurisdiction pursuant to CPLR 302 over a Spanish winery, but the appellate court mentioned only the winery's visits to this state to promote its products as a contact with New York. In *Magdalena v Lins (supra)*, the Appellate Division, First Department held that the New York court had no jurisdiction over the defendants, mentioning only an apartment in this state which a defendant owned but did not live in (his daughters did) as the only contact with New York.

In view of the foregoing, this court finds that defendant Goodyear's activities with the State of New York have been so continuous and systematic that the company is essentially at home here. (See, *Daimler A. G. v Bauman, supra*.)

6 There is another reason for finding general jurisdiction over defendant Goodyear. In New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process. (See, *Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432.) "[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiffs cause of action need not have arisen out of any business conducted by the foreign corporation in New York." (Alexander, Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:6[c], p21.) After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes. (See, Alexander, 2015 Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:8[c].) There is no New York state court appellate authority directly on point. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co. (supra)*, the appellate court relied on Banking Law § 200 which provides in substance that, inter alia, no foreign banking corporation shall conduct business in this state unless it filed with the Superintendent of Banking a written instrument appointing him as its agent "upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state *." (Emphasis added.) Banking Law § 200 concerns a limited jurisdiction, while other state registration statutes have been interpreted as a conferring general jurisdiction over a foreign corporation. The court notes parenthetically Alexander's observation that "[i]t would have been helpful if the [Mega] court had clarified how the suit at issue - a special proceeding to enforce an information subpoena-arose

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out of a transaction with the New York branch." (Alexander, Practice Commentaries [2015], McKinney's Cons Laws of NY, Book 7B, p5.)

Other registration and/or appointment statutes, e.g., Business Corp. Law §§ 304 and 1304, have been interpreted as conferring general jurisdiction over foreign corporations. (*See, e.g., Doubet LLC v Trustees of Columbia Univ. in City of New York*, 99 AD3d 433; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173; *Bailen v Air & Liquid Systems Corp.*, 2013 WL 1369452 [N.Y.Sup].) *Bauman* does not expressly address general jurisdiction based on such statutes, but the case's implication for such jurisdiction has become a matter of controversy. This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives *Bauman*. "When,*** the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions." (*Acorda Therapeutics, Inc. v Mylan Pharm. Inc.*, 78 F Supp 3d 572, 591 [D. Del. 2015], affd on 2016 WL 1077048 [Mar. 18, 2016] **7 .) In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so.

*4 The instant motion lacks merit. This court has jurisdiction over defendant Goodyear because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.

Dated: May 25, 2016

<<signature>>

THOMAS D. RAFFAELE, J.S.C.

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NYSCEF DO Aybar, 2016 WL 3389890 (2016)

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2016 WL 3389890 (N.Y.Sup.), 2016 N.Y. Slip Op. 31139(U) (Trial Order)

Supreme Court of New York.

Queens County

****1** Anna AYBAR, Orlando Gonzalez, Jesenia Aybar, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years; Jesenia Aybar, as Administratrix the Estate of Noelia Oliveras, Jesenia Aybar, as Administratrix of the Estate of T.C., a deceased infant under the age of fourteen (14) years, and Anna Aybar, as Administratrix of the Estate of Crystal Cruz-Aybar, Plaintiffs,

v.

Jose A. AYBAR, Jr., Ford Motor Company, The Goodyear Tire & Rubber Co., and "John Does 1 thru 30", Defendants.

No. 706909/2015.
May 31, 2016.

Short Form Order

Thomas D. Raffaele, Judge.

*1 Motion Date: 12/9/15

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by defendant, Ford Motor Company, for an order, pursuant to CPLR Section 3211(A)(8), dismissing plaintiffs' verified complaint, in its entirety as against Ford Motor Company, (Ford), on the grounds that there is no personal jurisdiction and directing the Clerk of the Court to enter judgment accordingly on behalf of Ford Motor Company and granting such other and further relief as this court deems just and proper.

Papers Numbered

Notice of Motion - Affidavits - Exhibits.

	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-9

Defendant, Ford's motion to dismiss is denied in its entirety for the reasons stated herein.

****2** The essential argument proffered by defendant, Ford is that Ford is not subject to personal jurisdiction in New York under the long-arm statute; since Ford neither committed a tort in New York, because the Explorer was built and designed outside the state and that defendant did not cause injury in the state because the subject accident which caused the death of three of the seven passengers traveling in the Ford 2002

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Explorer occurred in the state of Virginia. Defendant Ford relies on the recent seminal case of *Daimler A.G. v Bauman*, 134 S.Ct. 746, 762 [2014] which articulated a new standard of presence jurisdiction, according to CPLR Section 301. This new standard is whether the foreign corporation's affiliations with the state are so "continuous and systematic" as to render it essentially "at home" in the forum state.

A review of the complaint shows that plaintiffs' causes of action against defendant, Ford sound in negligence, products liability, strict product liability and wrongful death (see Verified Complaint, dated June 30, 2015). The complaint specifically alleges that on July 1, 2012, while co-defendant owner and operator was driving his used 2002 Ford Explorer in Virginia, the vehicle became "unstable following the failure of the rear driver's side subject 'Goodyear Wrangler AP tire' thereby causing and/or allowing and otherwise resulting in said subject motor vehicle losing stability and control, and to overturn and roll over multiple times" (*id* at paragraph 43). Plaintiffs further allege that the 2002 Explorer had "certain defective, unsafe, and defective condition(s) in the design, manufacture, fabrication and/or assembly" (*id* at paragraph 20).

On July 1, 2012, as defendant Jose Aybar operated the Ford Explorer northbound on Interstate Highway 85 in the County of Brunswick, Virginia, the vehicle became unstable because of the failure of the Wrangler tire, and the vehicle rolled over several times. Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar and Tiffany Cabral passengers in the vehicle, were injured and/or killed. On or about July 1, 2012 this action for, *inter alia*, negligence, products liability and wrongful death ensued.

As stated above, defendant Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, *relying on Daimler A.G. v Bauman*, 134 S Ct. 746 [2014]). For the reasons set forth herein, this court finds that Ford's reliance on *Daimler A.G. v Bauman* is misplaced.

*2 It is undisputed that the 2002 Ford Explorer was purchased **3 in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed with the Department of Motor Vehicles in New York State. The vehicle was traveling through Virginia on the route back to New York when the accident occurred. Moreover, Ford maintains a continuous and substantial presence in New York. It owns property in New York (see Exhibit 1 to opposition, \$150 million dollars invested by Ford to upgrade its Hamburg, New York plant). It has hundreds of dealerships selling Ford products under its brand name in New York. Since 1920, Ford has been registered with the New York State Department of State as an active foreign business corporation.

Defendant, Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, *relying on Daimler A.G. v Bauman*, 134 S Ct. 746 [2014]). In *Bauman*, Argentinian residents brought an action against Daimler, A.G., a German corporation, under the Alien Tort Statute and the Torture Victims Protection Act, alleging that its wholly-owned Argentinian subsidiary helped state security forces to kidnap, detain, torture, and kill the plaintiffs or their relatives during Argentina's "Dirty War." The United States Supreme Court held that due process did not permit the exercise of general jurisdiction over the parent corporation, which had a subsidiary operating in California. The Supreme Court drew a distinction between specific jurisdiction and general jurisdiction. Specific jurisdiction concerns adjudicatory authority where the suit arises out of or relates to the defendant's contacts with the forum.

General jurisdiction in substance concerns adjudicatory authority in cases arising anywhere, and "[t]he paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business ***." (*Daimler AG v Bauman, supra*, 749.) Another forum may assert general jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. (*Daimler AG v Bauman, supra*.) General jurisdiction requires affiliations so continuous

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and systematic as to make the foreign corporation essentially at home in the forum state, i.e., similar to a domestic enterprise in that state. (*Daimler AG v Bauman, supra*. **4)

In determining whether a court of New York has personal jurisdiction over a non-domiciliary, a two-step analysis must be employed. First, the court must inquire whether there is a statute which confers jurisdiction over the non-domiciliary, and, second, the court must inquire whether the exercise of jurisdiction meets due process standards. (See *Darrow v Deutschland*, 119 AD3d 1142; *Andrew Greenberg, Inc. v Sirtech Canada, Ltd.*, 79 AD3d 1419.)

In the case at bar, CPLR 302, "Personal jurisdiction by acts of non-domiciliaries," New York State's long arm statute, does not provide a basis for the assertion of in personam jurisdiction over defendant Ford. CPLR 302 (a)(3) provides for the exercise of jurisdiction over a foreign defendant who commits a tortious act outside the state which causes the injury within the state. This statute does not apply to the case at bar.

CPLR 301 reads in relevant part: "Jurisdiction over persons, property or status," is New York's statute for general jurisdiction, and it provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." A foreign corporation is subject to the jurisdiction of New York courts under CPLR 301 "if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted." (*Landoil Res. Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 [internal quotation marks and citations omitted]). In view of defendant Ford's extensive activities in this state since approximately 1920, a finding of "a continuous and systematic course of doing business" in New York can easily be made. "Even if this statutory standard is met, however, the Due Process Clause of the 14th Amendment limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (*Hood v Ascent Med. Corp.*, 2016 WL 1366920 [SDNY] [internal quotation marks and citations omitted]; see, *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S.Ct. 2846. [HN 5: "foreign subsidiaries of United States tire manufacturer were not subject to **5 general jurisdiction in North Carolina courts in action arising from a bus accident in France allegedly caused by a tire that was manufactured and sold abroad, although some of the tires made abroad by the foreign subsidiaries had reached North Carolina through the stream of commerce"].) There are New York State appellate cases decided after *Bauman* which have found a lack of general jurisdiction over the defendants. (See, *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.*, 131 AD3d 259; *D & R Glob. Selections, S.L. v Pineiro*, 128 AD3d 486; *Magdalena v Lins*, 123 AD3d 600.)

*3 This court has concluded that neither *Goodyear Dunlop Tires Operations, S.A. v Brown (supra)*, nor *Daimler A.G. v Bauman (supra)*, nor the New York State appellate cases require the dismissal of the case at bar. In *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, the estates of two minor North Carolina residents who died in a bus accident that occurred in France brought an action in a North Carolina state court against several subsidiaries of a United States tire manufacturer, including subsidiaries organized and operating in Luxembourg, Turkey, and France. The United States Supreme Court held that the North Carolina court lacked both specific and general jurisdiction over the foreign subsidiaries. The foreign subsidiaries were not registered to do business in North Carolina; had no place of business, employees, or bank accounts there; did not design, manufacture, or advertise their products in North Carolina; and did not solicit business in the state or sell or ship tires to North Carolina customers. The plaintiffs tried to argue that the North Carolina court had jurisdiction because "a small percentage of their [the subsidiaries'] tires were distributed in North Carolina by other Goodyear USA affiliates" (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2848), and The North Carolina Court of Appeals decided that the state court had general jurisdiction over the foreign subsidiaries, whose tires had reached North Carolina through the stream of commerce. The United States Supreme Court reversed with an opinion that stated "[c]onfusing or blending

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general and specific jurisdictional inquiries," the North Carolina courts had erroneously found jurisdiction (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.) In reference to the tenuous relationship between the foreign subsidiaries and North Carolina, the Supreme Court stated: "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction." (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.)

In sharp contrast, plaintiff Aybar has alleged without contradiction, *inter alia*, that the 2002 Ford Explorer was purchased in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed in New York. Ford has an organization of facilities in this state engaged in day-to-day activities. Ford also has many franchises across the state. Defendant Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts. Parenthetically, this court notes that in *Goodyear Dunlop Tires Operations, S.A. v Brown, (supra)*, the parent corporation, which operated plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.

The New York State appellate cases decided after *Bauman* which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar because of the level of Ford's activities within New York. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co. (supra*, 264), the Appellate Division, First Department, held that "under *Daimler*, New York does not have general jurisdiction over Mega's worldwide operations," the Mega International Commercial Bank Company being an international banking corporation, organized under the laws of Taiwan, with its principal place of business located there, and having 128 branches worldwide, only one of which was in New York. But the court found that there was jurisdiction (as discussed below, apparently not general jurisdiction) to compel compliance with information subpoenas arising from the bank's registration with the Superintendent of the Department of Financial Services and filing of a written instrument appointing the superintendent as an agent for service of process. "Mega consented to the necessary regulatory oversight in return for permission to operate in New York, and therefore is subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas ***." (*B & M Kingstone, LLC v Mega Int'l Commercial Bank Co., supra*, 265 *** [internal quotation marks and citation omitted].) In *D & R Glob. Selections, S.L. v Pineiro (supra)*, the Appellate Division, First Department held that the New York court did not have general jurisdiction pursuant to CPLR 301 or specific jurisdiction pursuant to CPLR 302 over a Spanish winery, but the appellate court mentioned only the winery's visits to this state to promote its products as a contact with New York. In *Magdalena v Lins (supra)*, the Appellate Division, First Department held that the New York court had no jurisdiction over the defendants, mentioning only an apartment in this state which a defendant owned but did not live in (his daughters did) as the only contact with New York.

*4 In view of the foregoing, this court finds that defendant Ford's activities with the State of New York have been so continuous and systematic that the company is essentially at home here. (See, *Daimler A.G. v Bauman, supra*.)

There is another reason for finding general jurisdiction over defendant Ford. In New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process. (See, *Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432.) "[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York." (Alexander, Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:6[c], p21.) After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes. (See, Alexander, 2015 Practice Commentaries, McKinney's

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Con. Law of NY, Book 7B, C301:8[c].) There is no New York state court appellate authority directly on point. In *B & M Kingstone, LLC v Mega Int'l Commercial Bank Co.* (*supra*), the appellate court relied on Banking Law § 200 which provides in substance that, *inter alia*, no foreign banking corporation shall conduct business in this state unless it filed with the **8 Superintendent of Banking a written instrument appointing him as its agent “upon whom all process in any action or proceeding against it *on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches*, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state ***.” (Emphasis added.) Banking Law § 200 concerns a limited jurisdiction, while other state registration statutes have been interpreted as a conferring general jurisdiction over a foreign corporation. The court notes parenthetically Alexander's observation that “[i]t would have been helpful if the [Mega] court had clarified how the suit at issue - a special proceeding to enforce an information subpoena- arose out of a transaction with the New York branch.” (Alexander, Practice Commentaries [2015], McKinney's Cons Laws of NY, Book 7B, p5.)

Other registration and/or appointment statutes, e.g., Business Corp. Law §§ 304 and 1304, have been interpreted as conferring general jurisdiction over foreign corporations. (See, e.g., *Doubet LLC v Trustees of Columbia Univ. in City of New York*, 99 AD3d 433; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173; *Bailen v Air & Liquid Systems Corp.*, 2013 WL 1369452 [N.Y.Sup.].) *Bauman* does not expressly address general jurisdiction based on such statutes, but the case's implication for such jurisdiction has become a matter of controversy. This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives *Bauman*. “When,*** the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions.” (*Acorda Therapeutics, Inc. v Mylan Pharm. Inc.*, 78 F Supp 3d 572, 591 [D. Del. 2015], aff'd on other grounds, 2016 WL 1077048 [Mar. 18, 2016].) In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so.

*5 **9 The instant motion lacks merit. This court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.

Dated: May 2016

<<signature>>

Thomas D. Raffaele, J.S.C.

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EXHIBIT B

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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C/htr

AD3d

Argued - March 26, 2018

JOHN M. LEVENTHAL, J.P.
SANDRA L. SGROI
HECTOR D. LASALLE
VALERIE BRATHWAITE NELSON, JJ.

2016-06194
2016-07397

OPINION & ORDER

Anna Aybar, et al., plaintiffs-respondents, v Jose A. Aybar, Jr., et al., defendants, Ford Motor Company, et al., appellants; U.S. Tires and Wheels of Queens, LLC, nonparty-respondent.

(Index No. 706909/15)

APPEAL by the defendant Ford Motor Company, in an action to recover damages for personal injuries and wrongful death, from an order of the Supreme Court (Thomas D. Raffaele, J.), entered May 31, 2016, in Queens County, and SEPARATE APPEAL by the defendant Goodyear Tire & Rubber Co. from an order of the same court, also entered May 31, 2016. The first order denied the motion of the defendant Ford Motor Company pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction. The second order denied the motion of the defendant Goodyear Tire & Rubber Co., pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction.

Aaronson Rappaport Feinstein & Deutsch, LLP (Eliot J. Zucker, Peter J. Fazio, and Hogan Lovells US LLP, New York, NY [Sean Marotta], of counsel), for appellant Ford Motor Company, and DLA Piper LLP, New York, NY (Kevin W. Rethore of counsel), for appellant Goodyear Tire & Rubber Co. (one brief filed).

Omrani & Taub, P.C. (Parker Waichman, LLP, Port Washington, NY [Jay L. T. Breakstone and Jessica L. Richman], of counsel), for plaintiffs-respondents.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York, NY (Adam C. Calvert of counsel), for nonparty-respondent.

BRATHWAITE NELSON, J.

We consider on these appeals whether, following the United States Supreme Court decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not.

I.

This action arises from a July 1, 2012, automobile accident that occurred on an interstate highway in Virginia. The defendant Jose A. Aybar, Jr., a New York resident, was operating a 2002 Ford Explorer that was registered in New York when one of its tires allegedly failed, causing the vehicle to become unstable and overturn and roll multiple times. Three of the six passengers died as a result of the accident and the other three were injured. The plaintiffs are the surviving passengers and the representatives of the deceased passengers' estates. They allege, among other things, that the defendant Ford Motor Company (hereinafter Ford) negligently manufactured and designed the Ford Explorer, and that the defendant Goodyear Tire & Rubber Co. (hereinafter Goodyear) negligently manufactured and designed the faulty tire.

Ford is incorporated in Delaware, with its principal place of business in Michigan, and Goodyear is incorporated in, and has its principal place of business in, Ohio. The complaint alleges that at all relevant times both corporations were registered to do business in New York, and that each, in fact, conducted business in New York and derived substantial revenue from such business.

Ford moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground that the Supreme Court lacked personal jurisdiction over it. In support of its motion, Ford submitted evidence that the subject vehicle was manufactured in Missouri and sold to a dealership in Ohio in March 2002, from where it was sold to an individual not involved in this lawsuit, and that the vehicle was not designed in New York. Ford also submitted evidence that it did not have any Ford Explorer manufacturing plants in New York, and it did not directly engage in the servicing of Ford vehicles in New York, which is done exclusively by independent dealers.

Aybar purchased the subject vehicle and tire in 2011 from a third party in New York.

In opposition to the motion, the plaintiffs argued that Ford was subject to general jurisdiction in New York because Ford maintained a substantial and continuous presence in New York. To support this proposition, the plaintiffs pointed to “hundreds” of Ford dealerships employing numerous New York residents, and they submitted evidence that Ford operated a stamping (manufacturing) plant in Hamburg, New York, which employed approximately 600 people and for which Ford had received incentive packages and tax credits from New York State. In reply, Ford submitted evidence that it had 62 plants and franchise agreements with 11,980 dealerships worldwide, and argued that its economic contacts with New York were not so substantial as compared to its contacts elsewhere so as to render Ford “at home” in New York.

Goodyear also moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it on the ground of lack of personal jurisdiction. In support of its motion, Goodyear submitted evidence that the subject tire was designed in Ohio, manufactured in Tennessee in 2002, and tested and inspected outside of New York. Goodyear asserted that it had no way of tracking the sale or ownership of a given tire over its service life, but could identify that the subject class of tire was sold as original equipment for certain Isuzu and Ford vehicles, and as a replacement tire. Goodyear additionally submitted evidence that it operated a chemical plant in New York and that it was a member of a limited liability company which owned and operated a tire manufacturing plant in New York, but that neither plant manufactured the subject tire, and that Goodyear did not specifically direct advertising of the subject tire at New York residents.

In opposition to Goodyear’s motion, the plaintiffs argued that Goodyear was subject to general jurisdiction in New York because its business affiliations within New York were so pervasive or continuous and systematic as to render it essentially “at home” in New York State. The plaintiffs submitted evidence that Goodyear had numerous tire and auto service center storefront locations in New York, from which the plaintiffs argued it could be inferred that Goodyear employed hundreds, possibly thousands, of New York residents. In reply, Goodyear submitted evidence that it had plants, service centers, and other properties worldwide. It argued that it employed “a tremendous number of people” worldwide, and that its economic contacts with New York were not so substantial as compared with its contacts elsewhere so as to render Goodyear “at home” in New York.

Nonparty U.S. Tires and Wheels of Queens, LLC (hereinafter U.S. Tires), was a defendant in a separate action brought by the plaintiffs arising from the same accident. At the time of the motions to dismiss of Ford and Goodyear, there was a pending motion to consolidate the two actions. U.S. Tires submitted opposition papers to the subject motions, and argued that both Ford and Goodyear had consented to general jurisdiction in New York by registering to do business with the New York Secretary of State and designating an agent for service of process in New York. U.S. Tires noted that it was a New York corporation with its principal place of business in New York, and, thus, if Ford and Goodyear were to succeed on their motions, the result would be three separate lawsuits, all involving the same accident, which, U.S. Tires contended, would likely result in inconsistent verdicts, duplication of discovery, and waste of judicial resources.

In response to U.S. Tires's opposition, Ford argued that the opposition was untimely, U.S. Tires lacked standing to oppose the motion, and, on the merits, Ford's compulsory registration to do business in New York and appointment of the Secretary of State as its agent for service of process did not constitute consent to general jurisdiction in New York. Goodyear advanced similar arguments in response to U.S. Tires's opposition.

In separate orders, each entered May 31, 2016, the Supreme Court, Queens County (hereinafter the motion court), denied the motions, concluding that Ford and Goodyear were each subject to general jurisdiction in New York. The motion court found that the activities of both Ford and Goodyear in New York were so continuous and systematic that both Ford and Goodyear are essentially at home here. The motion court also found that both Ford and Goodyear had otherwise consented to general jurisdiction in New York by each registering to do business in New York as a foreign corporation and designating a local agent for service of process. With regard to Ford's activities in New York, the motion court pointed to the facts that Aybar purchased the vehicle in New York and primarily used it in New York, Ford has an organization of facilities in New York engaged in day-to-day activities, and Ford has many franchises across New York. With regard to Goodyear, the motion court relied upon the facts that Goodyear had operated numerous stores in New York since approximately 1924 and had employed thousands of workers in those stores, and it has an organization of facilities in New York engaged in day-to-day activities. Ford and Goodyear appeal.¹

¹We note that the motion court did not rule on the merits of the issue of whether U.S. Tires could properly oppose the motions of Ford and Goodyear. On their appeals, neither Ford nor Goodyear

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II.

It is fundamental that a court must acquire personal jurisdiction over a defendant before it can render a judgment against that defendant (*see Burnham v Superior Court of Cal., County of Marin*, 495 US 604, 608; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 702). A defendant may consent to a court's exercise of personal jurisdiction (*see National Equipment Rental, Ltd. v Szukhent*, 375 US 311, 316), or waive the right to object to it (*see CPLR 3211[e]*; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US at 703; *Iacovangelo v Shepherd*, 5 NY3d 184, 186), but when a defendant has objected to the court's exercise of personal jurisdiction, the plaintiff bears the burden of coming forward with sufficient evidence to prove jurisdiction (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914).

Under modern jurisprudence, a court may assert general all-purpose jurisdiction or specific conduct-linked jurisdiction over a particular defendant (*see Daimler AG v Bauman*, 571 US at 122; *Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US 915). "A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State" (*Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct 1773, 1780; *see Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US at 919). "Specific jurisdiction, on the other hand, 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 Dunlop Tires Operations, S. A. v Brown*, 564 US at 919 [internal quotation marks and brackets omitted]; *see Bristol-Myers Squibb Co. v Superior Court of Cal., San Francisco County*, ____ US ____, 137 S Ct at 1780; *Daimler AG v Bauman*, 571 US at 127).

Here, in opposing the motions of Ford and Goodyear, the plaintiffs asserted that New York courts have general jurisdiction over each defendant. The plaintiffs did not assert that the court could exercise specific jurisdiction over these defendants in this action, and, thus, we do not consider whether jurisdiction might be exercised over them pursuant to New York's long-arm jurisdiction

raise this issue. We therefore assume, without deciding, that U.S. Tires has standing to oppose the motions and that its opposition was not untimely.

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statute² (see CPLR 302).

General jurisdiction in New York is provided for in CPLR 301, which allows a court to exercise “such jurisdiction over persons, property, or status as might have been exercised heretofore.” Prior to the United States Supreme Court’s decision in *Daimler AG v Bauman* (571 US 117), a foreign corporation was amenable to suit in New York under CPLR 301 if it had engaged in “such a continuous and systematic course of ‘doing business’ here that a finding of its ‘presence’ in this jurisdiction [was] warranted” (*Landoil Resources. Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33, quoting *Laufers v Ostrow*, 55 NY2d 305, 309-310). The parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction would be consistent with New York law. The disagreement lies in whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*.

In *Goodyear Dunlop Tires Operations, S. A. v Brown*, the Supreme Court addressed the distinction between general and specific jurisdiction, and stated that a court is authorized to exercise general jurisdiction over a foreign corporation when the corporation’s affiliations with the state “are so ‘continuous and systematic’ as to render them essentially at home in the forum State” (564 US at 919, quoting *International Shoe Co. v Washington*, 326 US 310, 317). In *Daimler*, the Court limited the scope of general jurisdiction to that definition, and rejected a standard that would allow the exercise of general jurisdiction in every state in which a corporation is engaged in a substantial, continuous, and systematic course of business (571 US at 137). The Court instructed that, with respect to corporations, the paradigm bases for general jurisdiction are the place of incorporation and principal place of business (see *id.*). Although the Court did not limit the exercise of general jurisdiction to those two forums, it left open only the possibility of an “exceptional case” where a corporate defendant’s operations in another state were “so substantial and of such a nature as to render the corporation at home in that State” (*id.* at 139 n 19; see *BNSF Ry Co. v Tyrrell*, _____ US _____, 137 S Ct 1549, 1558).

Neither Ford nor Goodyear is incorporated in New York or has its principal place of business here. Thus, New York courts can exercise general jurisdiction over each defendant only if the plaintiffs have established that its affiliations with New York are so continuous and systematic

²The arguments of nonparty U.S. Tires that specific jurisdiction is present in this case are not properly before this Court since they were not raised before the motion court.

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as to render it essentially “at home” here.

Since *Daimler*, the Supreme Court has reiterated that, standing alone, mere “in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum State]” (*BNSF Ry Co. v Tyrrell*, ____ US at ____, 137 S Ct at 1559). To determine whether a foreign corporate defendant’s affiliations with the state are so continuous and systematic as to render it essentially at home, *Daimler* advised that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts,” but “instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them” (*Daimler AG v Bauman*, 571 US at 139 n 20; *see BNSF Ry Co. v Tyrrell*, ____ US at ____, 137 S Ct at 1559).

The *Daimler* Court suggested that *Perkins v Benguet Consol. Mining Co.* (342 US 437) exemplified the “exceptional case” in which a corporate defendant’s operations in the forum state were so substantial and of such a nature as to render the corporation “at home” in that state (*see Daimler AG v Bauman*, 571 US at 129). In *Perkins*, the defendant was incorporated in the Philippine Islands, where it owned and operated certain mines (342 US at 439). Its operations were completely halted during the Japanese occupation of the Islands in World War II. During that interim, the president of the company, who was also the general manager and principal stockholder, returned to his home in Ohio, where he maintained an office and conducted the corporation’s affairs (*see id.* at 447-448). The Supreme Court held that Ohio courts could exercise general jurisdiction over the corporation without offending due process (*see id.* at 448). The Supreme Court later noted that “Ohio was the corporation’s principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State” (*Keeton v Hustler Magazine, Inc.*, 465 US 770, 779 n 11, *see Daimler AG v Bauman*, 571 US at 130).

A.

The plaintiffs argue that New York courts have general jurisdiction over Ford because Ford has “become woven into the fabric of New York state domestic activity.” They point to the facts that Ford has been authorized to do business in New York since 1920, it operates numerous facilities in New York, it owns property in New York and spends at least \$150 million to maintain the property, it employs significant numbers of New York residents, it contracts with hundreds of dealerships in New York to sell its products under the Ford brand name, and it has frequently been

a litigant in New York courts.

Under the strictures of *Daimler*, Ford's contacts with New York are insufficient to permit the assertion of general jurisdiction over claims that are unrelated to any activity occurring in New York. Ford concedes that it has extensive commercial activities in New York, but it notes that it has extensive commercial activities throughout the country and worldwide. Indeed, while the plaintiffs point to Ford's one factory in New York, employing approximately 600 people, and Ford's contracts with "hundreds" of dealerships in the state, Ford presented evidence that it has 62 plants, employing about 187,000 people, and 11,980 franchise agreements with dealerships worldwide. Appraising the magnitude of Ford's activities in New York in the context of the entirety of Ford's activities worldwide, it cannot be said that Ford is at home in New York.

B.

The plaintiffs contend that Goodyear's presence in New York is special, as it has conducted business in New York for nearly a century, it has owned and operated a chemical plant here since the 1940's, as well as a tire manufacturing plant, it has availed itself of New York's courts, and it has leased and subleased real estate in New York, maintained a network of dealers and service centers, and employed thousands of people in New York since 1924. Like Ford, Goodyear concedes that it has extensive commercial activity in New York, but it points to the evidence that it has 50 manufacturing plants worldwide and it operates approximately 1,200 retail outlets for the sale of its tires worldwide. Appraising Goodyear's activities in their entirety, Goodyear also is not at home in New York such that New York courts might exercise general jurisdiction over any claim brought against it.

III.

The plaintiffs also argue that Ford and Goodyear each consented to the jurisdiction of New York courts for all purposes, including this suit, by registering to do business in New York and appointing an agent for service of process. The plaintiffs do not rely on any particular business registration statute in making this argument. Before the motion court, U.S. Tires, which raised this argument, relied only on CPLR 301. Nevertheless, as relevant to these defendants, we note that Business Corporation Law § 1301(a) provides that "[a] foreign corporation shall not do business in this state until it has been authorized to do so." Business Corporation Law § 304(b) provides, inter alia, that no foreign corporation may be authorized to do business in New York unless in its

application for authority, it designates the secretary of state as the agent upon whom process against the corporation may be served. Similarly, Business Corporation Law § 1304(a)(6) requires a foreign corporation, in its application for authority to do business in New York, to designate the secretary of state as its agent upon whom process against it may be served and an address to which process received by the Secretary of State is to be mailed.

New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do business here has such an effect. There has been longstanding judicial construction, however, by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction (*see e.g. Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432, 436-437; *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d 433, 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d 747, 749 [Sup Ct, Albany County 1972]; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d 623, 624 [Sup Ct, Monroe County 1971]; *Carlton Props. v 328 Props.*, 208 Misc 776 [Sup Ct, Nassau County 1955]; *Devlin v Webster*, 188 Misc 891 [Sup Ct, NY County 1946], affd 272 App Div 793; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d 461, 464-467 [SD NY][listing numerous federal cases finding consent by registration]; cf. *Muollo v Crestwood Vil.*, 155 AD2d 420, 421). We hold that in view of the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.³

In New York, the theory of consent by registration originates in the 1916 opinion of Judge Cardozo in *Bagdon v Philadelphia & Reading Coal & Iron Co.* (217 NY 432). There, the Court of Appeals held that a foreign corporation could be sued in New York upon a cause of action

³The parties observe that post *Daimler*, some New York lawmakers have proposed amending Business Corporation Law § 1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation (*see* 2015 NY Senate-Assembly Bill S4846, A6714). No such changes in the law have been effected to date, and we decline the appellants' invitation to opine on the constitutionality of any such possible amendment.

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that had no relation to the corporation's New York activities because the corporation had consented to the jurisdiction of New York by obtaining authorization to do business here and appointing an agent for service of process in New York. *Bagdon* must be understood within the historical context in which it was decided.

At the time *Bagdon* was decided, *in personam* jurisdiction was still largely limited by the conceptual structure of *Pennoyer v Neff* (95 US 714). In *Pennoyer*, decided shortly after the enactment of the Fourteenth Amendment, the United States Supreme Court held that a court's jurisdiction was restricted by its territorial limits or geographic bounds (*see id.* at 720), and, thus, no state could exercise jurisdiction over persons or property outside of its territory (*see id.* at 722). "*Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there" (*Shaffer v Heitner*, 433 US 186, 199). To complicate matters, under the 19th century view, a corporation could have "no legal existence" outside of its state of incorporation (*Bank of Augusta v Earle*, 38 US 519, 588), and, thus, could be sued only in the state of incorporation, no matter how extensive its business in another state (*see Brown v Lockheed Martin Corp.*, 814 F3d 619, 631).

"In time, however, that strict territorial approach yielded to a less rigid understanding" (*Daimler AG v Bauman*, 571 US at 126). States enacted statutes requiring the appointment by foreign corporations of agents upon whom process could be served "primarily to subject them to the jurisdiction of [the] local courts in controversies growing out of transactions within the [S]tate" (*Morris & Co. v Skandinavia Ins. Co.*, 279 US 405, 409). The business registration statutes conditioned a corporation's authority to do business in a state on its designation of an appointed agent within the state to accept service. "Pointing to the acceptance of service by an in-state agent appointed by the corporation, a state could tenably argue that the corporation had voluntarily consented to jurisdiction there and that, notwithstanding *Earle*, it was 'present' in the state because it maintained an agent there" (*Brown v Lockheed Martin Corp.*, 814 F3d at 632). In addition, federal jurisprudence evolved such that a foreign corporation could be subject to the jurisdiction of a state's courts if the corporation was doing business within the state and service was made in the state upon some duly authorized officer or agent who was representing the corporation in its business (*see St. Louis Southwestern R. Co. of Tex. v Alexander*, 227 US 218, 226; *Herndon-Carter Co. v James N. Norris, Son & Co.*, 224 US 496, 499; *Peterson v Chicago, R. I. & P.R. Co.*, 205 US 364, 390).

Turning back to the Court of Appeals' decision in *Bagdon*, there, a New York

resident sued a Pennsylvania corporation for an alleged breach of contract that occurred in Pennsylvania. The defendant corporation was registered to do business in New York and had appointed an agent for the service of process in New York (*see Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY at 433). The defendant conceded the presence of an agent in New York, but argued that the scope of the agency of the person appointed to accept service of process in its behalf must be limited to actions which arose out of the business transacted in New York (*see id.* at 433-434). The Court of Appeals rejected the defendant's argument and found that the defendant could properly be sued in New York on the cause of action, even though it did not arise from the defendant's activities in New York. The Court reasoned that by obtaining a certificate from New York to do business here, the defendant had entered into a binding contract with New York. In exchange for the right to do business in New York, the defendant had filed a stipulation in the office of the secretary of state designating a person upon whom process may be served within the state (*see id.* at 436). The Court found that this person was a "true agent" of the defendant, and the stipulation was a "true contract" with New York (*id.*). The Court held that the actions in which this agent was to represent the corporation were not limited, and, as long as New York had subject matter jurisdiction over the action, service on the agent would give jurisdiction of the person (*see id.* at 437). The Court further explained that the agent was in the service of the corporation engaged in business in New York, and that the agent's "presence" brought the corporation within the jurisdiction of New York (*id.* at 439).

One year after *Bagdon* was decided, the Court of Appeals extended this reasoning to a corporation that apparently was unlicensed in New York, but which was doing regular business here. In *Tauza v Susquehanna Coal Co.*, the Court held that New York courts had jurisdiction over a foreign corporation that was doing business in New York and which had been served with process through a managing agent in its New York office, and that the court's jurisdiction "[did not] fail because the cause of action sued upon [had] no relation in its origin to the business here transacted" (220 NY 259, 268). The Court stated that "[t]he essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action" (*id.* at 268-269).

Twenty-three years after *Bagdon*, the Supreme Court of the United States interpreted a successor New York registration statute in accordance with *Bagdon*, and found that the defendant had consented to be sued in the courts of New York by designating an agent in New York for the

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service of process (*see Neirbo Co. v Bethlehem Shipbuilding Corp.*, 308 US 165, 174-175). The Court observed that the statute calling for such a designation was constitutional, and the designation of the agent was ““a voluntary act”” (*id.* at 175, quoting *Pennsylvania Fire Ins. Co. v Gold Issue Mining & Milling Co.*, 243 US 93, 96).

New York courts continued to be guided by the requirement that a defendant must be found to be “present” in the state in order to exercise jurisdiction over the defendant in accordance with federal due process (*see Simonson v International Bank*, 14 NY2d 281, 285). By registering to do business in New York and appointing an agent for the service of process, a foreign corporation was, in effect, consenting to be found within New York (*see Pohlers v Exeter Mfg. Co.*, 293 NY 274, 280 [“A designation of a public officer upon whom service may be made has the same effect as a voluntary consent”]).

In 1945, the United States Supreme Court decided *International Shoe Co. v State of Washington* (326 US 310), which altered our *in personam* jurisdiction jurisprudence. *International Shoe* extended the analysis beyond physical presence and authorized a state court to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (*id.* at 316, quoting *Milliken v Meyer*, 311 US 457, 463; *see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 923). “Following *International Shoe*, ‘the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction’” (*Daimler AG v Bauman*, 571 US at 126, quoting *Shaffer v Heitner*, 433 US at 204).

After *International Shoe*, courts began to differentiate between general all-purpose jurisdiction and specific case-linked jurisdiction (*see Goodyear Dunlop Tires Operations, S. A. v Brown*, 564 US at 919). In New York, in 1962, the Legislature enacted CPLR 302 to effect specific jurisdiction, and CPLR 301 to ensure that the general jurisdiction historically exercised in New York was not thought to be limited by the enactment of CPLR 302 (*see* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 301 at 7 [2010 ed]). In the interim between *International Shoe* and *Daimler*, where jurisdiction has been predicated on CPLR 301, the prevailing logic has continued to be that there is no need to establish a connection between the cause of action at issue and the foreign defendant’s business activities within the State, “because the

authority of the New York courts is based solely upon the fact that the defendant is ‘engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of its “presence” in this jurisdiction’” (*McGowan v Smith*, 52 NY2d 268, 272, quoting *Simonson v International Bank*, 14 NY2d at 285; *accord Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33). Some courts have continued to find that by registering to do business in New York and designating an agent for service of process, a foreign corporation has constructively consented to general in personam jurisdiction in New York in exchange for the privilege of doing business here (see *Doubet LLC v Trustees of Columbia Univ. in the City of N. Y.*, 99 AD3d at 434-435; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d at 175-176; *Le Vine v Isoserve, Inc.*, 70 Misc 2d at 749; *Robfogel Mill-Andrews Corp. v Cupples Co., Mfrs.*, 67 Misc 2d at 624; *Rockefeller Univ. v Ligand Pharmaceuticals*, 581 F Supp 2d at 464-467).

As discussed above, following the United States Supreme Court’s decision in *Daimler*, personal jurisdiction cannot be asserted against a foreign corporation based solely on the corporation’s continuous and systematic business activity in New York. The consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has consented to be found in New York. *Daimler* made clear, however, that general jurisdiction cannot be exercised solely on such presence (see *Daimler AG v Bauman*, 571 US at 137-138). The Supreme Court expressly cautioned that cases such as *Tauza v Susquehanna Coal Co.* (220 NY 259) which uphold the exercise of general jurisdiction based on the presence of a local office, “should not attract heavy reliance today” (*Daimler AG v Bauman*, 571 US at 138 n 18). As other courts have observed, it appears that every state in the Union has enacted a registration statute that requires foreign corporations to register to do business and appoint an in-state agent for service of process (see *Genuine Parts Co. v Cepec*, 137 A3d 123, 143; *Brown v Lockheed Martin Corp.*, 814 F3d at 640; see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343, 1363 n 109 [listing statutes]). We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be “unacceptably grasping” under *Daimler* (*Daimler AG v Bauman*, 571 US at 138).

The Court of Appeals does not appear to have cited to *Bagdon* or relied upon its

consent-by-registration theory since *International Shoe* was decided. We think that this is a strong indicator that its rationale is confined to that era, which was dominated by *Pennoyer*'s territorial thinking, and that it no longer holds in the post-*Daimler* landscape. We conclude that a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York.

IV.

The plaintiffs contend in the alternative that the motions should be denied on the ground that additional discovery is needed because facts essential to justify opposition may exist but cannot now be stated (*cf.* CPLR 3211[d]). The plaintiffs have not alleged any facts that would support personal jurisdiction and thus have failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exists here (*see Leuthner v Homewood Suites by Hilton*, 151 AD3d 1042, 1045; *Mejia-Haffner v Killington Ltd.*, 119 AD3d 912, 915).

Accordingly, the Supreme Court should have granted the separate motions of Ford and Goodyear to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction.

The orders entered May 31, 2016, are reversed, on the law, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

LEVENTHAL, J.P., SGROI and LASALLE, JJ., concur.

ORDERED that the orders entered May 31, 2016, are reversed, on the law, with costs, and the separate motions of the defendants Ford Motor Company and Goodyear Tire & Rubber Co. pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them are granted.

ENTER:



Aprilanne Agostino
Clerk of the Court

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EXHIBIT C

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This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

*1 Randall M. Hinton, Appellant,
 v.

Village of Pulaski, Respondent.

Court of Appeals of New York
 No. 35 SSM 27
 Decided on February 21, 2019

Submitted by Joel N. Melnicoff, for appellant.
 Submitted by Brian W. McElhenny, for respondent.
 New York State Conference of Mayors and Municipal Officials, amicus curiae.

OPINION OF THE COURT
MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

The Village of Pulaski Code provides, in relevant part, that “[n]o civil action shall be maintained” against defendant Village of Pulaski for personal injury sustained as a result of a defect in “any street, highway, bridge, culvert, sidewalk or crosswalk” unless prior written notice of the alleged defect is provided to the Village (Village of Pulaski Code § 122-14; *see also* Village Law § 6-628). Plaintiff commenced this action against the Village after he fell while descending an exterior stairway that connects a public road to a municipal parking lot. The Village did not receive prior written notice of the alleged defect before plaintiff commenced suit, and the Village moved for summary judgment dismissing the complaint. Supreme Court granted the motion (59 Misc 3d 1220 [A] [Sup Ct, Oswego County 2016]), and the Appellate Division unanimously affirmed (160 AD3d 1446 [4th Dept 2018]).

In *Woodson v City of New York*, this Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it “functionally fulfills the same purpose that a standard sidewalk would serve” (93 NY2d 936, 937-938 [1999], citing *Donnelly v Village of Perry*, 88 AD2d 764, 765 [4th Dept 1982] [holding that steps between a roadway and public

sidewalk were “the equivalent of a sidewalk” because they “provide(d) a passageway for the public”]) and *2 *Youngblood v Village of Cazenovia*, 118 Misc 2d 1020, 1022 [Sup Ct, Madison County 1982] [holding that steps are “essentially sidewalks laid on slopes, often connecting two stretches of sidewalk”], *affd on opn below* 93 AD2d 962 [3d Dept 1983]; *see also Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011] [parking lot served the “functional purpose” of a highway, thereby triggering a notice requirement]). In the twenty years since *Woodson* was decided, the Legislature -- “though fully capable of corrective action” -- has done nothing to “signal disapproval” of this interpretation (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 225 [2017]). As the identical question has been long since resolved by this Court, the present case involves the application of settled precedent -- not statutory interpretation (*see Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819-820 [2015] [noting that an “extraordinary and compelling justification is needed to overturn precedents involving statutory interpretation” because, “if the precedent or precedents have misinterpreted the legislative intention embodied in a statute, the Legislature’s competency to correct the misinterpretation is readily at hand”] [internal citation, quotation marks, and brackets omitted]; *Matter of Eckart*, 39 NY2d 493, 499-500 [1976] [“Generally, once the courts have interpreted a statute any change in the rule will be left to the Legislature, particularly where the courts’ interpretation is a long-standing one”]; *Heyert v Orange & Rockland Util.*, 17 NY2d 352, 360 [1966] [noting that “established precedents are not lightly to be set aside” because “the remedy (is) ordinarily with the Legislature”] [internal citation and quotation marks omitted]; *see also People v Taylor*, 9 NY3d 129, 148 [2007] [“Stare decisis is deeply rooted in the precept that we are bound by a rule of law--not the personalities that interpret the law”]). We see no compelling reason to overrule our longstanding precedent.¹

The courts below correctly applied *Woodson* in holding that the stairway at issue “functionally fulfills the same purpose” as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition (*Woodson*, 93 NY2d at 938). In its motion for summary judgment, the Village established that plaintiff failed to plead or prove prior written notice. Plaintiff did not raise a triable issue of fact in opposition, and therefore summary

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judgment was properly awarded to the Village. Plaintiff's remaining arguments lack merit or are unpreserved for review.

I

Hinton v Village of Pulaski

SSM No. 27

WILSON, J. (dissenting):

In this case, we ask: is a stairway a "sidewalk"? Conventions of normal English, legislative policy, and the invention of the escalator, would answer "no." But through the alchemy of a "functional equivalence" test conjured from *Woodson v City of New York* (93 NY2d 936, 937 [1999]), one can buy a sidewalk to heaven, climb the sidewalk to the stars, and build a sidewalk to paradise (with a new slab every day). Indeed, while on the subject of alchemy, if Harry Potter was set in New York, his Dursley abode would no doubt change to a cupboard under the sidewalk.

This is a personal injury action in which Randall Hinton fell down an (allegedly) negligently-maintained stairway. In Village Law § 6-628, the legislature gave villages what amounts to "prior written notice" protection from certain negligence actions, providing, in relevant part, that "[n]o civil action shall be maintained against [a] village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective[or] unsafe" (Village Law § 6-628).

By holding that the stairway in this case is a "sidewalk," the majority rewrites the Village Law to provide that the prior written notice rule applies to actions seeking damages for personal injuries allegedly sustained as a consequence of a defective village stairway -- even though the legislature specifically declined to include stairways in the list of municipal passageways to which prior written notice protection applies "evinced an intent to exclude any others not mentioned" (*Walker v Town of Hempstead*, 84 NY2d 360, 367 [1994]). "It is not within the province of this court to rewrite the enactments of the Legislature" (*In re Chase Nat. Bank of City of New York*, 283 NY 350, 360 [1940]; *accord Wolpoff v Cuomo*, 80 NY2d 70, 79 [1992]). I respectfully dissent because I cannot agree with either the majority's revision of Village Law § 6-628 or its conclusion that this stairway is a sidewalk.

The Village of Pulaski is a town of a few thousand people in Oswego County, NY, about ten minutes' drive from Lake Ontario. This is fishing country, and the heart of this fishing county is Salmon River. "Unique in the Northeast, the Salmon River is an angler's mecca. Thousands of trophy Chinook and coho salmon, steelhead, rainbows and brown trout, driven by urge to spawn, run its length each year. Twelve miles of classic rifts, pools, and runs are accessible to those who would test its waters with rod and reel" (Oswego County Tourism, *Visit Oswego County, New York: Where to Fish*, <http://visitoswegocounty.com/fishing-hunting/fishing/where-to-fish/> (last accessed Feb. 19, 2018)).

Locals will tell you the one of the best fishing spots on the Salmon River is the "Black Hole," on the west end of Pulaski. The south bank is part of a salmon run, but the north bank is public. (*id.*) At the peak of the season, hundreds of anglers ply the waters at the Black Hole. The throng regularly blocked the streets, so the Village installed signage directing anglers to park in an adjacent car park normally used by the Village Department of Public Works. From there, anglers must walk down a stairway, cross Riverview Drive, and walk further down the undeveloped bank before they reach the Black Hole. That stairway (many pictures of which are in the parties submissions) that is the subject of this appeal. It is a "railway tie" stairway, made of compacted earth nosed with recycled railway ties, many of which still include the rusted nails they once had. The stairs are steep, irregularly spaced, with the space between the nosings made of grasses and muddy strands with potholes and muddy clumps (which were exacerbated due to a recent heavy rain). The railings were rickety and wooden, and at a low height; there was also less railing on one side than the other. The stairway was built by the Village.

Mr. Hinton, the plaintiff in this case, is a licensed fishing guide and owns a fishing lodge. He makes his living renting out rooms to anglers and taking them fishing. On October 19, 2013, at the height of the season, finding his schedule unexpectedly free, he decided to spend the afternoon fishing without clients. Although Mr. Hinton preferred less congested spots, he decided to give the Black Hole a try. He drove to the DPW parking lot

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as the signs instructed, gathered his things, and started down the stairway. About a third of the way down, he tripped--possibly over a rut in the stairs or one of the spikes protruding from the stairs--and went down head over heels. He broke his left ankle, severely injured his knee and suffered various sprains. As he explained in his deposition "my fishing season ended on that day," costing him both medical bills and his livelihood. Faced with those serious financial consequences, Mr. *3 Hinton sued the Village, alleging that the Village had allowed the stairs to deteriorate and become a hazard to members of the public, and that his injuries were caused by the Village's negligent maintenance of the stairway.

In response the Village argued, among other things, that even if Mr. Hinton was injured as a result of the Village's negligence, he must lose, because Village Law § 6-628 provides that "no civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed."² Both Supreme Court (2016 NY Slip Op 51912[U]) and the Appellate Division (160 AD3d 1446 [2018]) agreed; we granted leave to appeal.

II

On its face, Village Law § 6-628 is inapplicable to this case: there is no dispute that Mr. Hinton fell on the stairway. However, in *Woodson v City of New York* (93 NY2d 936, 937 [1999])--a memorandum decision devoid of facts--the Court held that because "the stairway *in this case* functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal" (emphasis added), that particular stairway was a "sidewalk" for purposes of a statute, General Municipal Law § 50-c(4), with text largely similar to the Village Law section at issue here.

That sentence has spawned a jurisprudence applying what we have come to call the "functional equivalence test," where if a court thinks something not on the Village Law § 6-628 list is sufficiently like something on that list, it rewrites the statute to include it. Thus in *Groninger v Village of Mamaroneck* (17 NY3d 125 [2011]), we held that a parking lot "serves the functional purpose of a highway" (*id.* at 129) because "it was owned and maintained by the Village and accessible to the general

public for vehicular travel" (*id.*), even though, as the three dissenting Judges in that case explained at length, highways--accommodating moving vehicles--and parking lots--accommodating stationary vehicles--had precisely the opposite "functional purpose" (*id.* at 134 [Lippman, C.J., dissenting]).

In this case, the lower courts and majority have created a sort-of transitive property of traversable surfaces. There was nothing resembling a sidewalk to which the stairway connected, but, said the lower courts, because the Court of Appeals previously held that a parking lot was "functionally equivalent" to a highway, it follows that the stairway, which was connected to this "highway," was a "sidewalk." By concluding that a slapdash stairway is a sidewalk because they both have the same "functional purpose" as a sidewalk, conveying people from place to place, the Court expands a single fact-specific determination into an erroneous doctrine.

We need principles, not "one of these things is/is not like the other" reasoning, that can help lower courts apply the specific list of Village Law § 6-628 and its sister statutes. By disposing of this case as it does today, the Court deprives the lower courts--and itself--of the opportunity to examine *Woodson* thoughtfully. As I explain, if the result in *Woodson* is correct, it is only so when understood in light of its peculiar facts. To understand why *Woodson* does not resolve this case, we need to return to first principles of statutory interpretation.

"When presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature" (*DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). "We begin with the plain language of the statute, which is the clearest indicator of legislative intent" (*T-Mobile Northeast, LLC v DeBellis*, 2018 NY Slip Op 08539 [Ct App Dec. 13, 2018]). "When the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*4 *People v Pabon*, 28 NY3d 147, 152 [2016]). "Words of ordinary import in a statute are to be given their usual and commonly understood meaning, unless it is clear from the statutory language that a different meaning was intended" (*We're Assocs. Co. v Cohen, Stracher & Bloom*, 65 NY2d 148, 151 [1985]).

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If those mantras, reliably repeated in most of our statutory interpretation cases, had any application here, Mr. Hinton would win. Village Law § 6-628 immunizes villages from suits alleging injuries “sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed” without prior notice. No one argues that the stairway here is a highway, bridge, culvert, or crosswalk. In 1927, when Village Law § 6-628 was approved, and indeed since at least 1739, “sidewalk” meant “a paved footpath alongside a street or road, usually slightly raised above the level of the road surface” (“Sidewalk,” Oxford English Dictionary [2019]). No one looking at the site of Mr. Hinton’s fall would call it a sidewalk.

Likewise, the canons of construction bear out the intuition that the Legislature meant “sidewalk” when it wrote “sidewalk,” rather than some broader term. In a case interpreting the analogous General Municipal Law § 50-e(4), we explained that “we can only construe the Legislature’s enumeration of six, specific locations in the exception (i.e., streets, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned” (*Walker v Town of Hempstead*, 84 NY2d 360, 367 [1994] [citing McKinney’s Cons Laws of NY, Book 1, Statutes § 240]).³ *Noscitur a sociis*, “the familiar canon of construction [in which] we ordinarily interpret the meaning of an ambiguous word in relation to the meanings of adjacent words” (*Matter of Kese Industries v Roslyn Torah Found.*, 15 NY3d 485, 491 [2010]) does not apply here because “sidewalk” is not ambiguous, and even if it were, *noscitur a sociis* aims to limit the range of meanings of a set of words, not expand them (see, e.g., *Avella v City of New York*, 29 NY3d 425, 436 [2017]; cf. McKinney’s Cons Laws of NY, Book 1, Statutes § 240; Bryan Gardner and Antonin Scalia, *Reading Law* at 197 [2012]; William Eskridge, *Interpreting Law* at 76 [2016]). None of the six words in Village Law § 6-628 deals with stairways unless viewed in the abstract, and if the legislature wanted to describe village infrastructure more abstractly it surely knew how to do so (see, e.g. Village Law § 6-602 [describing “streets and public grounds of a village”]).

“Where, as here, the legislative language is clear, we have no occasion to examine extrinsic evidence to discover legislative intent” (*Makinen v City of New York*, 30 NY3d 81, 85 [2017]). However, what little extrinsic legislative evidence exists provides no support whatever

for a “functional equivalence” test or any expansion of the meaning of the word “sidewalk.” As near as can be determined, Village Law § 6-628’s listing of “street, highway, bridge, culvert, sidewalk or crosswalk” descends directly⁴ from various “local laws” passed by the Legislature in the *5 late nineteenth century to limit the liability of villages in the wake of our landmark decision in *Saulsbury v Village of Ithaca* (94 NY 27, 27 [1883]). In *Saulsbury*, we held that because the charter of the municipal corporation in that case obliged the village to repair “sidewalks,” it was liable for “injuries occasioned by an omission on its part to repair or remove a sidewalk . . . which had been, for a sufficient length of time to charge it with notice, in so defective a condition as to be dangerous for travel” (*id.* at 27).

The prior notice laws were--and indeed have always been--intensely controversial and carefully limited.⁵ Not one of those local laws reached “stairways” and not one of the cases decided until well into the later 20th century did a court apply those or analogous provisions in the general laws to cover trips and falls down “stairways.” Indeed, the prior notice statutes were adopted in the heyday of the presumption against derogation of the common law, where the Court declared “the rule to be well established and almost universally acted on, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language used in the statutes absolutely requires” (*Fitzgerald v Quann*, 109 NY 441, 445 [1888]). All agree that prior notice statutes derogate the common law (*Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]); the Legislature knew full well that in this context when it said “sidewalk” that term would be construed to mean what it says, and nothing more.

III

Text, context, structure, history, even statutory canons of construction provide no foundation for a “functional use” test that takes a list of six specific items of built environment and allows them to encompass a list of different, tangentially related other items. The majority does not deny this point, but argues that “the present case involves the application of settled precedent -- not statutory interpretation” (majority op at 3). If *Woodson v City of New York* (93 NY2d 936 [1999]), the sole substantive citation in the majority’s

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opinion, truly stood for the proposition the majority cites it for-- that prior notice statutes permitted such free association of concepts and statutory terms--it would have represented a radical break from centuries of this Court's common law jurisprudence as well as a sudden and uncharacteristic departure from our settled principles of statutory interpretation--and all in a terse memorandum.⁶ I do not believe our Court would be so cavalier with its own precedents. *Woodson* must mean something different, then, than what the majority says it means here. Once we understand it in its context, it becomes clear why it does not control this case.

In *Woodson*, we held that "when stairs are integrated with, or serve as part of, a connected standard sidewalk, they plainly fall within the meaning of that already existing category" (*id.* at 937). Distinguishing *Walker v Town of Hempstead*, where we held that a paddleboard court was not covered by the prior notice statute in question (84 NY2d at 368), we explained in *Woodson* that "a paddleball court is functionally different from each of the six locations enumerated in General Municipal Law § 50--e (4) (which is identical, as relevant here, to Village Law § 6-628). The stairway in this case functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal" (*Woodson*, 93 NY2d at 938). The stairway down which Mr. Hinton fell was not "integrated with, or a part of, a connected standard sidewalk" (*id.* at 937). Thus *Woodson* does not, on its own terms, determine the result here.

Although the Court in *Woodson* nowhere explained its basis for interposing a functional equivalence test on words had previously held in *Walker* to be exclusive, a review of the record and briefing in that case reveals the underlying rationale for the Court's opinion. The stairway at issue in *Woodson* connected the Julius Richman Memorial Park to Valentine Avenue in the Bronx. At the time of the suit, the stairway was relatively short, shallow, and perfunctory, comprising shallow concrete steps up a short, gentle incline connecting two concrete sidewalks. Crucially, the steps could have been replaced with a simple pavement ramp with the same result. What mattered was not merely that the stairway in *Woodson* served the same purpose as a standard sidewalk (making it easier for people to travel from place to place), but had the same functional potential to injure someone if defectively maintained: a person who tripped and fell on

that stairway would experience more or less the same kinds of injuries as a person who tripped on a hypothetical sidewalk ramp. The same could be said of our decision in *Groninger v Village of Mamaroneck* (17 NY3d 125, 129 [2011]) where the injuries one would incur owing to defects in a "highway" (the term at issue in that case) are the same kind of injuries one would incur owing to defects in a parking lot (where the plaintiff in *Groninger* tripped and fell).

What could make *Woodson* and *Groninger* consistent with *Walker*, in other words, is that they were faithful to the underlying purpose of the statute--to limit somewhat municipalities' duty to detect flaws in their infrastructure, but only for those items of infrastructure that, even when unrepaired, present modest danger to the user.⁷ Thus a *6 playground would be properly excluded from the reach of the prior notice law because its potential to injure its intended users is much greater than the items on the list--a small child is much likelier to be injured from a fall off a slide than such a child might be from a tumble on the sidewalk. Unimproved trails that have been cut through municipal parks are likewise distinguishable from sidewalks and roads not because they are comprised of a material other than concrete but because they present a different, and greater, injury potential than their more uniform infrastructural cousins (*see, e.g., Quackenbush v City of Buffalo*, 43 AD3d 1386 [4th Dept 2007] ["reject(ing) the City's contention that the unimproved trail or path upon which (the) plaintiff was injured (wa)s the functional equivalent of a sidewalk"]; *Iannuzzi v Town of Wallkill*, 54 AD3d 812, 813 [2d Dept 2008] [holding that an unpaved dirt path in a public park was not a sidewalk]; *see also Cieszynski v Town of Clifton Park*, 124 AD3d 1039, 1040-1041 [3d Dept 2015] [applying similar reasoning and holding that an unimproved grassy area could not be considered the functional equivalent of either a highway or sidewalk for purposes of a prior written notice statute]]--as well, of course, as falling very far outside even a generously expanded "plain meaning" of any of the six statutory terms at issue in this case.

The majority--having extended *Woodson* well beyond its limited holding-- ignores this discussion of what the functional equivalence test in *Woodson* meant and instead declares (without analysis) that only overruling *Woodson* would justify a different outcome in this case. The *stare decisis* reach of *Woodson* covers stairs integrated with a connected sidewalk, possessing the same injury potential

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as a sidewalk, but not other stairs. Expanding *Woodson*, without any articulated justification or analysis, is not “the application of settled precedent” (majority op at 3) but the creation of a new doctrine that all stairs are sidewalks, or perhaps that some are, with no rule as to how to sort them beyond a mantra (“functional equivalent”) that raises more questions in its bare form than it answers. That the Legislature has not “disapproved” *Woodson* is of no moment. Ignoring a holding that a few steps connecting two sidewalks are a “sidewalk” implies nothing about the legislature’s view of whether, as the majority seems to affirm today, all stairways are always sidewalks.

The problem with the expanded “functional equivalence” test the majority endorses is that it considers all elements of a sidewalk’s “function” except the one that mattered most to the legislature--its function as a source of injury. *Woodson* recognized that some stairways may well possess the same injury profile as the common sidewalk, or be so closely integrated into existing sidewalk infrastructure as to be effectively indistinguishable from it. But most stairways are much more hazardous than sidewalks. “Falls are the leading cause of non-fatal injury in the United States, and are associated with significant morbidity and mortality among older adults,” (Danielle Blazewick, et al, *Stair-related injuries treated in United States Emergency Departments*, 36 Am. J. Emergency Med. 608, 608 [2018]) and “stairways are a common location for falls, and they result in a disproportionate risk of death or severe injury” (JV Jacobs, *A Review of Stairway Falls and Stair Negotiation*, 49 Gait Posture 159, 159 [2016]). Almost 2 million people were admitted to emergency rooms for stairway-related injuries incurred on stairways outside the home between 1990 and 2012 (Blazewick, *supra*, at 610). Those injuries were incurred in large part because of *7 characteristics possessed by stairways and not sidewalks: lack of vertical uniformity of the steps, rickety handrails, and missing nosings—all characteristics, it appears, of the stairway in this case. Of course, whether a particular stairway is functionally equivalent to the injury potential of a sidewalk is a fact-

intensive inquiry. But consideration of injury potential is the only way to make the “functional equivalence” test consistent with the purpose of the legislature in approving these prior notice statutes.

The majority’s conclusion has regrettable real-world consequences. Village Law § 6-62 and other prior notice statutes “practically . . . result[s] in limiting a locality’s duty of care” (*Poirier v City of Schenectady*, 85 NY2d 310, 314 [1995]). Today, by declaring the stairs at issue in this case are a “sidewalk,” the Court deprives Mr. Hinton and others like him of the opportunity to prove whether municipalities are negligent in constructing or maintaining stairways that cause injuries. As a result, local governments will have less incentive to maintain their potentially dangerous stairways, making all of us less safe.

The plaintiff in this case does not ask us to overrule *Woodson* and I have no occasion here to consider whether its premises and purported test “leads to an unworkable rule, or that creates more questions than it resolves, [and therefore] may ultimately be better served by a new rule” (*cf. People v Taylor*, 9 NY3d 129, 149 [2007]). *Woodson* did not resolve the question in this case, which I posed at the start: does the word “sidewalk” mean “stairway”? It does not; I therefore dissent.

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judge Fahey concurs.

Decided February 21, 2019

FOOTNOTES

Copr. (C) 2019, Secretary of State, State of New York

Footnotes

- 1 Nor do we agree that the test derived from *Woodson* (and applied again in *Groninger*) is limited to an examination of whether a defect would cause “more or less the same kinds of injuries” (dissenting op at 13).
- 2 Laws dealing with other forms of local governments or governmental bodies have analogous language (see General Municipal Law § 50-e [“street, highway, bridge, culvert, sidewalk or crosswalk”]; Town Law § 65-a [“highway, bridge,

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- culvert or sidewalk"); Second Class Cities Law § 244 ("street, highway, bridge, culvert, sidewalk or crosswalk"); and Highway Law § 139 ("road, highway, bridge or culvert").
- 3 Indeed, Bryan Gardner and the late Justice Antonin Scalia praised *Johnson v City of Laconia* (684 A2d 500, 501-02 [NH 1996]) as a correct result of the application of *expressio unius* canon. There, the New Hampshire Supreme Court interpreted N.H. Rev. Stat. § 231-92-a (1991) that immunized municipalities from "damages arising from insufficiencies on public highways, bridges, or sidewalks" to exclude a public parking lot; "because the law specified three types of public property but omitted all others, the immunity did not bar the lawsuit" (Bryan Gardner and Antonin Scalia, *Reading Law*, 110-111 [2012]; cf. *Yates v United States*, 135 S Ct 1074, 1093 [2015] [treating *Reading Law* as persuasive authority]).
- 4 The Village Law § 6-628 began its life as section 341-a of the Village Law of 1927 (L 1927, Ch 650, § 42), having been recodified (with amendments not relevant here) in 1972 (L 1972 Ch 892). The 1927 law's language, however, was itself a wholesale import from the Second Class Cities law, copied in an effort to harmonize various laws pertaining to municipalities (see L 1927, Ch 650, Bill Jacket). For present purposes, the prior notice provision appears to have been first added to the Second Class Cities Law in 1906, as part of the Uniform Charter of Cities of the Second Class (L 1906 Ch 473), and today (after yet another recodification) can be found at Second Class Cities Law § 244; it reads (and read) almost identically to the Village Law provision ("street, highway, bridge, culvert, sidewalk or crosswalk"). The 1906 law in turn was adopted to iron out inconsistencies in local laws that had cropped up over the preceding quarter-century, and incorporated common charter amendments (which in those days required action from the state legislature) so as to develop a uniform rule.
- 5 In response to one of the first of such laws, adopted by the Legislature in 1881 and applying solely to the City of Cohoes (L 1881 Ch 183 ["the city of Cohoes shall not be liable for any damage or injury sustained by any person in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk in said city being out of repair, unsafe, [or] dangerous"] a major treatise on negligence in New York declared "The City of Cohoes has, as appears by the reports, been the most negligently administered city in all the state. It seems to have found a new way of escaping the penalty, by making the law to wink at the carelessness of its officials" (John Brooks Leavitt, *Law of Negligence in New York* [1895] [reviewing *McNally v City of Cohoes*, 127 NY 350, 353 (1891)]). Likewise, a bill of identical wording introduced in 1892 pertaining to the then-City of Brooklyn (the five boroughs consolidated only in 1898) was condemned by the New York Times as "in keeping with the wild, untamed vagaries of this present Legislature." (The State Legislature, N.Y. Times at 3 [March 4, 1892] [available at <https://www.nytimes.com/1892/03/04/archives/the-state-legislature-he-insurance-bill-restored-to-life-the.html>]). Discussion of the careful balance struck when the Village Law prior notice provision was reviewed can be found in the New York State Legislative Annual for 1957 (at 205-07). A more contemporary controversy over (successful) efforts by New York City to incorporate almost identical language into its ordinances is thoroughly documented in Terri J. Frank, *New York City's Pothole Law: In Need of Repair* (10 Fordham Urban L.J. 323 [1982]).
- 6 I note, as did the dissenters in *Groninger* (17 NY3d at 133) that Woodson did not engage in the thoughtful statutory analysis that once characterized our prior notice decisions, like *Walker*.
- 7 Because of that purpose (as well as the statutory text), we have held that prior notice statutes do not cover acts of municipal "affirmative negligence." Municipalities are liable for dangerous hazards they affirmatively create, rather than allow to happen through neglect, even if their creations are included on the prior notice list, on the theory that such "a hazard was foreseeable, insofar as the municipality created it by, for example, digging an unmarked ditch in a road or neglecting to cover a street drain" (*San Marco v Village and Town of Mount Kisco*, 16 NY3d 111, 117 [2010]). Therefore, for example, in *San Marco* we reversed a grant of summary judgment when plaintiffs showed the municipality's negligent snow plowing allowed black ice to form where it would not otherwise have formed. I note that Mr. Hinton argues in this Court that the Village affirmatively created the hazard by building an inherently dangerous stairway. However, that argument was not made in the trial court (in which Mr. Hinton argued only that the Village had failed to maintain the stairway) and is therefore not preserved for our review (*McGovern v Mount Pleasant Central School Dist.*, 25 NY3d 1051, 1053 [2015]).

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Docket #'s 2016-06194, 2016-07397 and 2016-07396
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

ANNA AYBAR, et al.,

Plaintiffs-Respondents,

-against-

JOSE A. AYBAR, et al.,

Defendants,

-and-

FORD MOTOR COMPANY, et al.,

Defendants-Appellants.

JOSE AYBAR,

Plaintiff-Respondent,

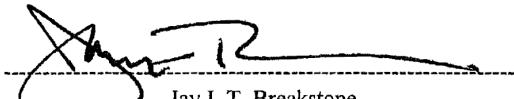
-against-

THE GOODYEAR TIRE & RUBBER CO.,

Defendant-Appellant.

NOTICE OF MOTION, AFFIRMATION AND EXHIBIT(S)

Certification per 22NYCRR § 130-1.1a



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To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

NOTICE OF

ENTRY that the within is a (certified) true copy of a
entered in the office of the Clerk of the within named
Court on 20 .

NOTICE OF that an Order of which the within is a true copy will be
presented to the Hon. , one of the
SETTLEMENT judges of the within named Court, at 45 Monroe Place,
, on
2017, at M.

Dated: January 12, 2017

**EXHIBIT D TO CALVERT AFFIRMATION -
ORDER, DATED AUGUST 2, 2017
(REPRODUCED HEREIN AT PP. 316-323)**

**EXHIBIT E TO CALVERT AFFIRMATION -
JOINT BRIEF IN OPPOSITION TO MOTION
FOR LEAVE TO APPEAL, DATED MARCH 8, 2019 [669 - 687]**

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INDEX NO. 703632/2017

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Queens County Clerk's Index No. 706909/15

Appellate Division—Second Department Docket Nos. 2016-06194 and 2016-07397

**Court of Appeals
State of New York**

ANNA AYBAR, *et al.*,

Plaintiffs-Respondents,

—against—

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

—and—

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Respondents.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Appellant.

**JOINT BRIEF IN OPPOSITION TO
MOTION FOR LEAVE TO APPEAL**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to 22 NYCRR § 500.1(f), Ford Motor Company states that it has no parent company. The corporate affiliates of Ford Motor Company are: Blue Oval Holdings; CAB East LLC; CAB West LLC; Canadian Road Leasing Company; FCE Bank plc; FCIF Holdings LP; FCSH GmbH; FMC Automobiles SAS; Ford Argentina S.C.A.; Ford Asia Pacific Automotive Holdings Ltd.; Ford Auto Securitization Trust; Ford Automotive Finance (China) Limited; Ford Credit Auto Owner Trust 2014-REV1; Ford Credit Auto Owner Trust 2014-REV2; Ford Credit Auto Owner Trust 2015-REV1; Ford Credit Auto Owner Trust 2016-REV1; Ford Credit Auto Owner Trust 2016-REV2; Ford Credit Auto Owner Trust 2017-REV1; Ford Credit Auto Owner Trust 2017-REV2; Ford Credit Canada Company; Ford Credit CP Auto Receivables LLC; Ford Credit Floorplan Master Owner Trust A; Ford Credit International LLC; Ford Deutschland Holding GmbH; Ford Espana S.L.; Ford European Holdings LLC; Ford Floorplan Auto Securitization Trust; Ford Global Technologies, LLC; Ford Holdings LLC; Ford India Private Limited; Ford International Capital LLC; Ford Italia S.p.A; Ford Lease Trust; Ford Mexico Holdings LLC; Ford Motor (China) Ltd.; Ford Motor Company Brasil Ltda.; Ford Motor Company Limited; Ford Motor Company of Australia Limited; Ford Motor Company of Canada, Limited; Ford Motor Company of Southern Africa (Pty)

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Limited; Goodyear Taiwan Limited; Goodyear (Thailand) Public Company Limited; Goodyear Tire Management Company (Shanghai) Ltd.; Goodyear Tyre and Rubber Holdings (Pty) Ltd; Goodyear Tyres Pty Ltd; Goodyear Tyres Vietnam LLC; Goodyear Western Hemisphere Corporation; GY Tire Kitakanto Kabushiki Kaisha; Hi-Q Automotive (Pty) Ltd; Kabushiki Kaisha Goodyear Aviation Japan; Kabushiki Kaisha Tohoku GY; Kelly-Springfield Tyre Company Ltd; Kettering Tyres Ltd; Laurelwood Properties, Inc.; Luxembourg Mounting Center S.A.; Mercury Participacoes Ltda; Motorway Tyres and Accessories (UK) Limited; Neumaticos Goodyear S.r.L.; Nippon Giant Tyre Kabushiki Kaisha; Nippon Goodyear Kabushiki Kaisha; P.T. Goodyear Indonesia Tbk; Retreading L, Inc.; Retreading L., Inc. of Oregon; Rossal No 103 (Pty) Ltd; SACRT Trading Pty Ltd; Sava Trade d.o.o.; Snella Auto; SP Brand Holding EEIG; T&WA, Inc.; Tire Company Debica S.A.; Tredcor (Kenya) Limited; Tren Tyre Holdings (Pty) Ltd; Trentyre (Lesotho) (Pty) Ltd; Trentyre (Pty) Ltd; Tyre Services Great Britain Limited; Ventech Systems GmbH; Vulcan Participacoes Ltda; Vulco Developpement; Vulco Truck Services; Wingfoot Corporation; Wingfoot Insurance Company Limited; and 4 Fleet Group GmbH.

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David D. Siegel, <i>New York Practice</i> § 449 (6th ed.) (Dec. 2018 update).....	9

QUESTION PRESENTED

Whether the Court should, at the behest of an entity that is not even a party to the suit in which the question arises, review the Appellate Division's holding that New York cannot exercise general jurisdiction over an out-of-state company based solely on the company's compliance with the New York registration statute.

Suggested answer: No.

COUNTERSTATEMENT

Plaintiffs' Accident and the Supreme Court Proceedings. Plaintiffs allege that while traveling in Brunswick, Virginia, the 2002 Ford Explorer in which they were passengers left the roadway and rolled over after the tread on a Goodyear tire installed by U.S. Tires and Wheels of Queens detached. R. 51-52. Plaintiffs allege that the accident caused them various personal injuries, and they sued Ford and Goodyear in the Queens County Supreme Court, asserting product-liability claims. R. 54-69.¹

Ford and Goodyear moved to dismiss Plaintiffs' claims for lack of personal jurisdiction, explaining that they were neither "at home" in New York nor subject to specific jurisdiction on Plaintiffs' causes of action. R. 27-28, 75-76. Plaintiffs

¹ In a separate lawsuit, which is still proceeding in the Queens County Supreme Court, Plaintiffs sued U.S. Tires, and U.S. Tires asserted third-party claims against both Ford and Goodyear.

opposed, arguing that Ford and Goodyear were “at home” and thus subject to general jurisdiction in New York. R. 122-131, 152-166.

U.S. Tires—which is not a party to this suit—opposed, arguing that Ford and Goodyear were subject to personal jurisdiction in New York because the companies had registered to do business here and appointed the Secretary of State as their agent for service of process as required by the Business Corporation Law. R. 205-206. Ford objected to U.S. Tires’ opposition, pointing out that U.S. Tires, as a non-party, had no right to oppose the motions. R. 209-210.

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions to dismiss. R. 7-15, 20-26. The Supreme Court held that Ford and Goodyear were “at home” in New York and subject to general jurisdiction here because of their extensive contacts with the State. R. 13, 24. The Supreme Court also held that Ford and Goodyear had “consent[ed] to general jurisdiction” in New York by registering as foreign corporations and appointing the Secretary of State as their agent for service of process. R. 13, 25.² The Supreme Court did not address Ford’s objection regarding U.S. Tires’ participation in the proceedings.

² Neither Plaintiffs nor U.S. Tires argued that Ford and Goodyear were subject to specific jurisdiction, and the Supreme Court held that the companies were not. R. 10, 22. U.S. Tires belatedly attempted to raise specific jurisdiction for the first time in the Appellate Division, but the Appellate Division held that U.S. Tires forfeited the argument by not raising it in the Supreme Court. App. Div. Op. 6 n.2. U.S. Tires quibbles with that holding (Mot. 11 n.2), but it ultimately makes no difference because U.S. Tires does not ask this Court to review the Appellate

The Appellate Division's Opinion. Ford and Goodyear appealed, and the Appellate Division reversed. App. Div. Op. 14. The Appellate Division first noted Ford's argument that U.S. Tires had no right to oppose Ford's and Goodyear's motions to dismiss and observed that the Supreme Court never addressed it. *Id.* at 4-5 n.1. But because neither Ford nor Goodyear opposed U.S. Tires' participation on appeal, the court "assume[d], without deciding, that U.S. Tires ha[d] standing to oppose the motions." *Id.*

On the merits, the Appellate Division held that Ford and Goodyear were not "at home" in New York and thus were not subject to general jurisdiction here. *Id.* at 5-8. The court explained that even though Ford and Goodyear had commercial activities in New York, those activities were not so great—when compared with the companies' respective world-wide activities—that New York could be said to be Ford's or Goodyear's corporate home. *Id.* at 8.

The Appellate Division then held that neither Ford nor Goodyear consented to the exercise of general jurisdiction in New York by registering to do business here and appointing the Secretary of State as their agent for service of process. *Id.* at 8-14. The court observed that the Business Corporation Law does not expressly

Division's specific-jurisdiction ruling. *See Mot.* 4. To be clear, however: the Appellate Division was entirely correct that U.S. Tires' unpreserved specific-jurisdiction arguments were not properly before it. *See, e.g., Dowsett v. Dowsett,* 172 A.D.2d 610, 611 (2d Dep't 1991).

require consent to general jurisdiction as a condition of doing business in New York, but noted what it called “longstanding judicial construction” to the effect that it does. *Id.* at 9. But the court went on to hold that, even in the face of that construction, “in view of the evolution of personal jurisdiction jurisprudence . . . it cannot be said that a corporation’s compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.” *Id.*

The Appellate Division acknowledged that this Court upheld consent by registration over a century ago, in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). *Id.* But in 1945, the U.S. Supreme Court decided *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) “which altered our in personam jurisdiction jurisprudence.” App. Div. Op. 12. From then on, “the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States . . . became the central concern of the inquiry into personal jurisdiction.” *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014)).

The Appellate Division correctly held that the shift occasioned by *International Shoe* mattered. It explained that “[t]he consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has

consented to be found in New York.” *Id.* at 13. But that reasoning is flawed; as the Appellate Division recognized, the U.S. Supreme Court’s modern decisions, including *Daimler*, “made clear . . . that general jurisdiction cannot be exercised solely on such presence.” *Id.*

The Appellate Division thus rejected Plaintiffs’ and U.S. Tires’ arguments that *Bagdon* remained binding. *Id.* at 13-14. The court noted that this Court had not “cited to *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided.” *Id.* The Appellate Division viewed that as a “strong indicator that its rationale is confined to that era, which was dominated by . . . territorial thinking, and that it no longer holds in the post-*Daimler* landscape.” *Id.* at 14. The court therefore held that the Supreme Court should have granted Ford and Goodyear’s motions to dismiss, and reversed the Supreme Court’s contrary orders. *Id.*

U.S. Tires’ motion for leave to appeal in this Court followed. Plaintiffs filed a separate motion to reargue or for leave to appeal at the Second Department.

ARGUMENT**I. THE COURT SHOULD DENY U.S. TIRES' MOTION FOR LEAVE TO APPEAL BECAUSE U.S. TIRES IS NOT A PARTY TO THE UNDERLYING CASE AND PLAINTIFFS' MOTION FOR LEAVE TO APPEAL IS PENDING AT THE SECOND DEPARTMENT.**

U.S. Tires asks this Court to resolve whether the exercise of general jurisdiction, premised on a theory of supposed consent by registration, is permissible under New York law and the U.S. Constitution. Mot. 4. But U.S. Tires' motion is a poor candidate for this Court to consider that issue, given U.S. Tires' unorthodox role in the case. U.S. Tires opposed Ford's and Goodyear's motions to dismiss. R. 205-207. But it did so despite its status as a non-party; U.S. Tires was neither a defendant, nor a third-party, nor an intervenor in the underlying case. U.S. Tires' only explanation as to why it participated was that it was "a defendant in a related action brought by the plaintiffs arising from the same accident" as this case. R. 205.

That was not enough to give U.S. Tires the right to oppose Ford and Goodyear's motions to dismiss, and it is not enough to give U.S. Tires the right to pursue an appeal. Plaintiffs are the only parties to assert claims against Ford and Goodyear, and it is thus *Plaintiffs*, not an unrelated non-party, who had and failed to carry the burden of proving personal jurisdiction over Ford and Goodyear. See *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 n.5 (2007). U.S. Tires was not and cannot be aggrieved by Ford and Goodyear's motions to dismiss; the resolution of Ford's

and Goodyear's jurisdictional challenge cannot affect U.S. Tires in this case. U.S. Tires should not have been permitted to oppose those motions, and it should not be permitted to appeal to this Court. *See Blake Realty, Inc. v. Shiller*, 87 A.D.2d 729, 729 (3d Dep't 1982) (where party had no "matured right or claim" against the moving party, the party was not aggrieved by the moving party's motion); *see also Flood v. Akmal*, 269 A.D.2d 562, 563 (2d Dep't 2000) (defendant was not aggrieved by order permitting plaintiff to add a separate defendant to the case). Any appeal by U.S. Tires to this Court would therefore be properly affirmed on the ground that U.S. Tires had no standing to challenge Ford and Goodyear's motions to dismiss, and has no right to be heard by this Court in this action.

To be sure, Ford and Goodyear did not object to U.S. Tires' participation in the Appellate Division proceedings. App. Div. Op. 4-5 n.1. But there was little reason for Ford and Goodyear to do so. Plaintiffs were respondents on the appeal, and U.S. Tires' submission was little more than an *amicus* brief in support of Plaintiffs' position. But U.S. Tires' stand-alone motion in this Court raises the possibility of proceedings pressed solely by an entity that is a stranger to the case.

And Ford and Goodyear would be entitled to present this alternative ground for affirmance even though they did not object to U.S. Tires' standing in the Appellate Division. *See Parochial Bus Sys., Inc. v. Board of Educ. of N.Y.*, 60 N.Y.2d 539, 545-546 (1983) (party that won below may raise alternative grounds

for affirmance in appellate court). Under this Court's longstanding precedent, a party may raise in this Court any argument first advanced in the Supreme Court, even if the argument is not re-raised in the Appellate Division. *See, e.g., State v. Rashid*, 16 N.Y.3d 1, 13 (2010); *People ex rel. Matthews v. New York State Div. of Parole*, 95 N.Y.2d 640, 644 n.2 (2001).

Moreover, if this Court wishes to rule upon the merits of the dispute, a better vehicle exists. Plaintiffs have already moved in the Appellate Division for reargument, or, in the alternative, leave to appeal. If the Second Department denies that motion, Plaintiffs may seek leave from this Court. *See CPLR 5602(a)*. And if either the Second Department or this Court grants Plaintiffs' motion for leave, U.S. Tires' motion would be moot; the jurisdictional issue would be presented for this Court's consideration. Against this backdrop, the Court should decline U.S. Tires' invitation to muck through a procedural quagmire. The Court should not grant this motion from this non-party at this time.

II. THE APPELLATE DIVISION'S DECISION IS CORRECT.

U.S. Tires spends much of its motion attacking the Appellate Division's holding. *See Mot. 13-24*. But the Appellate Division was exactly correct:

Consent by registration simply is no longer constitutional in the modern personal-jurisdiction era.³

Boiled down, U.S. Tires argues that lower courts are bound to follow this Court's century-old decision in *Bagdon*, even though *Bagdon* was decided before *International Shoe* ushered in a new era of personal jurisdiction, and even though this Court has not relied on *Bagdon* since *International Shoe* was decided in 1945. *See Mot.* 13-15. U.S. Tires ignores that even this Court's decisions no longer bind lower courts after those decisions are abrogated by intervening U.S. Supreme Court precedent. *See Hunt v. Werner Spitz Const. Co.*, 152 A.D.2d 936, 936 (4th Dep't 1989); David D. Siegel, *New York Practice* § 449 (6th ed.) (Dec. 2018 update).

And the U.S. Supreme Court has abrogated *Bagdon*. Three times. First, the Court recognized that the “consent” created by registration is “purely fictional,” and that *International Shoe* “cast th[at] fiction[] aside.” *Burnham v. Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion). Next, the Court

³ Ford and Goodyear explained in their Appellate Division briefs that any construction of the Business Corporation Law that deems a company's registration to do business and appointment of the Secretary of State as an agent for service of process to be company's “consent” to general jurisdiction in New York is contrary to the plain text of the Law and a myriad of other canons. *See Appellants' App. Div. Opening Brief* 18-25; *Appellants' App. Div. Reply Br.* 11-15. If this Court were to grant U.S. Tires' motion, Ford and Goodyear would also defend the judgment on this statutory ground.

explained that “*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny” and “[t]o the extent that prior decisions are inconsistent with [*International Shoe*], they are overruled.” *Shaffer v. Heitner*, 433 U.S. 186, 212 & n.39 (1977) (emphasis added). Finally, in *Daimler*, the Supreme Court admonished that cases predating *International Shoe*—like *Bagdon*—“should not attract heavy reliance today.” 571 U.S. at 138 n.18; *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1557-58 (2017) (“cautioning against reliance on cases” that “were decided before this Court’s transformative decision on personal jurisdiction in *International Shoe*”). The Appellate Division correctly recognized that all of this U.S. Supreme Court precedent cast *Bagdon* to the dustbin. *See* App. Div. Op. 12-14.

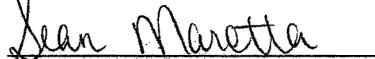
U.S. Tires’ only response is to point to a smattering of trial courts and separate opinions that cling to *Bagdon* and similar pre-*International Shoe* decisions, despite *International Shoe* and the later cases. *See* Mot. 15-16. But those opinions are a distinct minority. As Ford and Goodyear pointed out below, the vast majority of courts—from both before and after *Daimler*—have held that consent by registration is impermissible. *See* Appellants’ App. Div. Opening Br. 27-29 (collecting cases); Appellants’ App. Div. Reply Br. 17-18 (same). The Appellate Division joined good company in rejecting the Supreme Court’s consent-by-registration holding. App. Div. Op. 13 (“agree[ing] with those courts”

that hold “that asserting over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be ‘unacceptably grasping’ under *Daimler*”). If the Court hears the case on the merits, it should do the same.

CONCLUSION

For the foregoing reasons, U.S. Tires’ motion should be denied.

Respectfully submitted,



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Counsel for Ford Motor Company

March 8, 2019

**EXHIBIT F TO CALVERT AFFIRMATION -
AMENDED THIRD-PARTY SUMMONS AND AMENDED
THIRD-PARTY COMPLAINT, DATED MARCH 13, 2019 [688 - 701]**

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NYSCEF DOC. NO. 171

INDEX NO. 703632/2017

RECEIVED NYSCEF: 03/13/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
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 KEILA CABRAL, a
minor, ANNA AYBAR and JESENIA AYBAR as
Administratrix of THE ESTATE OF TIFFANY CABRAL,

Index No.: 9344/2014

**STATEMENT
RULE 3402(b)**

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X
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.

-----X

COUNSELORS:

PLEASE TAKE NOTICE, that by the Third-Party Summons and Verified Third-Party Complaint, dated March 13, 2019, The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd., and Ford Motor Company, have been brought in as third-party defendants in the above-entitled action and the title of this action has been changed to read as entitled above. A copy of this statement has been served upon all the attorneys appearing in this action as of this date.

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NYSCEF DOC. NO. 171

INDEX NO. 703632/2017

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This case has not been noticed for trial.

Dated: New York, New York
March 13, 2019

Marshall Dennehey Warner Coleman & Goggin

By: _____

Adam C. Calvert
Attorneys for Defendant/Third-Party Plaintiff
U.S. Tires and Wheels of Queens, LLC
Wall Street Plaza · 88 Pine Street – 21st Floor
New York, New York 10005
Tel: (212) 376-6400
Fax: (212) 376-6490
File No.: 40318.00121

To: Through the Secretary of State – New York upon:
The Goodyear Tire & Rubber Company
200 Innovation Way
Akron, OH 44316

Through the Secretary of State – New York upon:
Goodyear Dunlop Tires North America, Ltd.
C/o Corporation Service Company
80 State Street
Albany, New York 12201

Through the Secretary of State – New York upon:
Ford Motor Company
1 American Road
Dearborn, MI 48126

Omrani & Taub, P.C.
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Montfort, Healy, McGuire & Salley
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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 KEILA CABRAL, a
minor, ANNA AYBAR and JESENIA AYBAR as
Administratrix of THE ESTATE OF TIFFANY CABRAL,

Index No.: 9344/2014

**AMENDED THIRD-
PARTY SUMMONS**

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X
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.

-----X

ABOVE-NAMED THIRD PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the third-party complaint of the defendant/third-party plaintiff, U.S. Tires and Wheels of Queens, LLC, which is served on you, and to serve a copy of your answer on the attorneys for the defendant/third-party plaintiff; counsel for the plaintiffs, Omrani & Taub, P.C., 16 Court Street, 28th Floor, Brooklyn, New York 11241; Certain & Zilberg, PLLC, 909 Third Avenue – 28th Floor, New York, New York 10022; attorneys for defendant/third-party defendant, Ford Motor Company, Aaron, Rappaport,

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RECEIVED NYSCEF: 03/13/2019

Feinstein & Deutsch, LLP, 600 Third Avenue, New York, New York 10016; attorneys for defendant/third-party defendant The Goodyear Tire & Rubber Company, DLA Piper LLP (US), 1251 Avenue of the Americas – 27th Floor, New York, New York 10020; and attorneys for defendant, Jose A. Aybar, Jr., Montfort, Healy, McGuire & Salley, 840 Franklin Avenue, P.O. Box 7677, Garden City, New York 11530-7677 within 20 days after the service of the summons, exclusive of the date of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York), and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the third-party complaint.

PLEASE TAKE NOTICE that pursuant to CPLR § 3402(b), the title of this action has been changed from the title of the plaintiff's complaint to the title of this third-party summons and complaint.

Dated: New York, New York
March 13, 2019

Marshall Dennehey Warner Coleman & Goggin

By: _____
Adam C. Calvert
Attorneys for Defendant/Third-Party Plaintiff
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Wall Street Plaza · 88 Pine Street – 21st Floor
New York, New York 10005
Tel: (212) 376-6400
Fax: (212) 376-6490
File No.: 40318.00121

To: Through the Secretary of State – New York upon:
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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AYBAR, JESENIA AYBAR as Administratrix of THE
ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as
LEGAL GUARDIAN on behalf of KEILA CABRAL, a
minor, ANNA AYBAR and JESENIA AYBAR as
Administratrix of THE ESTATE OF TIFFANY CABRAL,

Index No.: 9344/2014

**AMENDED THIRD-
PARTY COMPLAINT**

Plaintiffs,

-against-

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

-----X

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.

-----X

Defendant/third-party plaintiff, U.S. Tires and Wheels of Queens, LLC, by its attorneys, Marshall Dennehey Warner Coleman & Goggin, as and for its amended third-party complaint against The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company, alleges upon information and belief, as follows:

1. Plaintiffs commenced an action for personal injury and wrongful death against defendant/third-party plaintiff US Tires and Wheel of Queens, LLC under Index No. 9344/14 for

US Tire's alleged negligence in the installation of Goodyear tires on plaintiff-Jose Aybar's Ford Explorer. The tires allegedly failed, causing an accident and injuries on July 1, 2012. Complaint & Answer (**Exhibit A**).

2. Plaintiff Jose Aybar commenced a separate action against The Goodyear Tire & Rubber Company, and Goodyear Dunlop Tires North America, Ltd., (hereinafter "Goodyear") under Index No. 706908/15, alleging that Goodyear was liable to him for the same July 1, 2012 accident based on strict products liability, negligence, breach of warranty, and deceptive trade practices. Complaint in Index No. 706908/15 (**Exhibit B**).

3. Plaintiffs Anna Aybar, Orlando Gonzalez, Jesenia Aybar, as legal guardian on behalf of Keyla Cabral, an infant over the age of fourteen (14) years; Jesnia Aybar, as Administratrix of the Estate of Noelia Oliveras, Jesenia Aybar, as Administratrix of the Estate of Tiffany Cabral, a deceased infant under the age of fourteen (14) years, and Anna Aybar, as Administratrix of the Estate of Crystal Cruz-Aybar, commenced an action against Jose A. Aybar, Jr., Ford Motor Company, The Goodyear Tire & Rubber Co., and John Does 1 thru 30, under Index No. 706909/15 for the same July 1, 2012 accident based on strict products liability, negligence, breach of warrant, and deceptive trade practices. Complaint in Index No. 706909/15 (**Exhibit C**).

4. Third-party defendant the Goodyear Tire and Rubber Company is a foreign corporation registered to do business in New York and appointed an agent for service of process with the Secretary of State.

5. Third-party defendant the Goodyear Tire and Rubber Company transacts business within the state of New York or contracts anywhere to supply goods or services in the state.

6. Third-party defendant the Goodyear Tire and Rubber Company committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective tire.

7. Third-party defendant the Goodyear Tire and Rubber Company regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York.

8. Third-party defendant the Goodyear Tire and Rubber Company expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

9. Third-party defendant Goodyear Dunlop Tires North America, Ltd. is a foreign corporation registered to do business in New York and appointed an agent for service of process with the Secretary of State.

10. Third-party defendant Goodyear Dunlop Tires North America, Ltd. transacts business within the state of New York or contracts anywhere to supply goods or services in the state.

11. Third-party defendant Goodyear Dunlop Tires North America, Ltd. committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective tire.

12. Third-party defendant Goodyear Dunlop Tires North America, Ltd. regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York.

13. Third-party defendant Goodyear Dunlop Tires North America, Ltd. expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

14. Third-party defendant Ford Motor Company is a foreign corporation registered to do business in New York and appointed an agent for service of process with the Secretary of State.

15. Third-party defendant Ford Motor Company transacts business within the state of New York or contracts anywhere to supply goods or services in the state.

16. Third-party defendant Ford Motor Company committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective vehicle.

17. Third-party defendant Ford Motor Company regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York.

18. Third-party defendant Ford Motor Company expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

19. U.S. Tires and Wheels of Queens, LLC is a garage in Queens that regularly services Goodyear tires and Ford Explorers.

**AS AND FOR A FIRST CAUSE OF ACTION
AGAINST THE THIRD-PARTY DEFENDANTS
(COMMON LAW INDEMNITY AND CONTRIBUTION)**

20. Defendant/third-party plaintiff repeats and realleges the allegations contained in paragraphs 1 through 18 as if set forth fully herein.

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21. If US Tires and Wheels of Queens LLC is held liable to anyone in this action, its liability and damages will have arisen out of the affirmative active and primary negligence of The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company, their agents, servants or employees, and without any active or primary negligence or active participation on the part of US Tires and Wheels of Queens LLC, and that if any negligence or liability is found to exist on the part of US Tires and Wheels of Queens LLC, that liability and negligence would be secondary or passive or the result solely of the operation of law as opposed to negligence of The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company, whose liability and negligence will be active and primary, and if the plaintiff's allegations are proven true at trial US Tires and Wheels of Queens LLC will be entitled to and demands common law indemnification or contribution from The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company for the amount of any verdict or judgment that may be recovered against it in this action.

WHEREFORE, defendant/third-party plaintiff U.S. Tires and Wheels of Queens, LLC demands judgment over and against The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company for all or part of any verdict or judgment that may be had against the defendant/third-party plaintiff in this action; judgment against The Goodyear Tire & Rubber Company, Goodyear Dunlop Tires North America, Ltd. and Ford Motor Company, for all attorneys' fees, costs, interest, other expenses and all costs of settlement of the claim and/or satisfaction of judgment as may be obtained against defendant/third-party plaintiff U.S. Tires and Wheels of Queens, LLC, in connection with the subject action because of

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third-party defendants' negligence; and together with all costs, interest, expenses, and legal fees incurred in defending the litigation.

Dated: New York, New York
March 13, 2019

Marshall Dennehey Warner Coleman & Goggin

By: _____

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Attorneys for Defendant/Third-Party Plaintiff
U.S. Tires and Wheels of Queens, LLC
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Fax: (212) 376-6490
File No.: 40318.00121

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Akron, OH 44316

Through the Secretary of State – New York upon:
Goodyear Dunlop Tires North America, Ltd.
C/o Corporation Service Company
80 State Street
Albany, New York 12201

Through the Secretary of State – New York upon:
Ford Motor Company
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ATTORNEY VERIFICATION

Adam C. Calvert, an attorney admitted in the State of New York, affirms and says:

I am associated with the firm of Marshall Dennehey Warner Coleman & Goggin, attorneys for defendant/third-party plaintiff U.S. Tires and Wheels of Queens, LLC. I have read the Verified Third-Party Complaint and know its contents and they are true to my knowledge, except those matters which are stated to be alleged on information and belief, and as to those matters I believe them to be true. The reason why this verification is made by me instead of by defendant/third-party plaintiff U.S. Tires and Wheels of Queens, LLC, is because it is not in the county where my firm maintains an office.

Dated: New York, New York
March 13, 2019

Adam C. Calvert

**AFFIRMATION OF MICHAEL A. TAUB, FOR PLAINTIFFS, IN OPPOSITION
TO CROSS-MOTION TO DISMISS CAUSE OF ACTION AGAINST THIRD-PARTY
DEFENDANT FORD MOTOR COMPANY, DATED MARCH 15, 2019 [702 - 715]**

FILED: QUEENS COUNTY CLERK 03/15/2019 10:43 PM
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----x
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 a legal
Guardian on behalf of KEILA CABRAL, a minor, ANNA
AYBAR and JESENIA AYBARas Proposed Administratrix
of the Estate of TIFFANY CABRAL

Action #1
Index: 9344/14

Plaintiffs

- against -

**PLAINTIFFS'
OPPOSITION TO CROSS-
MOTION TO DISMISS
CAUSE OF ACTION
AGAINST THIRD-PARTY
DEFENDANT, FORD
FORD MOTOR COMPANY**

US TIRES AND WHEELS OF QUEENS, LLC.

Defendant.

-----x
US TIRES AND WHEELS OF QUEENS, LLC.

Third-Party Plaintiff,

-against-

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

Third-Party Defendants.

-----x
MICHAEL A. TAUB, ESQ., an attorney duly admitted to practice law before the Courts
of the State of New York, hereby affirms the following under penalty of perjury: That

1. I am an attorney with the Law Offices of OMRANI & TAUB, P.C., attorney(s) for each of the plaintiffs in the above entitled action except for JOSE AYBAR, who is

represented by separate counsel. I am fully familiar with the facts and circumstances surrounding this action through a review of the file maintained by this law office.

2. This affirmation is submitted in Opposition to the Cross-Motion by the Third-Party Defendant, FORD MOTOR COMPANY (hereinafter “FORD”), seeking to dismiss the third-party action asserted against it, arguing lack of personal jurisdiction over FORD in New York State in the instant matter. (Notably, the legal analysis contained herein, particularly with regard to recent developments in jurisdictional case law since the filing of the initial underlying motion by GOODYEAR, in May, 2018 should be broadly applied with respect to both of the third-party defendants, FORD and GOODYEAR, and applied with the same force and effect to motion by GOODYEAR as well as the instant cross-motion by FORD).

3. At the outset, it must be asserted that this motion is premature, as very little discovery has been exchanged, and EBTs of all parties, particularly a representative of FORD, remain outstanding. Thus, while FORD no doubt expects its adversary (and the Court) to have extensive familiarity with its well known, extensively advertised automobile products, it nonetheless puts the plaintiffs at a disadvantage, as the full extent of FORD’s business dealings in New York (including questions regarding the amount of revenue received from its New York business presence, or the amount of real property that FORD owns, uses or possesses in New York State) remains undisclosed, and can only be guessed at by the plaintiffs (and this court) in responding to or deciding the instant motion. Suffice it to say that FORD’s presence in New York State is significant, pervasive, continuous, systematic and long-standing, and that FORD without question derives significant revenue in the tens (or even hundreds) of millions of dollars from its New York presence, which includes maintaining a multi-million dollar assembly ‘stamping’ plant in Buffalo, New York, and maintenance and control of dozens (if not hundreds)

of Ford dealerships, which sell and service thousands of FORD motor vehicles throughout every corner of New York State.

TRADITIONAL PERSONAL JURISDICTION

4. For well over one hundred years, it has been well settled under New York law, and through case decisions, that large corporations such as FORD MOTOR COMPANY, which engage in continuous, systematic, long-standing business in New York State and which derive substantial income from such persistent business operations, are subject to both general and specific jurisdiction in New York courts. Indeed, until very recently, it was generally considered well settled that personal jurisdiction over the moving third-party defendant, FORD, under the specific facts and circumstances of this case, could be soundly established pursuant to CPLR §302 which reads as follows:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

In fact, CPLR §302 as well as CPLR §301, remain intact to this date, despite recent holdings, discussed herein, which raise questions as to whether the CPLR still represents sound law with regard to corporate jurisdiction.

5. Here, CPLR §302 subsections (1), (2), (3) and (4) are separated by the word “or”; meaning that only one of these elements need be satisfied to establish personal jurisdiction over FORD. Assuming that FORD is a foreign (out-of-state) corporation, which is not contested, it qualifies as a “non-domiciliary” for purposes of applicability of CPLR §302. Thus, at the outset, it should be FORD’s burden to present evidence in admissible form sufficient to show the following:

- A) With regard to subsection 302(1): that it does not transact *any* business within New York State, or contract anywhere to supply goods or services in New York; and/or
- B) With regard to subsection 302(3): that it did not commit a tortious act without the State causing injury to a person or property within the State, and that it does not regularly do business in New York or otherwise derive substantial revenue from interstate or international commerce; and/or
- C) That FORD does not own, use or possess any real property situated in the State of New York.

6. In this regard, and due to the lack of any discovery exchange by FORD prior to its filing of the instant motion, the plaintiffs herein request that the court to take judicial notice of the following:

- That FORD MOTOR COMPANY is engaged in the business of designing, manufacturing, distributing, selling, leasing and servicing FORD brand automobiles, including but not limited to the Ford Explorer vehicle which is the subject of this litigation;
- That thousands upon thousands of FORD brand automobiles are sold in every corner of New York State, and have been for decades. Such sales include both used vehicles and brand new vehicles, which are widely advertised, and regularly sold, leased and serviced at hundreds of FORD dealerships located throughout New York State;
- That FORD owns, uses and/or possesses the Ford Stamping Plant in Buffalo (suburb of Hamburg) New York, employing over 2,000 workers who manufacture and assemble exclusively Ford automobile products.

7. It should therefore be sufficiently clear that FORD MOTOR COMPANY does business in New York, and that its pervasive, continuous and long-standing business in New York State subjects it to personal jurisdiction in New York State under present New York law.,

NEW DEVELOPMENTS IN JURISDICTION CASE LAW (DAIMLER AND ITS PROGENY)

8. In the instant motion, FORD argues that the holding of the United States Supreme Court Case entitled Daimler A.G. v. Bauman, 134 S. Ct. 746, 571 U.S. 117 (2014), applies to this third-party action, precluding the defendant from asserting third-party claims against FORD in this court. At the outset, a brief review of the Daimler case (relied upon and discussed extensively in the moving papers) reveal that the facts of Daimler are entirely different, and easily distinguishable, from the instant matter. Briefly, in Daimler, a group of Argentine nationals forum shopped, and chose to sue DaimlerChrysler (a German Corporation) in an

American court in the State of California, over events that took place several decades ago in Argentina at a Mercedes Benz plant located in Buenos Aires. In a majority opinion written by Justice Ginsberg, the U.S. Supreme Court held that foreign nationals could not assert personal jurisdiction over a foreign corporation in an American federal court.

9. Yet, the Court inexplicably engaged in dicta comparing international foreign corporations with inter-state American corporations, dictating that, except under “exceptional circumstances”, a corporation could be subject to ‘general’ (or all-purpose) jurisdiction only in its home state or its official state of incorporation. This opinion affected, and effectively overturned, nearly one hundred years of prior case law, dating back as far as the seminal International Shoe Co. v. Washington (1945) decision, leading to a flurry of new cases, which are still being vetted in various courts throughout the nation (including the NYS Appellate Division, Second Department). See Aybar v. Aybar, 2016 N.Y. Misc. LESIX 2253, 2016 N.Y. Slip. Op. 31138(U)Id. *(The Aybar holding, which is cited by the moving defendant, is not yet settled, or controlling) law, as a post-decision motion reargue is presently pending, seeking reargument and/or leave to appeal to the Court of Appeals). Nevertheless, the Daimler decision and its recent progeny, including the Aybar v. Goodyear decision, are distinguishable from this matter in quite relevant ways.

UNLIKE DAIMLER or AYBAR V. GOODYEAR, WHICH INVOLVE DIRECT ACTIONS, THE INSTANT MATTER INVOLVES A THIRD-PARTY CLAIM CONSTITUTING “EXCEPTIONAL CIRCUMSTANCES”.

10. The Daimler decision represents what some scholars have concluded “constitutes a radical departure from settled law.” *Cornet & Hoffheimer, Good-Bye Significant Contacts:*

General Personal Jurisdiction after Daimler AG v. Bauman, 76 Ohio St. L.J 101 (2015). The Daimler court, however, articulated an “exceptional circumstances” exception, although it left that standard undefined. See Daimler, footnote #19.*

* *We do not foreclose the possibility that in an exceptional case, see, e.g., Perkins, described at 129-131, 187 L. Ed. 2d, at 634-636, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, see infra, at 141, 187 L. Ed. 2d, at 642, quite another to expose it to suit on claims having no connection whatever to the forum State.*

11. Unlike the parties in Daimler, the instant matter involves a ‘third-party action’ in a pending case where jurisdiction among the principal parties is already established, and correct. Here, unlike Daimler, the third-party plaintiff did not forum shop for a venue of choice – it had no other option where to bring the so-called “third-party” action, as the matter was already being litigated in a correct and jurisdictionally sound venue (where the plaintiffs and the defendant both resided). FORD’s argument, that the third-party plaintiff should have started a new and different action altogether, in multiple foreign jurisdictions unrelated to the principal parties, denigrates the very meaning of the term “third-party action”. Taken to its logical conclusion, FORD essentially argues that no third-party actions could ever be brought against it anywhere

except in its home state of Michigan (or its state of incorporation, Delaware). And that in actions where there are multiple third-parties, then multiple new cases in multiple jurisdictions would need to be brought.

12. By attempting to apply Daimler dicta to the instant third-party action, FORD essentially argues that the very basis of any jurisdictional review (traditional notions of fair play and substantial justice) are satisfied by requiring the third-party plaintiffs to file separate actions in multiple out-of-state courthouses. What is substantially ‘just’ or ‘fair’ about that scenario?

13. Here, the instant matter was initially brought in the correct jurisdiction. The plaintiffs (New York residents, residing in Queens County) brought suit against a New York Corporation (doing business in Queens County). There was no reasonable alternative but to bring suit here in New York State. Likewise, the defendant/third-party-plaintiff made a routine and obvious choice to bring its “third-party” complaint in this same venue.

14. Therefore, this Court should alleviate itself from the constraints of Daimler and hold that, under the totality of the facts and circumstances of this case, an ‘exceptional circumstance’ exists.

15. To hold third-party plaintiffs to the jurisdictional standard of Daimler, would be to subject litigants to unwieldy, prohibitively costly and unrealistic multi-state litigation in multiple jurisdictions, with the likelihood of encountering conflicting laws in those various jurisdictions, both procedural and substantive. And beyond the two third-party defendants in this matter, arguably, in the case of a product as multi-faceted and complicated as an automobile, which likely has component parts that are potentially manufactured in many different states by many different suppliers), a single third-party action in one state could conceivably, ultimately, require

dozens of separate actions in dozens of different states, just to obtain jurisdiction over the multiple possible corporate entities involved in the stream of production.

16. For this reason, the plaintiff argues that traditional notions of fair play and substantial justice dictate a holding by this court boldly distinguishing this matter from Daimler, and finding that the facts of this case (and other such cases such as this involving third-party actions where jurisdiction over the principal parties is otherwise sound) satisfy the “exceptional circumstances” exception envisioned (though not defined) by the Daimler court.

THE UNIQUE FACTS OF THIS CASE SATIFY SPECIFIC JURISDICTION, AS
OPPOSED TO GENERAL, ALL PURPOSE JURISDICTION

17. It is not clear why the Second Department articulated that its decision in Aybar v. Aybar, was limited to “general” (all-purpose) jurisdiction, and specifically declined to address “specific” jurisdiction, in its decision. Thus, the issue of whether the facts of this third-party action satisfy ‘specific jurisdiction’ over FORD (or GOODYEAR) is unclear, and is properly raised herein.

18. The Aybar decision, authored by Justice Brathwaite Nelson, begins as follows: “*We consider on these appeals whether, following the United States Supreme Court decision in Daimler AG v. Bauman (57 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not.*” It goes on as follows: “*Here, in opposing the motions of Ford and Goodyear, the plaintiffs asserted that New York courts have general jurisdiction over each defendant. The plaintiffs did not assert that the court could exercise specific jurisdiction over these defendants in*

this action, and, thus, we do not consider whether jurisdiction might be exercised over them pursuant to New York's long-arm jurisdiction statute (CPLR 302). (Referencing footnote #2: "The arguments of nonparty U.S. Tires that specific jurisdiction is present in this case are not properly before this Court since they were not raised before the motion court."

19. Thus, movant's argument that the Second Department's decision in Aybar v. Aybar is misplaced, as here, the issue goes beyond 'registration' and is not limited to 'general jurisdiction'. Indeed, it is succinctly argued that the underlying facts of the instant matter establish 'specific jurisdiction' over the moving corporate defendants.

20. To repeat the plaintiff's earlier position, they did not forum shop, or othersie randomly elect to bring their action in New York State, Queens Supreme Court. Indeed, it was a logical and correct choice, as the plaintiffs resided in New York, Queens County, and the target defendant was incorporated in New York, and 'resided' (or rather operated its principal place of business) in Queens County. Likewise, the defendant, US TIRES AND WHEELS OF QUEENS, LLC, did not forum shop Queens Supreme Court as a choice of venue for its third-party complaint against FORD or GOODYEAR. Indeed, it merely sought to bring them into the pending action.

21. This should not offend any court's traditional notions of fair play or substantial justice. Here, the subject motor vehicle was owned by a New York resident. It was registered with the DMV to that same New York resident. It bore New York State license plates, and bore a New York State inspection certification sticker. It was garaged full time in New York by its owner. And it was serviced (by the defendant/third-party plaintiff) in New York. Indeed, the singular issue outside of New York State is that the one-car vehicular accident happened to occur outside of New York State, on an interstate federal highway, during a brief vacation trip the

owner and his family were taking. That singular fact, standing alone, should not be determinative under the totality of facts and circumstances, to preclude jurisdiction over FORD or GOODYEAR in this third-party action.

22. Furthermore, contrary to FORD's argument in its supporting papers, it is unnecessary for purposes of the Long Arm statute for the actual product that is the subject of the lawsuit to be manufactured in New York. And it is not necessary for the tortious act to have occurred in New York State (which is the reason CPLR 302§(1) is separated from §(2) by the word "or" as opposed to "and"). Indeed, there is case law holding that to prove specific jurisdiction, "*the Court considers whether the plaintiff's claim arises out of or relates to the defendants' activities in the forum state.*" Miriam Kaller Family Irrevocable Trust v. Lincoln Benefit Life Co., 56 Misc3d 395, Supreme Court, Kings County (2017), citing Marten v. Goodwin. 499 F.3d 290, 296 (3d Cir. 2007); emphasis added.

23. Here, the main (sole) purpose for FORD or GOODYEAR doing business in New York is to sell motor vehicles and tires for those automobiles. The exclusive subject matter giving rise to the instant cause of action (and third-party cause of action) arose out of the use and operation of a FORD motor vehicle bearing GOODYEAR tires. Arguably, the third-party defendants have purposefully and knowingly placed the subject vehicle into the stream of commerce, randomly, knowing the distinct likelihood that it would end up being purchased and registered in New York, and thus should reasonably have anticipated being haled into court in this forum as a result of its substantial business here. This case is directly and inseparably related to the third-part defendants' actions and activities in New York selling motor vehicles, not as a result of random, fortuitous or attenuated contacts with New York. Thus, whether the specific vehicle was originally sold in New York, or manufactured in New York, or assembled in

New York, should be disregarded as fortuitous after-the-fact analysis. The fact remainsj that FORD does manufacture, assemble and sell motor vehicles in New York State, and this third-party action relates to a FORD motor vehicle (that, according to FORD, just happened to have been manufactured and originally sold in Ohio).

24. Finally, the third-party cause of action sounds in common law indemnification, not necessarily in products liability or torts. Actions for indemnification should not be affected by questions of personal jurisdiction as indemnity is regarded as contractual in nature.

CONCLUSION

25. Here, the alleged tort by the first-named defendant, US TIRES AND WHEELS OF QUEENS, LLC., occurred in Queens, New York (albeit the resulting tire failure and vehicle rollover occurred on a federal highway in Virginia). On that basis, the third-party defendants essentially ask this court to treat the plaintiffs, and the third-party plaintiff herein, (who are New York State residents) on equal footing as the Argentina nationals who forum selected a California Federal District Court venue in which to sue Daimler (a German company) over events which occurred over forty-five years ago in Argentina! The Supreme Court perhaps correctly held that Daimler was not amenable to suit in California for injuries allegedly caused by the conduct of a Daimler subsidiary outside of the United States decades earlier, in a venue where none of the parties resided, and where none of the parties were even residents of the United States. Notably, unlike here, the Supreme Court found that the plaintiffs in Daimler did not even have “minimum contacts” with the forum State. Compare that to the facts herein, where New York State was not only the logical choice of venue, but perhaps the *only* proper venue for the underlying lawsuit.

26. Here, FORD has maintained a substantial and continuous presence in New York since the early 1900's. It owns and uses and possesses real property in New York. It owns, or controls, hundreds of "FORD" dealerships, which sell exclusively FORD motor vehicles and displays FORD's logo and corporate colors at its FORD dealerships. In short, its ongoing, continuous and systematic business dealings and affiliations in New York State easily satisfy the requirements of CPLR §302, and rise far above the 'minimum contacts' traditionally required by the courts in order to obtain general jurisdiction over a corporate entity. They also further satisfy the so-called "exceptional circumstances" test, as newly articulated in the controversial and recent Daimler decision. The proper analysis to undertake is not whether FORD is *actually* at home in New York State, but if it is 'essentially at home' for the purpose of obtaining jurisdiction over FORD in a third-party indemnification action.

27. For the foregoing reasons addressed herein, the instant motion to dismiss the third-party claims against the movant, FORD MOTOR COMPANY, for lack of personal jurisdiction over it, should be denied in its entirety.

Dated: New York, New York
 March 15, 2019

Yours, etc.

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**AFFIRMATION OF JUSTIN EDWARD KERNER, FOR THIRD-PARTY DEFENDANT
THE GOODYEAR TIRE & RUBBER COMPANY, IN OPPOSITION TO CROSS-MOTION
BY DEFENDANT/THIRD-PARTY PLAINTIFF, DATED MARCH 22, 2019 [716 - 729]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----	X
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.	:
-----	X
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.	:
-----	X

I, Justin Edward Kerner, an attorney admitted to practice law before the courts of the State 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 opposition to the purported Cross-Motion filed by Defendant/Third-Party Plaintiff, US Tire and Wheels of Queens, LLC (“USTW”).

3. The majority of USTW’s submission bears no relation whatsoever to its requests for relief (*i.e.*, for either leave to amend or a stay), which are buried in the last three pages of its thirty-page filing. Instead, USTW ignores the Court’s February 26, 2019 decree that no further written arguments be submitted,¹ and it improperly uses its Cross-Motion as a vehicle for introducing additional arguments in opposition to Goodyear’s Motion to Dismiss.

4. Because USTW violated this Court’s clear directive, the part of its supporting affirmation that raises “further written arguments” on the exercise of personal jurisdiction and the applicability of the doctrine of collateral estoppel (*i.e.*, the first twenty-seven pages) should be disregarded.

5. Notwithstanding the impropriety of Plaintiffs’ additional arguments, in an overabundance of caution, Goodyear herein responds to each of Plaintiffs’ arguments. For the reasons that follow: USTW’s request for leave to amend should be denied, and its eleventh-hour jurisdictional arguments should be rejected as waived, belated, and, in the alternative, meritless.

ARGUMENT

I. USTW’S CROSS-MOTION FOR LEAVE TO AMEND SHOULD BE DENIED AS A MATTER OF LAW.

6. In support of its request for leave to amend its Third Party Complaint, USTW wrongly states that the only barrier to amendment is a showing that no prejudice would result. (*See* Calvert Aff. in Supp. of USTW Cross-Mot. ¶ 67 [hereafter Calvert Aff].) But New York appellate precedent is clear: “if the proposed amendment is patently lacking in merit or its lack of merit is

¹ Goodyear does not seek sanctions for this conduct and filing. However, USTW should not be rewarded for showing disregard for this Court’s directive.

clear and free from doubt, it will not be permitted and leave [to amend] should be denied as a matter of law.” *Staines v. Nassau Queens Med. Grp.*, 176 A.D.2d 718, 718 (2d Dep’t 1991) (citations, quotation marks, and alterations omitted); *see also Gitseg v. Herbst*, 220 A.D.2d 380, 381 (2d Dep’t 1995) (“While leave to amend a complaint should be freely given . . . , a meritless application should not be granted.”).

7. With respect to Goodyear, each of USTW’s proposed amendments are indeed meritless. USTW seeks leave to amend so that it may assert that Goodyear:

- “is a foreign corporation registered to do business in New York and appointed an agent for service of process with the Secretary of State”;
- “transacts business within the state of New York or contracts anywhere to supply goods or services in the state”;
- “committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective tire”
- “regularly does or solicits business, or engages in any other persistent course of conduct, or services substantial revenue from goods used or consumed or services rendered, in the state of New York”; and
- “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.”

(USTW’s Proposed Am. 3d-Pty Compl. ¶¶ 4-8.)

8. Each of the proposed amendments is meritless because none would permit this Court to exercise personal jurisdiction over Goodyear.

9. First, by seeking leave to assert that Goodyear “is a foreign corporation registered to do business in New York and appointed an agent for service of process with the [New York] Secretary of State” (*id.* at ¶ 4), USTW seeks the exercise of general jurisdiction over Goodyear under the theory of “consent-by-business-registration.” That theory has, however, been explicitly rejected by the Second Department. *See Aybar v. Aybar*, 93 N.Y.S.3d 159, 165-70, ---A.D.3d ----

, 2019 N.Y. Slip Op. 00412, (2d Dep’t 2019) [hereafter *Anna Aybar*]. This Court is bound by the Second Department’s decision. *See, e.g., D’Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep’t 2014) (“It is axiomatic that [the]Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department . . .”).

10. By seeking leave to assert that Goodyear “transacts business within the state” and “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York” (USTW’s Proposed 3d-Pty Compl. ¶¶ 5, 7; *see also id.* at ¶ 8 (asserting that Goodyear “derives substantial revenue from interstate or international commerce”)), USTW suggests exercising general jurisdiction over Goodyear based on supposed “continuous and systematic contacts.” However, that theory has also been rejected. In *Daimler AG v. Bauman*, the Supreme Court of the United States stated that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there,” and concluded that “the place of incorporation and principal place of business are paradigm” for the exercise of “general jurisdiction.” 571 U.S. 117, 137 (2014) (citation, quotation marks, and alterations omitted).

11. In *Anna Aybar*, the Second Department examined Goodyear’s New York operations and unequivocally held, with specific regard to the facts of this case, that “Goodyear . . . is not at home in New York such that New York courts might exercise general jurisdiction over any claim brought against it.” 93 N.Y.S.3d at 165. Nothing USTW has offered or could offer would shake that conclusion, which was premised on all of the same facts implicated by USTW’s proposed amendments.²

² The Second Department examined the scope of Goodyear’s business operations in New York and recited that “it has conducted business in New York for nearly a century, it has owned and operated a chemical plan here since the 1940’s, as well as a tire manufacturing plan, it has

12. Finally, by seeking leave to assert that Goodyear “committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective tire” and “expects or should reasonably expect the act . . . to have consequences in the state,” USTW invites this Court to exercise specific jurisdiction over Goodyear based on the so-called “stream of commerce” theory. It does so in spite of Justice Raffaele’s conclusion that the New York long-arm statute, which “provides for the exercise of jurisdiction over a foreign defendant who commits a tortious act outside the state which causes [an] injury within the state’ . . . does not apply to the” facts presented here. *Aybar v. Aybar*, No. 706909/2015, 2016 WL 3389890, at *2 (N.Y. Sup. Ct. May 31, 2016), *rev’d on other grounds*, 93 N.Y.S.3d 159 (2d Dep’t 2019).

13. Specific jurisdiction, like general jurisdiction, cannot be exercised here without violating Goodyear’s rights under the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. 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.*, 137 S. Ct. 1773, 1780 (2017) (alterations omitted). Here, it is undisputed that USTW’s third-party claims neither arise out of nor relate to any New York actions *attributable to Goodyear*. As recognized and determined by the Second Department, Goodyear designed the tire at issue in Ohio and manufactured it in Tennessee. (*See* Dancy Aff. ¶ 5.)³ *See*

availed itself of New York’s courts, and it has leased and subleased real estate in New York, maintained a network of dealers and service centers, and employed thousands of people in New York since 1924.” *Anna Aybar*, 93 N.Y.S.3d at 165. However, those facts did not bring Goodyear within the ambit of the court’s general jurisdiction. *See id.* Goodyear is subject to general jurisdiction only in the forum in which it is incorporated and maintains its principal place of business: the State of Ohio. *See id.* at 161; *Daimler*, 571 U.S. 117, 137.

³ The Dancy Affirmation is appended to Goodyear’s opening brief.

also *Anna Aybar*, 93 N.Y.S.3d at 161. No evidence of record supports USTW's unfounded presumption that Goodyear in any way or at any time directed the tire at issue to New York.⁴

14. USTW disregards those facts and urges the Court, through its meritless proposed amendments, to instead focus on others' contacts with the State of New York (principally, Plaintiffs' contacts with USTW). But neither Plaintiffs' nor USTW's relationship with the forum should be part of this 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 v. Fiore*, 571 U.S. 277, 285 (2014) (emphasis added). "Due process requires that a defendant be haled into court in a forum State based on [its] own affiliations with the State, not based on the random, fortuitous, or attenuated contacts" of "other persons affiliated with the State." *Id.* at 286 (citation and quotation marks omitted).

15. For all of the reasons set forth here, and for the additional reasons set forth in Goodyear's earlier briefing (*i.e.*, Goodyear's original affirmation in support of its motion; its Reply to USTW's Opposition; and its Reply to Plaintiff's opposition) and in Section II.B of this Affirmation, *infra* (addressing USTW's belated arguments on the potential exercise of specific jurisdiction), USTW's "proposed amendment is patently lacking in merit" and, thus, USTW's Cross-Motion "should be denied as a matter of law." *Staines*, 176 A.D.2d at 718.⁵

⁴ As detailed below, in Paragraphs 22-28, the facts of this case—Involving a tire that was designed in Ohio and manufactured in Tennessee, and an auto accident in Virginia—do not support the exercise of specific jurisdiction.

⁵ Goodyear takes no position with respect to USTW's request for a stay.

II. USTW'S REMAINING ARGUMENTS ARE MERITLESS.

16. The remainder of USTW's supporting Affirmation is dedicated to three points: (1) USTW's contentions regarding the Second Department's conclusions in *Anna Aybar*; (2) a transparent attempt to salvage this case by arguing for the exercise of specific jurisdiction; and (3) an argument against the application of collateral estoppel.

17. None of those points warrant this Court's attention. As set forth above, the Court explicitly denied USTW's informal request (at the February 26, 2018 conference in this matter) for further submissions in opposition to Goodyear's motion. USTW should not be rewarded for disregarding the Court's instruction.

18. Notwithstanding the impropriety of USTW's new merits arguments, Goodyear briefly responds to each of those points below.

A. This Court is bound by the Second Department's decision in *Anna Aybar*.

19. USTW asks this Court to defy binding precedent and disregard the Second Department's decision in *Anna Aybar*, based only on its own self-serving belief that *Anna Aybar* may be overturned on appeal. (*See Calvert Aff.*, p. 2.) But “[i]t is axiomatic that [this] Court is bound to apply the law as promulgated by” the Second Department. *D'Alessandro*, 123 A.D.3d at 6.

20. USTW ignores that axiom, and it invites this Court to do so—and, in the process, to commit reversible error. That invitation should be declined.

21. Despite USTW's protestations otherwise, the fact remains that *Anna Aybar* accords with the great weight of authority from around the country. The Supreme Court of the United States no longer expressly recognizes “consent-by-business-registration” as a valid theory of general jurisdiction, *see Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 704-

06 (1982) (enumerating methods of consenting to the exercise of personal jurisdiction and omitting theory of consent-by-business-registration), and the majority of state and federal courts to consider the constitutionality of that theory in *Daimler*'s wake held that it does not accord with the modern understanding of limits on personal jurisdiction, in accord with Due Process.⁶

22. Insofar as USTW disagrees with the Second Department's decision (and also with the great weight of case law from around the country, demonstrating that the exercise of personal jurisdiction, when premised on nothing more than supposed consent-by-business-registration, offends Due Process), this is not the forum in which to express that disappointment. This Court must adhere to precedent; whatever merit the Court may see in USTW arguments (and,

⁶ See, e.g., *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 4 (Mont. 2018); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 447-48 (Ill. 2017); *Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019, 1021-22 (Or. 2017); *Segregated Account of Ambac Assur. Co. v. Countrywide Home Loans*, 898 N.W.2d 70, 81-82 (Wis. 2017); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 47 (Mo. 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127-28 (Del. 2016); *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1038 (Colo. 2016); *Campbell v. Acme Insulations, Inc.*, 105 N.E.3d 984, 993 (Ill. App. 2018); *Ford Motor Co. v. Cejas*, No. 09-16-00280, 2018 WL 1003791, at *7-10 (Tex. App. Feb. 22, 2018); *Woodruff-Sawyer & Co. v. Ghilotti*, 255 So.3d 423, 429 (Fla. App. 2018); *Dutch Run Mays Draft, LLC v. Wolf Block LLP*, 164 A.3d 435, 444 (N.J. App. Div.), certif. denied, 173 A.3d 596 (N.J. 2017); *Wal-Mart Stores, Inc. v. Lemaire*, 395 P.3d 1116, 1120 (Ariz. App. 2017); *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 883 (Cal. 2016), rev'd on other grounds, 137 S. Ct. 1773 (2017); see also, e.g., *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1319 n.5 (11th Cir. 2018); *Gulf Coast Bank & Trust Co. v. Designed Conveyor Sys., LLC*, 717 F. App'x 394, 398 (5th Cir. 2017); *Am Trust v. UBS AG*, 681 F. App'x 587, 589 (9th Cir. 2017); *Brown v. Lockheed-Martin Corp.*, 814 F.3d 619, 636 (2d Cir. 2016).

These decisions accord with the majority of the post-*Daimler* but pre-*Anna Aybar* decisions from New York's state and federal courts. See, e.g., *Spratley v. FCA US LLC*, No. 17-62, 2017 WL 4023348, at *3-4 (N.D.N.Y. Sept. 12, 2017); *Wilderness USA, Inc. v. DeAngelo Bros. LLC*, 265 F. Supp. 3d 301, 313-14 (W.D.N.Y. 2017); *Famulari v. Whirlpool Corp.*, No. 16-944, 2017 WL 2470844, at *4 (S.D.N.Y. June 7, 2017); *Bonkowski v. HP Hood LLC*, No. 15- 4956, 2016 WL 4536868, at *3 (E.D.N.Y. Aug. 30, 2016); *Taormina v. Thrifty Car Rental*, No. 16- 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); *Kline v. Facebook, Inc. & Google, LLC*, 62 Misc.3d 1207(A), 2019 WL 209516 (table), at *2 (N.Y. Sup. Ct. Jan. 10, 2019); *Kyowa Seni, Co. v. ANA Aircraft Technics, Co.*, 80 N.Y.S.3d 866, 870 (N.Y. Sup. Ct. July 5, 2018); *Amelius v. Grand Imperial LLC*, 64 N.Y.S.3d 835, 849-53 (N.Y. Sup. Ct. Sept. 11, 2017).

respectfully, there is none)," the mere existence of" such arguments "is not sufficient, in and of itself, to compel the court to overturn judicial precedent. *Dufel v. Green*, 198 A.D.2d 640, 640, 603 N.Y.S.2d 624, 625 (3d Dep't 1993), *aff'd*, 84 N.Y.2d 795 (1995).

A. Specific jurisdiction is lacking here, and USTW has not proven and cannot prove otherwise.

23. "[W]hen a defendant has objected to the court's exercise of personal jurisdiction, the plaintiff bears the burden of coming forward with sufficient **evidence** to prove jurisdiction." *Anna Aybar*, 93 N.Y.S. at 163 (emphasis added). USTW, as the Third-Party Plaintiff in this matter, bears the burden here. But no such evidence has been adduced.

24. USTW argues at length that Goodyear's contacts with the State of New York are such that the State's long-arm statute is satisfied. (*See* Calvert Aff. ¶¶ 36-60.) It pays mere lip service to both the Due Process clause of the Fourteenth Amendment to the U.S. Constitution and the U.S. Supreme Court's related precedent. (*See id.* at ¶¶ 61-64.)

25. In fact, with respect to the facts of this case, USTW devotes only two sentences to its argument that specific jurisdiction may be exercised here without violating Goodyear's constitutional rights: "In this case, finding that the New York courts have jurisdiction over . . . Goodyear does not violate due process. [It] marketed and sold [its] products in New York and therefore [it] should reasonably expect the products [*sic*] defects to have consequences in New York." (Calvert Aff. ¶ 65.)

26. USTW's argument is unsupported and meritless. It conflates the doctrines of general and specific jurisdiction, and thus invites reversible error. General jurisdiction permits a court "to hear any and all claims" against a defendant in extremely limited circumstances (principally, if it is "at home" in the forum). *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). But specific jurisdiction "is confined to adjudication of issues deriving

from, or connected with, the very controversy that establishes jurisdiction.” *Id.* (citation and internal quotation marks omitted). Here, the “controversy that establishes jurisdiction” is the supposedly defective nature of *the specific tire at issue*, which was neither designed nor manufactured in New York. The design, manufacture, and/or sale of other tires are simply irrelevant. That is so because “even regularly occurring sales of a product in a State do not justify the exercise of [specific] jurisdiction over a claim unrelated to those sales.” *Id.* at 930 n.6 (emphasis added). *See also Bristol-Myers Squibb*, 137 S. Ct. at 1780 (demonstrating that torts founded on manufacture and sales of other, similar products—or even other instances of the same product—will neither suffice nor support the exercise of specific jurisdiction).

27. In this respect, the U.S. Supreme Court’s most recent decision on specific jurisdiction, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, is directly on point. That California products liability case was commenced by two groups of plaintiffs who alleged they were injured by Plavix, a drug manufactured by Bristol-Myers Squibb Company. The first group consisted of 86 California residents (the “residents”), and the second group consisted of 592 individuals from 33 other states (the “nonresidents”). *Id.* at 1778. Importantly, the nonresidents (like the Josephs in this case) did not present evidence that the product at issue was manufactured or sold in the forum; indeed, they “were not prescribed Plavix in California, did not purchase Plavix in California, and were not injured by Plavix in California.” *Id.* at 1781.

28. Bristol-Myers Squibb challenged the nonresidents’ claims for lack of personal jurisdiction, and the ruling on its motion was appealed to the California Supreme Court. That court concluded that Bristol-Myers Squibb was subject to specific jurisdiction based on a “sliding scale approach,” whereby the claims asserted by the nonresidents could be heard because their claims

were “based on the same allegedly defective product” and “were similar in several ways to the claims of the . . . residents (as to which specific jurisdiction was uncontested).” *Id.* at 1778-79. Following grant of a writ of certiorari, the Supreme Court of the United States reversed, striking the California Supreme Court’s “sliding scale” approach as unconstitutional. *See id.* That Court stated:

Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. *Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.* For specific jurisdiction, a defendant’s general connections with the forum are not enough.

Id. at 1781 (emphasis added). The Court noted that its holding accorded with “settled principles regarding specific jurisdiction,” *id.*, which led it to conclude that the “mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. . . . ‘[A] defendant’s relationship with a third party, standing alone, is an insufficient basis for jurisdiction.’” *Id.* (quoting *Walden*, 134 S. Ct. at 1123 (emphasis added)).

What was needed to support the exercise of specific jurisdiction in *Bristol-Myers Squibb*—and what was lacking in that case—was “a connection between the forum *and the specific claims at issue.*” *Id.*

29. The same connection is lacking here, and the same result is warranted. Plaintiffs’ claims against USTW and USTW’s third-party claims against Goodyear are each premised on the allegedly defective nature of the tire at issue. None of those claims have anything to do with the marketing or sale of any other tire. Plaintiffs are wrong to attempt to base the exercise of specific jurisdiction on activities to which their claims do not relate, and on products other than the tire at

issue. *See, e.g., Joseph v. The Goodyear Tire & Rubber Co.*, No. GD-17-6580, 2018 WL 7228605, at *3 (Pa. C.P. Allegheny Oct. 24, 2018) (concluding that plaintiffs' assertion of specific was unfounded, as their claims did not arise out of or relate to marketing or sale of tires other than the tire allegedly at issue in that case)

C. USTW's arguments on the inapplicability of collateral estoppel distract from the real issues.

30. Goodyear never before urged the application of collateral estoppel, so USTW's argument is a red herring. However, it warrants note that USTW has urged its application; USTW argued that the trial court's decision in *Anna Aybar* should bind this Court. (*See USTW's Opp'n 2-5* (June 5, 2018).)⁷

31. Of course, since USTW raised that argument in this case, the Second Department has concluded that the trial court's decision in *Anna Aybar* was wrong; vacated the *Anna Aybar* trial court's order; and granted Goodyear's motion to dismiss for lack of personal jurisdiction. In so doing, the Second Department recognized that Goodyear designed the tire at issue in Ohio and manufactured the tire at issue in Tennessee, and "did not specifically direct advertising of the subject tire at New York residents." *Anna Aybar*, 93 N.Y.S.3d at 161.

32. USTW now claims that its participation in the *Anna Aybar* proceedings (both at trial and on appeal) was insufficient, and that its participation in those proceedings should not be held against it. But its position runs contrary to the fact that, over Goodyear's and Ford's objections, USTW did participate in the *Anna Aybar* trial court proceeding; that it did present both a written brief and oral argument in the *Anna Aybar* appeal; and that it now has a motion for leave to appeal pending before the Court of Appeal.

⁷ In fact, that is ***the only argument*** that USTW raised in opposition to Goodyear's motion to dismiss, insofar as Goodyear sought dismissal for lack of personal jurisdiction.

33. Ultimately, USTW speaks out of both sides of its mouth. When it was convenient, USTW claimed that *Anna Aybar* precluded the parties from re-litigating the jurisdictional issues that are before this Court. Now, however—now that *Anna Aybar* cuts against it—USTW asserts that collateral estoppel is inapplicable.

34. Enough is enough. USTW's newfound arguments are barred by the doctrine of judicial estoppel, which “precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed.” *Tedesco v. Tedesco*, 64 A.D.3d 583, 584 (2d Dep’t 2009). Because USTW argued that it should be permitted to participate in the *Anna Aybar* proceedings and secured the right to do so, it cannot now claim that its participation in those proceedings was insufficient to protect its interests. *See id.*; *see also Festinger v. Edrich*, 32 A.D.3d 412, 413 (2d Dep’t 2006).

35. Thus, insofar as the Court deems it necessary to entertain this argument, it is meritless and should be disregarded.

CONCLUSION

36. This is USTW’s fourth bite at the apple. It argued in favor of the exercise of personal jurisdiction over Goodyear in *Anna Aybar*, both at trial and on appeal. It has moved the Court of Appeal for leave to present further argument on jurisdictional issues. And now it presents the same arguments in this action.

37. For all of the foregoing reasons, USTW’s request for leave to amend should be denied, and Goodyear’s motion to dismiss for lack of personal jurisdiction should be granted without further delay.

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DLA PIPER LLP (US)

Dated: March 22, 2019

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**REPLY AFFIRMATION OF WALSY K. SAEZ AGUIRRE, FOR THIRD-PARTY
DEFENDANT FORD MOTOR COMPANY, IN FURTHER SUPPORT
OF MOTION TO DISMISS, DATED MARCH 25, 2019 [730 - 757]**

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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,

**REPLY AFFIRMATION IN
FURTHER SUPPORT OF
MOTION TO DISMISS**

Index No. 703632/2017 [E-Filed]

Previously Index No. 9344/2014

- 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.

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

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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 reply to the opposition papers to Ford's motion to dismiss on jurisdictional grounds that have been submitted by Third-Party Plaintiff US Tires and Wheels of Queens, LLC ("US Tires") and the plaintiffs in this action with the exception of plaintiff Jose Aybar, who has not opposed this motion (hereinafter the "Plaintiffs"). US Tires' opposition to Ford's motion is embodied in a Cross-Motion, which seeks a stay of this action pending the outcome of appellate activities and permission to amend their third-party pleadings. Ford addresses US Tires' request for leave to amend in separate opposition papers. We note that US Tires' inclusion of their opposition arguments in their Cross-Motion does not entitle them to submit further papers, beyond their current submission, on the jurisdictional question. This Court should reject any form of sur-reply US Tires might try to submit on this issue.

PRELIMINARY STATEMENT

3. US Tires' and Plaintiffs' opposition papers improperly rely on stale case law that is no longer controlling on either a federal or state level. Wishing U.S. Supreme Court precedent away and ignoring the binding nature of New York Appellate Division decisions on New York trial courts can hardly be seen as any kind of truly substantive opposition. US Tires repeats *ad nauseam* that the New York Appellate Division, Second Department's decision 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") [hereinafter *Aybar*] "will be overturned on appeal." (See Adam C. Calvert Affirmation in Support of US Tires' Cross-Motion [hereinafter Calvert Aff.] Exhibit "K", at 2.). That is wishful thinking on their part, but it is not

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the law, and their fantasies about what might happen in the future certainly should not be a basis for overruling what is now binding appellate precedent.

4. Essentially, US Tires' and Plaintiffs' argument is that every court that has overruled the case law they cite in their opposition papers has been wrong. According to US Tires and Plaintiffs, the U.S. Supreme Court entirely got Due Process wrong in *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014) and *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549. US Tires and Plaintiffs also appear to believe that the U.S. Court of Appeals for the Second Circuit and the U.S. District Courts simply do not understand how to apply *Daimler* to large corporations with extensive nationwide and worldwide operations. They also apparently maintain that appellate state courts around the country¹ are wrong and misunderstood *Daimler* in finding that Ford was not subject to general jurisdiction within their States. Further, US Tires and Plaintiffs maintain that the Second Department was even more wrong and misunderstood not just *Daimler* and Due Process constraints on general personal jurisdiction but its own State's Business Corporation Law ("BCL") and long-arm statute when granting Ford's and Goodyear's motions to dismiss on appeal. In other words, their position is that current jurisprudence on personal jurisdiction at a federal and nationwide level is just wrong, and their belief in its "wrongness" should be enough for this Court to ignore what its Appellate Department and what the U.S. Supreme Court mandate.

5. Fortunately, the Court need not waste its time with such self-serving arguments. In spite of US Tires' and Plaintiffs' displeasure, *Aybar* is controlling here and compels this Court to grant Ford's pending motion to dismiss. See *Gutin v. Frank Mascali & Sons, Inc.*, 11 N.Y.2d

¹ See, e.g., *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); *Erwin v. Ford Motor Co.*, No. 8:16-cv-01322-SCB-AEP, 2016 WL 7655398, at *12 (M.D. Fla. Aug. 31, 2016); *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1036, 1039 (Colo. 2016); *Pitts v. Ford Motor Company*, 127 F. Supp. 3d 676, 2015 U.S. Dist. LEXIS 121673 (S.D. Miss. 2015).

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97, 99, 181 N.E.2d 449, 450 (Ct. App. 1962) ("It is settled that the discretion of the Supreme Court is controlled by the Appellate Division..."); *Stewart v. Volkswagen*, 181 A.D.2d 4 (2d Dep't 1992) *overturned on other grounds* ("the rule in New York is that the trial courts must follow an Appellate Division precedent..."); *Mountain View Coach v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) ("the doctrine of stare decisis requires trial courts...to follow precedents set by the Appellate Division of another department until the Court of Appeals or [their Department] pronounces a contrary rule"). The fact is that US Tires has not even obtained leave to appeal the decision and, until the New York Court of Appeals decides differently, *Aybar* remains the law.

6. Either way, contrary to US Tires' and Plaintiffs' arguments, there is no basis to find specific jurisdiction over Ford under the facts of this case because US Tires' third-party claims against Ford *do not arise from* any contact Ford has with New York. Indeed, Ford does not have any case-specific contacts with New York and therefore, it cannot be subject to personal jurisdiction under CPLR §§ 302(a)(1), (a)(3)(i), or (a)(3)(ii) or the Due Process Clause. Accordingly, Ford's motion must be granted.

STATEMENT OF RELEVANT FACTS

7. Ford respectfully refers the Court to its original motion papers for a full recitation of the facts relevant to this motion, but wishes to correct key factual inaccuracies stated in US Tires' and Plaintiffs' opposition papers.

8. In its Third-Party Summons and Complaint (annexed as **Exhibit "B"**) US Tires seeks indemnification and contribution from Ford and Goodyear for "affirmative active and primary negligence" based on Plaintiffs' strict products liability, negligence, breach of warranty and deceptive trade practices claims against Ford.

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9. As stated in the Affidavit of Robert Pascarella (annexed as **Exhibit "C"**) Ford did not design, manufacture, assemble or sell the Subject Vehicle in New York. (Pascarella Aff., Ex. C ¶¶ 5-7.) Ford does not have any Ford Explorer manufacturing plants in New York. (*Id.* at ¶ 8.) Further, as indicated in the affidavit Ford submitted in support of its motion to dismiss *Anna Aybar, et al. v. Ford Motor Company, et al.*, Index No. 706909/2015 ("Action 3"), Ford did not service the Subject Vehicles in New York. (Affidavit of Elizabeth Dwyer, **Exhibit "D,"** ¶¶ 10-11.)

10. In 2002, Ford sold the Subject Vehicle to an independently-owned Ford dealership in Ohio. (Pascarella Aff., Ex. C ¶ 5; Dwyer Aff., Ex D ¶ 5.) Around 2009, the Subject Vehicle entered New York when it was sold and registered to an individual named Jose Velez, without any involvement by Ford. (Dwyer Aff., Ex D ¶ 6.)

STANDARD

11. Where a defendant objects to the court's exercise of personal jurisdiction, *it is the plaintiff (including a third-party plaintiff) who bears the ultimate burden of proving jurisdiction based on evidence. See Aybar, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *8; Mejia-Haffner v. Killington, Ltd., 119 A.D.3d 912, 914, 990 N.Y.S. 2d 561, 564 (2d Dep't 2014).* Plaintiffs seek to obfuscate this standard by arguing in their opposition papers that Ford has the burden to submit evidence showing that it is not subject to personal jurisdiction under CPLR § 302(a)(1), -(2), -(3) or -(4). (See Michael A. Taub's Opposition to Cross-Motion to Dismiss Cause of Action Against Third-Party Defendant, Ford Motor Company [hereinafter Taub Aff.] (**Exhibit "L"**) ¶ 5.) This is simply not Ford's burden. Notably, as Plaintiffs do not assert any claims against Ford in this action, US Tires is the only party required to establish jurisdiction over Ford

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here. In any event, as established in *Aybar*, Ford is not subject to personal jurisdiction in this action, and therefore, US Tires' third-party claims against Ford must be dismissed.

ARGUMENT

I. THIS COURT IS BOUND TO FOLLOW *AYBAR*.

12. This Court is compelled to grant Ford's cross-motion to dismiss based on *Aybar*. Plaintiffs' request that the Court "alleviate itself from the constraints of *Daimler*" is absurd because the Court simply does not have discretion to render a different ruling. (Taub Aff. ¶ 14.) Trial courts are bound to apply the law as promulgated by the Appellate Division within their particular Judicial Department. *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014). In fact, at this juncture, *all trial courts in New York are bound* and not just guided by *Aybar*. See *Mountain View*, 102 A.D.2d at 664. Accordingly, Plaintiffs and US Tires cannot ask this Court to depart from the Second Department's decision in *Aybar*.

13. Further, US Tires' self-serving argument that *Aybar* will be overturned cannot be given any weight by this Court. It is not this Court's domain to speculate what the Court of Appeals will or will not decide. Notably, US Tires has not even been yet granted leave to appeal. Further, even if US Tires and Plaintiffs had any arguments for why *Aybar* was wrongly decided (which they do not), "the mere existence" of arguments against judicial precedent "is not sufficient, in and of itself, to compel the court to overturn judicial precedent." *Dufel v. Green*, 198 A.D.2d 640, 640, 603 N.Y.S.2d 624, 625 (3d Dep't 1993), aff'd, 84 N.Y.2d 795 (1995).

14. In *Aybar*, the Second Department held that Ford is not subject to personal jurisdiction in this case after a thorough and well-reasoned historical analysis of personal jurisdictional case law and a methodical application of that case law to the facts presented. *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). In its decision, the Court established that a foreign corporation *does not* become subject to general personal jurisdiction in New York

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through the mere act of registering to do business in or appointing an agent for service of process within New York. *Id.* at *6-7, 15. *Aybar* also settled that Ford does not have sufficiently “continuous and systematic contacts” with New York as to render it to be “at home” within the state and thus make it subject to general personal jurisdiction. *Id.* at *13-14.

(a) **The Second Department Has Established that Business Registration in Compliance with BCL § 304 Does Not Constitute Consent to be Subjected to Personal Jurisdiction in New York.**

15. In *Aybar*, the Second Department thoroughly analyzed New York and federal jurisprudence construing the act of registering to do business in and designating an agent for service in New York as consent to general jurisdiction. *See id.* at *16-25. The Court ruled that those cases are no longer good law in light of *Daimler*. *Id.* The Court explained that “[t]he consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has consented to be ‘found’ in New York.” *Id.* at *23-24. But this is no longer permissible because the U.S. Supreme Court’s modern decisions, including *Daimler*, “made clear . . . that general jurisdiction cannot be exercise solely on such presence.” *Id.*

16. The Second Department’s holding is in accord with the vast majority of cases in New York and beyond, before *Daimler* and after. *See, e.g., Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-183 (5th Cir. 1992) (noting that “mere service on a corporate agent . . . displays a fundamental misconception of corporate jurisdictional principles” and is “directly contrary to the historical rationale of” the U.S. Supreme Court’s personal-jurisdiction decisions); *Consol. Dev. Co. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (“Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation.”); *Sandstrom v.*

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ChemLawn Corp., 904 F.2d 83, 89 n.6 (1st Cir. 1990) (rejecting the argument that “licensure and appointment of an agent for service of process constituted a consensual submission to the jurisdiction of Maine’s courts”); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (a corporation’s compliance with a State’s registration act “cannot satisfy-standing alone-the demands of due process”); *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require [more than] mere compliance with state [registration] statutes.”); *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) (“Service on a designated agent alone does not establish minimum contact.”); *Freeman v. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000) (“[C]ourts and legal scholars have agreed that the mere act of appointing an agent to receive service of process, by itself, does not subject a non-resident corporation to general jurisdiction.”) Indeed, courts in New York have held that *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939) and the like are improperly grounded in notions of territorialism are no longer good law. See, e.g., *Brown v. Lockheed-Martin Corp.*, 814 F.3d 619, 639, 2016 U.S. App. LEXIS 2763, at *50-52 (2d Cir. 2016).

17. In their opposition, US Tires and Plaintiffs contend that the Second Department somehow misapprehended the binding force of the Court of Appeals’ decision in *Bagdon* and the U.S. Supreme Court’s decision in *Neirbo*. This contention is flawed because it presumes that the U.S. Supreme Court’s most-recent decisions on the exercise of general jurisdiction over seventy years later in *Daimler* and *BNSF* did not overturn *Bagdon* and *Neirbo*.

18. Plaintiffs and US Tires made the exact same arguments in their merits brief before the Second Department. (See Plaintiffs’ Br. at 9-18; US Tires’ Br. at 8-24 (briefs collectively annexed as Exhibit “E”).) They argued that *Bagdon* and *Neirbo* were binding and not abrogated

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by *Daimler* or *BNSF*. But the Second Department already considered, addressed, and rejected these arguments. In *Aybar*, the Court acknowledged both *Bagdon* and *Neirbo*, and explained how the U.S. Supreme Court's later personal jurisdiction jurisprudence, from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to *Daimler* and *BNSF*, repudiated the foundations upon which *Bagdon* and *Neirbo* were based. 2019 N.Y. App. Div. LEXIS 444 (Ex. A), *13. The Court specifically found that *Bagdon* was no longer binding because, among other things, the Court of Appeals had not "cited *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided." *Id.* The Court correctly interpreted that as a "strong indicator that its rationale is confined to that era, which was dominated by...territorial thinking, and that it no longer holds in the post-*Daimler* landscape." *Id.* at 14. The Court thus held that the Court of Appeals' failure to rely on *Bagdon* after *International Shoe* confirmed that *Bagdon* did not survive *International Shoe* or the cases decided after, and that *Bagdon has no role in the modern era of personal jurisdiction*. Despite US Tires' and Plaintiffs' insistence, New York courts are no longer bound by Court of Appeals opinions abrogated by intervening Supreme Court precedent. See *Hunt v. Werner Spitz Const. Co.*, 152 A.D.2d 936, 936 (4th Dep't 1989); David D. Siegel, New York Practice § 449 (6th ed.) (Dec. 2018 update).

19. US Tires' and Plaintiffs' specious argument that *Aybar* is "not yet settled" precedent merely because it overturns pre-*Daimler* cases is meritless. (See Taub Aff. ¶ 9.) Simply disagreeing with the Second Department's decision or wanting to appeal *Aybar* cannot overturn the Second Department's case law. A decision by our appellate courts or the U.S. Supreme Court does not have to "age" a certain length of time before it becomes binding. It is binding and controlling from the moment it is issued.

20. Further, US Tires and Plaintiffs misrepresent Ford's arguments as founded on public policy, even though Ford never asked the Second Department to overturn *Bagdon* based on public policy grounds. US Tires claims that Ford "cr[ies] prejudice at the prospect of litigating this case in New York." (Calvert Aff. ¶ 20.) But Ford's argument is not based on prejudice or public policy; it is simply based on the fact that the U.S. Supreme Court has the authority to abrogate precedent by State appellate courts, and it did. Ford argued that the U.S. Supreme Court abrogated *Bagdon* through its intervening personal-jurisdiction case law and the Second Department agreed. (See Ford and Goodyear's Joint Appellate Brief, **Exhibit "F,"** at 29-34.) See also *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *9-14. As discussed in Ford's original papers, there is no basis to interpret compliance with BCL § 304 as consent to general jurisdiction and such interpretation of the statute would render it unconstitutional. (Walsy K. Saez Aguirre Affirmation in Support of Ford's Motion to Dismiss ¶¶ 52-62.)

(b) It is Also Established that Ford Is Not Subject to General Personal Jurisdiction in New York.

21. The Second Department established that Ford does not have sufficient contacts with New York as to permit the exercise of general jurisdiction. *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *4, 8-15. The Court explicitly rejected Plaintiffs' arguments that Ford was subject to general jurisdiction because it:

...has been authorized to do business in New York since 1920, it operates numerous facilities in New York, it owns property in New York and spends at least \$150 million to maintain the property, it employs a significant numbers of New York residents, it contracts with hundreds of dealerships in New York to sell its products under the Ford brand name, and it has frequently been a litigant in New York courts. *Id.* at *13.

22. Citing *BNSF*, the Court noted that since *Daimler*, the Supreme Court has established that "standing alone, mere 'in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims that are unrelated to any activity in [the forum

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State].” *Id.* at *11. The Court noted—correctly—that *Daimler* “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide” to assess whether a foreign corporate defendant’s affiliations with the forum state are so “continuous and systematic” as to render it essentially at home in the state. *Id.* at *11-12, 13. Applying this framework, the Court found that an appraisal of the magnitude of Ford’s activities in New York in the context of Ford’s activities worldwide demonstrates that Ford cannot be said to be essentially “at home” in New York. *Id.* at *13.

23. Plaintiffs’ and US Tires’ opposition papers focus on denying the immutable fact that *Daimler* has altered the landscape of *in personam* jurisdiction. *See id.* They cannot present meritorious legal arguments on this issue. Instead, Plaintiffs mistakenly state that “it has been well settled under New York law...that large corporations” like Ford “are subject to both general and specific jurisdiction in New York courts” based on “continuous, systematic, long-standing business in New York” and derivation of “substantial income from such persistent business operations.” (Taub Aff. ¶ 4.) But conjuring “traditional personal jurisdiction” and pretending that *Daimler*, *BNSF* and *Aybar* never occurred does not make it true. The Second Department has already squarely rejected Plaintiffs’ arguments.

24. Similarly, US Tires ignores *Daimler* and focuses on arguing that this Court should have general jurisdiction over Ford in this case because “New York has a substantial interest in this case” and US Tires would not have a forum to pursue its indemnification and contribution claims against Ford. (*See* Calvert Aff. ¶¶ 18, 20.) Substantial interest, however, is simply not the standard to determine whether a foreign corporation is subject to general personal jurisdiction in a State. Personal jurisdiction must be established as to each defendant, respecting each defendant’s Due Process rights. *See Bristol-Myers*, 137 S. Ct. at 1783; *Rush v. Savchuk*, 444

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U.S. 320, 332 (1980). Accordingly, US Tires' status as a third-party defendant in this case bears no relevance whatsoever as to whether *in personam* jurisdiction can be asserted over Ford.

(c) **The Second Department Recognized the "Exceptional Circumstances" Envisioned in *Daimler* and Determined that They Did Not Exist in this Case.**

25. In *Aybar*, the Second Department acknowledged and explained the exceptional circumstances envisioned in *Daimler* while discussing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S. Ct. 413 (1952). See 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *4, 8-15. It determined that those exceptional circumstances did not exist in this case. *Id.* at *11-15.

26. Plaintiffs' self-serving claim that this case presents "exceptional circumstances" warranting an outcome different than *Daimler* lacks merit. Plaintiffs cannot cite any case law for their inventive proposition that "exceptional circumstances" exist simply because this is a third-party action. Neither can they show support for their argument that "special circumstances" exist based on their mere speculation that a complex automobile product liability action such as this case may involve manufacturers and suppliers in many different states and may require separate actions in different fora.

27. Once the Court applies *Aybar*, it need not address the balance of this Reply Affirmation. The remainder of this Affirmation addresses US Tires' and Plaintiffs' arguments only in the abundance of caution and to preserve the record.

II. COLLATERAL ESTOPPEL APPLIES TO THE ISSUE OF WHETHER FORD IS SUBJECT TO GENERAL AND SPECIFIC JURISDICTION IN THIS ACTION.

28. Collateral estoppel applies here with respect to the question of whether Ford and Goodyear are subject to personal jurisdiction in New York under the jurisdictional facts of this case. Indeed, before Ford raised this argument, *US Tires agreed that collateral estoppel applies*. US Tires argued in its opposition to Goodyear's motion to dismiss (Motion No. 017) that Ford

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and Goodyear were collaterally estopped from re-litigating the issue of whether this Court has personal jurisdiction over them in this action (even when, back then, the parties had briefed and argued an appeal and were waiting for a decision from the Second Department). (*See US Tires' Affirmation in Opposition to Goodyear Motion to Dismiss [hereinafter Calvert Aff. Goodyear Mot.], Exhibit "G" ¶¶ 2-10.*) Of course US Tires maintained that collateral estoppel applied only when it was convenient. Now it claims collateral estoppel is inapplicable simply because the Second Department happened to rule against it and Plaintiffs in *Aybar*.

29. Collateral estoppel *only* requires two elements: identity of issues, and a full and fair opportunity to contest the decision said to be controlling. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-501, 467 N.E.2d 487, 490 (Ct. App. 1984); *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729 (Ct. App. 1969). The issue must have been “necessarily decided in the prior action” and be “decisive of the present action,” and must be the same issue to be decided in the second action, such that “a different judgment in the second would destroy or impair rights or interests established by the first.” *Ryan*, 62 N.Y.2d at 500-501; *see also Schwartz*, 24 N.Y.2d at 71. Further, the party against whom the doctrine would apply must have had a full and fair opportunity to challenge the decision. *Schwartz*, 24 N.Y.2d at 71. The doctrine is based on the principle that “[o]ne who has had his day in court should not be permitted to [re]-litigate the question anew.” *Id.* at 70. It is “insignificant if not irrelevant” whether the party against whom collateral estoppel is sought was actually a named party in the prior action, or whether the parties in both actions were “true adversaries.” *Id.* at 71, 72.

30. US Tires cannot disprove that the first element of collateral estoppel is satisfied here. The only argument US Tires presents to support its contention that the issues in *Aybar* and this case are not identical is that Plaintiffs asserted products liability claims against Ford in

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Aybar 3, and here, US Tires asserts third-party claims against Ford for contribution and indemnity. However, this argument confounds issues with claims, and identity of claims is simply not an element of collateral estoppel. The issue in *Aybar* and in this motion is whether the Court can exercise personal jurisdiction over Ford under the facts giving rise to this action (Action 1) and Action 3. Significantly, *US Tires has already admitted that there is identity of issues.* (See Calvert Aff. Goodyear Mot., Ex. G ¶ 7.)

31. In any event, US Tires has admitted that its “third-party [C]omplaint against Goodyear and Ford in this action is based on the plaintiffs’ claims against Ford and Goodyear in the other actions [Action 3].” (*Id.* ¶ 4.) As US Tires’ indemnity and contribution claims against Ford in this action are premised on the very same facts as Plaintiffs’ products liability claims against Ford in Action 3, the difference in the claims asserted against Ford in Actions 1 and 3 is irrelevant for purposes of the issue of this Court has personal jurisdiction over Ford in both actions.

32. The authorities US Tires cites in support of its argument that identity of issue is not present are inapposite and easily distinguishable. Unlike Ford, US Tires fails to cite a single case where personal jurisdiction was the issue. Instead, it cites cases involving liability findings,² and cases where the party seeking to apply collateral estoppel tried to obtain a decision

² *City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124 (2007); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (1985); *Peresluha v. City of New York*, 60 A.D.2d 226 (1st Dep’t 1977) all deal with the application of collateral estoppel with respect to liability issues. That is not what Ford is trying to do here, as this motion does not concern liability and is not on the merits of the action.

City of New York dealt with the application of collateral estoppel to issues relating to liability, since it concerned an order granting summary judgment (a motion on the merits) in favor of a corporation. That case dealt with whether a granting of summary judgment against a defendant in the first action (based on a finding that he owed no legal duty towards the general public) would estop another party from arguing in a subsequent action that the same defendant did not properly perform contractual duties. *Kaufman* deals with whether jury findings on liability in a prior case had a collateral estoppel effect in a subsequent action. *Perusha* involves the application of collateral estoppel to a finding of negligence.

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on an issue that was starkly different than the one decided in the prior action.³ That is simply not the case here.

33. Further, US Tires cannot dispute that the second element of collateral estoppel is met. US Tires' disingenuous position that it did not have a full and fair opportunity to litigate the issue of personal jurisdiction over Ford is meritless. US Tires argues that it did not have a full and fair opportunity to litigate the issue because (i) it not a named party in Action 3, (ii) was not in privity with Plaintiffs in Action 3, (iii) was never served with the motions, and (iv) Ford and Goodyear opposed its motion for leave to appeal to the Court of Appeals based on lack of standing. These arguments are mere red herrings.

34. First, the fact is that, despite Ford's protestation, this Court not only accepted US Tires' Affirmation in Opposition to Ford's and Goodyear's motions (annexed as **Exhibit "H"**) but also permitted US Tires to present oral arguments on the motions on or about December 9, 2015. Additionally, the Second Department accepted US Tires' brief in opposition to Ford's and Goodyear's motions, permitted US Tires to present oral arguments, and even addressed US Tires' arguments directly in *Aybar*. See *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *7-8, 8 n.1, 15-25. Accordingly, US Tires has no basis to deny that it fully participated *twice* in litigating the issue of personal jurisdiction over Ford in this action. What US Tires wants now is a third bite at the apple.

³ *City of New York, Weiss v. Manfredi*, 83 N.Y.2d 974 (1994) and *Peresluah* all dealt with attempts to apply collateral estoppel where there was no identity of issues. In *City of New York*, the issue in the first action was a finding that a defendant did not owe a (noncontractual) duty to the general public and the issue in the second action was whether the defendant breached contractual duties. In *Weiss*, the issue in the first action was whether the settling defendants engaged in fraud, collusion, mistake of accident, which would vitiate a settlement, and the issue in the subsequent case was whether there was legal malpractice. In *Kaufman*, the issue in the first action was a finding of liability under a theory of negligence, and the issue in the second action was liability under the theory of malicious prosecution. Unlike the parties in *City of New York, Weiss* and *Peresluah*, Ford seeks to apply collateral estoppel to the single issue of whether this Court has personal jurisdiction over it in two actions involving the same facts.

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35. Second, collateral estoppel does not require privity or personal service of papers or motions. It is true that courts scrutinize collateral estoppel “with care [in] any situation where [it] is asserted by a person who was neither a party nor in privity with a party to the first case, to make certain no unfairness will result to the prior litigant if the estoppel is applied.” *Vincent v. Thompson*, 50 A.D.2d 211, 220, 377 N.Y.S.2d 118, 127 (2d Dep’t 1969). But nothing prevents collateral estoppel from being applied in instances where the parties were not the same in both suits. US Tires appears to conflate collateral estoppel with the doctrine of *res judicata*, which *does* require identity of parties. See *City of New York*, 9 N.Y.3d at 127 (“One linchpin of *res judicata* is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim *between* the parties has been previously ‘brought to a final conclusion’.”) (emphasis in original); *Evergreen Bank, N.A. v. Dashnaw*, 246 A.D.2d 814, 815, 668 N.Y.S.2d 256, 257 (3d Dep’t) (“*Res judicata* bars future litigation between the same parties, or those in privity with the parties...”) (emphasis added). See also *Schwartz*, 24 N.Y.2d at 71-72 (discussing that the distinction of whether the parties in the second action were actual adversaries with the parties in the second action is insignificant for determining the application of collateral estoppel).

36. None of the cases US Tires cites support its flawed proposition that privity is required in collateral estoppel. *D’Arata v. New York Century Mutual Fire Insurance Company*, 76 N.Y.2d 659, 664, 564 N.E.2d 634, 637 (Ct. App. 1990) merely notes that privity “is an amorphous concept,” and provides an inclusive, not exclusive list, of instances where privity is generally found. Nowhere does *D’Arata* say that privity is an element of collateral estoppel. Further, US Tires’ reliance on *Taylor v. Sturgell*, 128 S. Ct. 2161, 553 U.S. 880 (2008) and

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Evergreen, 246 A.D.2d at 814 is mistaken. Those cases concern *res judicata* and do not even discuss collateral estoppel, which is a distinct doctrine.

37. As privity is simply not an element of collateral estoppel, the Court need not entertain US Tires' discussion of *Shanley v. Callanan Industries*, 54 N.Y.2d 52 (1981) or *Ecumenical Task Force of Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency*, 179 A.D.2d 261 (4th Dep't 1992). Notably, in *Shanley*, the Court of Appeals determined that collateral estoppel was not applicable because there was no identity of issues. The decision was not based on lack of identity of parties. See *Shanley*, 54 N.Y.2d at 57 ("The doctrine of collateral estoppel is not applicable in this case. The issue of Callanan's negligence simply was not litigated or necessarily decided in the first action.")

38. Further, it must be noted that in *Taylor*, the U.S. Supreme Court emphasized that it has "never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case," and declined to elaborate on that issue. 128 S. Ct. at 2179. Although *Taylor* appears to discuss preclusion generally, it only discusses preclusion in the context of the issue of "virtual representation," which is not present here. In that case, the question was whether an individual was precluded from bringing a FOIA claim against the Federal Aviation Administration simply because his friend, independently, had previously brought a FOIA suit against the FAA seeking the same technical documents he sought in the second action. The FAA argued that the petitioner should be precluded because his friend had litigated the issue and his friend was his "virtual representative." That is not the case here. Ford is not arguing in this motion that US Tires should be precluded based on the participation of a possibly related entity or individual in the prior action. US Tires must be precluded from re-

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litigating the issue of personal jurisdiction over Ford because US Tires *itself* already participated directly in litigating that issue, and it lost.

39. Lastly, US Tires' argument that collateral estoppel cannot be applied because the Second Department did not rule on whether there is personal jurisdiction is equally devoid of merit. Although the Court stated that it did not consider specific jurisdiction over Ford and Goodyear (because US Tires did not raise that issue before the motion court), its unanimous decision to grant Ford's and Goodyear's motions to dismiss was not equivocal or conditional. The Court clearly reversed Judge Thomas D. Raffaele's May 31, 2016 Order on the law, with costs, and granted Ford's motion to dismiss on appeal. *Id.* at *7-8. That should be the end of it. US Tires' and Plaintiffs' rebuke of *Daimler* and *Aybar* is inconsequential, as it is not a valid standard to deny Ford's instant motion.

III. PLAINTIFFS AND US TIRES CANNOT ESTABLISH SPECIFIC PERSONAL JURISDICTION OVER FORD.

40. Plaintiffs and US Tires maintain that Ford is subject to specific jurisdiction in this case because Ford placed Ford Explorers into New York's stream of commerce; the requirements of CPLR §§ 302(a)(1), 302(a)(2)(i) or 302(a)(2)(ii) are satisfied; and the exercise of specific jurisdiction over Ford in this case comports with Due Process. Once again, these arguments have no legal basis.

41. First, all subsections of CPLR § 302 require the claim over which jurisdiction is to be asserted to *arise from* any of the contacts specifically listed under the statute. See CPLR § 302. Second, specific jurisdiction cannot be asserted consistent with Due Process unless a defendant's *suit-related* conduct creates a *substantial* connection with the forum State. *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122, 571 U.S. 277, 284 (2014). Third, the U.S. Supreme Court has rejected the "stream of commerce" theory as a basis for specific jurisdiction. See *Bristol-*

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Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017) (“For specific jurisdiction, a defendant’s general connections with the forum are not enough.”) Here, Ford is not subject to specific jurisdiction in New York because US Tires’ and Plaintiffs’ claims against Ford do not arise from any contact Ford has with New York.

(a) Plaintiffs and US Tires Cannot Establish Specific Jurisdiction Over Ford Under New York’s Long-Arm Statute.

42. Ford is not subject to specific jurisdiction in this matter under New York’s long-arm statute because this action *does not* arise out of, or even relate to Ford’s contacts with New York. In fact, this Court found that New York’s long-arm statute does not provide a basis for asserting specific jurisdiction over Ford in this action. *See Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, at *5, 2016 N.Y. Slip. Op. 31139(U), 3 (Sup. Ct., NY County 2016).

43. The long-arm statute permits New York courts to assert specific jurisdiction over non-domiciliary only “[a]s to a cause of action *arising from* any of the *acts* [by the defendant] enumerated in th[at] section.” CPLR § 302 (emphasis added). *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). This requirement applies to *all* subsections of the long-arm statute. *See* CPLR § 302. Additionally, courts have held that the long-arm statute requires an “articulable nexus” or “substantial relationship” between the plaintiffs’ claims and the defendant’s New York activities. *See Fernandez v. Daimler Chrysler AG*, 143 A.D.3d 765, 767 (2d Dep’t 2016) (holding there was no specific jurisdiction under CPLR § 302 in a case involving automobile product liability claims where the plaintiffs failed to show that their claims “arose from any of [the manufacturer’s] activities in New York”); *Krajewski v. Osterlund, Inc.*, 111 A.D.2d 905, 906 (2d Dep’t 1985) (finding there was no

specific jurisdiction over a defendant manufacturer in an automobile product defect case where the crash occurred in Indiana and there was no nexus between the defendant's "business transacted in New York or the contracts for shipment of defendant's products into New York," and plaintiff's claims).

44. The scope of the New York long-arm statute is *narrower and more restrictive* than the constitutional test for jurisdiction. *See Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 512, 881 N.E.2d 830, 837-838 (Ct. App. 2007). The statute does not extend as far as it is permitted under the Constitution. *See, e.g., Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d. 460, 471, 522 N.E.2d 40, 46 (Ct. App. 1988). Accordingly, if Ford is not subject to personal jurisdiction in this action under the constitutional Due Process test, it cannot be subject to personal jurisdiction under New York's long-arm statute.

45. Here, Plaintiffs and US Tires fail to satisfy the requirements under any branch of CPLR 302 because neither Plaintiffs' nor US Tires' respective claims against Ford arise from acts Ford committed in New York. (*See supra* Section III(b).) Also, Plaintiffs' and US Tires' arguments on specific personal jurisdiction under Sections 302(a)(3)(i) and 302(a)(3)(ii) are meritless because they—like the majority of their arguments—seek support from inapposite cases or rely on wrong legal standards.

i. *US Tires cannot establish specific jurisdiction under CPLR § 302(a)(3)(i).*

46. US Tires asks the Court to assert specific jurisdiction over Ford under CPLR § 302(a)(3)(i) based on its claim that Ford marketed Ford Explorers in New York. This argument fails because, as discussed, the U.S. Supreme Court has abrogated "stream of commerce" theory of personal jurisdiction.

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47. The New York cases US Tires cites for this proposition are inapposite, as they either involve different facts, or are no longer good law. *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (Ct. App. 2016) and *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982) are inapposite because they involved defendants who actually had case-specific connections with New York. In *Rushaid*, there was evidence that the defendants knowingly and actively used New York accounts to transfer money from laundered profits to the plaintiff's employees who allegedly took bribes and kickbacks from the plaintiff employers. The employers asserted claims against the defendant banks for aiding and abetting the employees in committing torts against them. Unsurprisingly, the Court of Appeals found that the defendant banks transacted case-specific business in New York and were subject to specific jurisdiction under the long-arm statute.

48. In *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982) a manufacturer was found to have case-specific contacts with New York based on evidence that the manufacturer sold the allegedly defective product to the plaintiff in New York through a retailer. Unlike the defendants in *Rushaid* and *Tonns*, Ford did not conduct any business in New York with respect to the Subject Vehicle. (See *supra* ¶ 58.)

49. Similarly, *Singer v. Walker*, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964) involves a manufacturer who had case-specific contacts with New York. The manufacturer in *Singer* was found to be responsible for circulating the subject hammer and physically delivering it to the plaintiff in New York. Unlike the plaintiffs in this case, the plaintiff in *Singer* purchased the subject product directly from a New York dealer of the manufacturer by a direct mail order, using a catalogue which the defendant manufacturer had mailed to him. *Id.* at 287-289. In its analysis, the First Department noted that the fact that plaintiff "obtained possession of the hammer in New York [was] an essential nexus to sustain jurisdiction." *Id.* at 290. Here, Ford

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was not responsible for circulating the Subject Vehicle into New York. Ford did not ship or deliver the Subject Vehicle to Plaintiffs in New York. Also, Plaintiffs did not order or purchase the Subject Vehicle using a marketing material directly sent to them by Ford. Plaintiff Jose Aybar did not even purchase the Subject Vehicle from Ford. Accordingly, a comparison to *Singer* is completely inapposite.

50. US Tires' citation of *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 2016 U.S. App. LEXIS 23563 (2d Cir. 2016) is also mistaken. *EMI Christian* does not discuss New York's long-arm statute at all and therefore does not support US Tires' argument specific jurisdiction is proper under Section 302(a)(1) applies. Lastly, the out-of-state cases US Tires cites for this proposition do not merit the Court's attention because New York's long-arm statute is unique compared to other State's jurisdictional statutes in that it is narrower and more restrictive than constitutional limits. As explained, US Tires cannot provide a legal basis for its argument that Ford is subject to specific jurisdiction under Section 302(a)(1).

ii. US Tires' Argument that Ford is subject to specific jurisdiction under CPLR § 302(a)(3) is devoid of merit because it relies on the wrong standard for injury.

51. US Tires cannot establish jurisdiction under Section 302(a)(3) because the torts it claims Ford committed did not cause injury in New York within the meaning of CPLR § 302(a)(3). The Second Department has clearly established that under CPLR § 302(a)(3), the location 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).

52. Here, based on *Paterno* as well as Plaintiffs' and US Tires' theories, the only events that may be deemed to have originally caused the injury to Plaintiffs and US Tires are the

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accident itself and the defendants' alleged tortious conduct. US Tires is mistaken in arguing that the event causing injury would be a judgment in favor of the plaintiffs. In this third-party pleadings, US Tires claims that if it is "held liable to anyone in this action, its liability and claims will have arise out of the affirmative active and primary negligence" of Ford. (See Third-Party Complaint ¶¶ 4-5.) Also, in its proposed Amended Third-Party Complaint (Exhibit "J") (which has not been approved by the Court, and which Ford opposes through separate papers), US Tires claims that Ford "committed a tortious act without the State of New York causing injury to person or property to person or property within the state in its manufacturing and sale of the allegedly defective vehicle." (Prop. Third-Party Am. Compl. Ex. J ¶ 16.) As a result, as between Ford and US Tires, the injury to US Tires is a finding that US Tires is liable to anyone, and the original event purported to have caused that injury is Ford's alleged "affirmative active and primary negligence" in manufacturing, designing and/or selling the vehicle. (Third-Party Complaint, Ex. B ¶¶ 4-5.) As between Plaintiffs and Ford, the injury to Plaintiffs is the subject accident and the original event purported to have caused that injury is Ford's alleged tortious conduct in manufacturing, designing, assembling and/or selling the Subject Vehicle. (Compl. Action 3, Ex. I ¶¶ 20, 47.) None of Ford's alleged tortious conduct as to US Tires or Plaintiffs happened in New York. As neither the accident nor Ford's alleged tortious conduct occurred within New York, the injury cannot be deemed to have occurred in New York. Therefore, Plaintiffs and US Tires have no basis to argue that Ford is subject to specific jurisdiction under Section 302(a)(3).

(b) The "Stream of Commerce" Theory Is Not a Valid Basis for Specific Jurisdiction.

53. Plaintiffs and US Tires contention that Ford is subject to specific jurisdiction in this case because it generally sold vehicles of the same model as the Subject Vehicle in New

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York, and placed the Subject Vehicle into the stream of commerce, is not supported by the law. In *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1987), which US Tires erroneously cites for this proposition, the U.S. Supreme Court actually held that “the ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about *by an action of the defendant purposefully directed towards the forum State.*” 480 U.S. at 112 (emphasis in original). The Court then explained that “[t]he placement of a product into the stream of commerce, without more, is *not* an act of the defendant purposefully directed toward the forum State.” *Id.* (emphasis added). The Court also noted that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” *Id.*

54. US Tires’ reliance on *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 297 (1980) for this proposition is similarly unavailing. US Tires’ quote from *World-Wide Volkswagen* is dictum. The defendants challenging personal jurisdiction in *World-Wide Volkswagen* were a regional distributor and an individual dealership; the two vehicle manufacturers named as defendants did not challenge personal jurisdiction. The Court’s statement regarding the stream of commerce as applied to personal jurisdiction over vehicle manufacturers was dictum because it had no bearing on the Court’s decision. See *Colonial City Traction Co. v. Kingston C. R. Co.*, 154 N.Y. 493, 495 (Ct. App. 1897) (“If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court.”). As a result, the passage US Tires quotes from *World-Wide Volkswagen* is in no way binding upon this court. See, e.g., *People v. Taylor*, 9 N.Y.3d 129, 164

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(Ct. App. 2007) (quoting *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979)) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”); *People ex rel. Abell v. Clarkson*, 217 A.D. 746, 747 (Ct. App. 1926) (noting that anything that was “merely dicta” was “in no way binding upon” the court); *James v. Farina*, No. 450170/2016, 2019 N.Y.L.J. LEXIS 792, at *31 (1st Dep’t March 18, 2019) (noting that the court was not bound by the dicta in two opinions).

55. The U.S. Supreme Court has rejected the “stream of commerce” theory as the sole basis for specific jurisdiction. See, e.g., *Bristol-Myers*, 137 S. Ct. at 1781 (“For specific jurisdiction, a defendant’s general connections with the forum are not enough.”); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011) (nothing that a defendant’s “continuous activity of some sorts within a state is not enough to support the demand that a corporation be amenable to suits unrelated to that activity”); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.) (noting that the stream of commerce theory “does not amend the general rule[s] of personal jurisdiction”). New York federal and appellate courts have also declined to exercise specific personal jurisdiction solely on the basis of the stream of commerce theory. See, e.g., *Ikeda v. J Sisters 57, Inc.*, No. 14-cv-3570 (ER), 2015 U.S. Dist. LEXIS 87783, at *8 (S.D.N.Y. 2015); *Davidson v. Honeywell Int’l Inc.*, No. 14 Civ. 3886 (LGS), 2015 U.S. Dist. LEXIS 40813, at *3 (S.D.N.Y. 2015); *Boyce v. Cycle Spectrum, Inc.*, 303 F.R.D. 182, 186 (E.D.N.Y. 2014); *Williams v Beemiller, Inc.*, 159 A.D.3d 148, 157 (4th Dep’t 2018). As a result, the Court should dismiss Plaintiffs’ and US’ Tires stream of commerce argument.

(c) Exercising Specific Jurisdiction Over Ford Would Violate Due Process.

56. The Due Process “minimum contacts” test for specific jurisdiction is whether the defendant’s suit-related conduct creates a substantial connection with the forum State. *Walden*,

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134 S. Ct. at 1120-1121. The relationship between the forum State and the claims over which jurisdiction is sought “must *arise out of* contacts that the ‘*defendant himself*’ creates” “with the forum State itself, not the defendant’s contacts with persons who reside there.” *Id.* at 1121-1122 (emphasis added). The plaintiffs’ contacts with the forum are not decisive. *Id.*; see also *Bristol-Myers*, 137 S. Ct. at 1780 (“In order for a state court to exercise specific jurisdiction, ‘*the suit*’ must ‘*aris[e]* out of or relat[e] to the defendant’s contacts with the *forum*.’”) (emphasis in original) (citations omitted).

57. US Tires and Plaintiffs ask the Court to focus on Plaintiffs’ contacts with the State of New York, emphasizing that Plaintiffs are residents of New York, stored their vehicle here and had their vehicle serviced here by US Tires (not Ford or Goodyear). US Tires also emphasizes to the Court that it “regularly services Goodyear tires and Ford Explorers.” However, those facts cannot be the only factors driving the Due Process inquiry for specific jurisdiction in this case. See *Walden*, 134 S. Ct. at 1125 (noting that an approach to the “minimum contacts” analysis for specific jurisdiction which allows “a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis” is improper). As the U.S. Supreme Court has established, “however significant the plaintiff’s contacts with the forum may be, those contacts *cannot be* ‘*decisive*’ in determining whether the defendant’s due process rights are violated.” *Walden*, 134 S. Ct. at 1115, 1125 (quoting *Rush*, 444 U.S. at 332) (emphasis added). The Due Process “minimum contacts” analysis for specific jurisdiction must focus on the contacts the defendant creates with the forum State itself. *Walden*, 134 S. Ct. at 1121; *Bristol-Myers*, 137 S. Ct. at 1781-1782.

58. As noted in Ford’s original motion papers, Ford’s alleged suit-related conduct—the design, manufacturing and distribution of the Subject Vehicle—bears no connection to New

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York. Ford did not manufacture, design, distribute, sell, or service the Subject Vehicle in New York. (See Pascarella Aff., Ex. C ¶¶ 5-10; Dwyer Aff., Ex D ¶¶ 10-11.) There is no evidence that Ford directed the Subject Vehicle in New York in any way. The fact that Plaintiff Jose Aybar had the Subject Vehicle registered in New York is irrelevant because Ford did not have control over that. Ford did not even have any involvement in bringing the Subject Vehicle to New York. (See Pascarella Aff., Ex. C ¶¶ 5-10; Dwyer Aff., Ex D ¶ 5.)

59. US Tires attempts to get around these facts with the inventive argument that specific jurisdiction is proper because Ford sold, distributed or marketed vehicles of the same model as the Subject Vehicle within the State of New York. This argument conflates general with specific jurisdiction. The defendant's suit-related action here is Ford's design, manufacturing and distribution of the *Subject Vehicle*, as this case is not about Ford Explorers generally; it is about the 2002 Ford Explorer involved in the accident at issue in Actions 1 and 3. (See Compl. Action 3, Exhibit "I" ¶¶ 16-34-48.)

60. For the reasons elaborated above and in Ford's original papers, this Court cannot assert specific jurisdiction over Ford under the facts of this case without offending Due Process.

IV. DUE PROCESS DOES NOT PERMIT STATE COURTS TO DECIDE ON PERSONAL JURISDICTION MOTIONS BASED ON THE CONVENIENCE OF PLAINTIFFS OR THIRD PARTIES.

61. "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. at 1122. The Due Process analysis requires a consideration of more than just "the practical problems resulting from litigating in the forum." *Bristol-Myers*, 137 S. Ct. at 1780. See also *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (noting that the Due Process Clause is "more than a guarantee of immunity from inconvenient or distant litigation"). The plaintiffs or third-party plaintiffs' desire to litigate their claims in their home State cannot take precedence

over a defendant's Due Process rights. Indeed, the requirements of the Due Process Clause "must be met as to each defendant." *Bristol-Myers*, 137 S. Ct. at 1783 (quoting *Rush*, 444 U.S. at 332). In this case, Plaintiffs' and US Tires' complaints about the inconvenience of having to litigate against Ford and Goodyear outside of New York is not a basis for the Court to violate Ford's and Goodyear's Due Process rights. Accordingly, the Court cannot consider this argument by Plaintiffs and US Tires in deciding Ford's motion.

CONCLUSION

62. The Second Department has already established that New York courts do not have personal jurisdiction over Ford in this action. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). This Court is bound to follow that decision under the doctrine of *stare decisis*. Even if the Court believed it has discretion to decide whether Ford is subject to specific jurisdiction in this action, it must grant Ford's motion to dismiss because the requirements for specific jurisdiction under both the Due Process and the New York long-arm statute are not met. The Court cannot exercise specific jurisdiction over Ford because Ford does not have any case-related contacts with New York.

63. For all of the foregoing reasons, this Court should grant Ford's motion to dismiss for lack of personal jurisdiction in its entirety.

Dated: New York, New York
March 25, 2019



Walsy K. Sáez Aguirre

**EXHIBIT A TO SAEZ AGUIRRE AFFIRMATION -
APPELLATE DIVISION, SECOND DEPARTMENT
DECISION, DATED JANUARY 23, 2019
(REPRODUCED HEREIN AT PP. 417-441)**

**EXHIBIT B TO SAEZ AGUIRRE AFFIRMATION -
THIRD-PARTY SUMMONS AND THIRD-PARTY COMPLAINT
OF JOSE AYBAR, ET AL., DATED JULY 19, 2016
(REPRODUCED HEREIN AT PP. 474-482)**

**EXHIBIT C TO SAEZ AGUIRRE AFFIRMATION -
AFFIDAVIT OF ROBERT PASCARELLA,
SWORN TO JANUARY 28, 2019
(REPRODUCED HEREIN AT PP. 490-492)**

**EXHIBIT D TO SAEZ AGUIRRE AFFIRMATION -
(I) BRIEF FOR PLAINTIFFS-RESPONDENTS, DATED JUNE 19, 2017 [759 - 799]**

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*To be Argued by:
JAY L. T. BREAKSTONE
(Time Requested: 15 Minutes)*

**New York Supreme Court
Appellate Division—Second Department**

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Docket Nos.:
2016-06194
2016-07397

Plaintiffs-Respondents,

— against —

JOSE A. AYBAR, JR. and “JOHN DOES 1 THRU 30,”

Defendants,

— and —

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Appellants.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Respondent.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. Whether Defendants-Appellants, The Goodyear Tire & Rubber Company ("Goodyear") and Ford Motor Company ("Ford"), knowingly and voluntarily consented to general jurisdiction in New York by registering to conduct business here and appointing the Secretary of State as their agent for service of process.

Supreme Court held that Goodyear and Ford had consented to general jurisdiction in New York because foreign corporations have been on notice since 1916 that registration to conduct business in New York amounts to consent to general jurisdiction here.

B. Whether Goodyear's activities within the State of New York have been so continuous and systematic that the company is essentially "at home" here.

Supreme Court held that Goodyear is essentially at home in New York State due to the degree of its systematic and continuous activity here, and therefore, New York courts had general jurisdiction over Goodyear.

C. Whether Ford's activities within the State of New York have been so continuous and systematic that the company is essentially "at home" here.

Supreme Court held that Ford is essentially at home in New York State due to the degree of its systematic and continuous activity here, and therefore, New York courts had general jurisdiction over Ford.

COUNTERSTATEMENT OF THE FACTS AND NATURE OF THE CASE

In light of the specific facts presented, longstanding laws, and well-settled precedents of New York State, Supreme Court correctly held that there were two independent bases by which The Goodyear Tire & Rubber Company (“*Goodyear*”) and Ford Motor Company (“*Ford*”) each are subject to general personal jurisdiction here, and its determinations as to both bases should be affirmed. Not only did the court below hold that Goodyear and Ford each had consented to general jurisdiction in New York, because “[i]n New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here,” (Record on Appeal (“R.”) 14, 26), but also that Goodyear’s and Ford’s “activities with the State of New York have been so continuous and systematic that the company[ies] [are] essentially at home here.” (R. 13, 24; *see also* R. 15 [“This court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.”]; R. 26 [“This court has jurisdiction over defendant Goodyear because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.”])

In 2011, Defendant Jose Aybar (“*Mr. Aybar*”), a resident of New York State, purchased a used 2002 Ford Explorer (“*Ford Explorer*”) equipped with a Goodyear

Wrangler AP Tire (the “*Wrangler Tire*”) from Jose Velez, who is also a New York State resident. (R. 21)

It is conceded by Ford, a foreign corporation registered with the New York State Department of State and authorized to do business in the state (R. 15), that it is in the business of designing and manufacturing cars and trucks (Affidavit of Elizabeth Dwyer, Retail Network Operations Manager, at R. 73, ¶ 3), that Ford designed the Ford Explorer (R. 41, at ¶ 31), and that the Ford Explorer was assembled in Ford’s own manufacturing plant. (*Id.*, at R. 73, ¶ 5). It is undisputed that the Ford Explorer was purchased by Mr. Aybar in New York, used primarily in New York by Mr. Aybar, and registered and licensed with the Department of Motor Vehicles in New York State. (R. 8-9, 12) It is also undisputed that Goodyear, a foreign corporation registered with the New York State Department of State and authorized to do business in the state, manufactured the Wrangler Tire. (R. 21)

In July, as Mr. Aybar drove the Ford Explorer northbound on Interstate Highway 85 in Virginia, the vehicle became unstable as a result of the failure of the Wrangler Tire, which caused the Ford Explorer to lose stability and control, rolling over several times. (R. 8, 21, 51) Plaintiffs-Respondents Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar, and Tiffany Cabral (“*Plaintiffs*”), passengers in the vehicle, were killed or injured. (R. 8, 21) Plaintiffs have alleged that the Ford Explorer had “certain defective, unsafe, and

defective condition(s) in the design, manufacture, fabrication and/or assembly[.]”

(R. 8, 49) This action, sounding in, among other causes, negligence and strict products liability was brought in July 2015. (R. 21)

In the court below, Plaintiffs demonstrated that (1) Goodyear had owned and operated a chemical plant in Niagara, New York since the 1940’s; (2) Goodyear had been the exclusive supplier of tires and related products for the New York City Transit Authority bus fleet since 1987; (3) Goodyear maintained at least 180 authorized Goodyear dealers for its products within New York State;¹ and that (4) Goodyear owned and operated numerous service centers in New York State which employed many residents of the state.² (R. 21) Plaintiff also showed that, since 1924, Goodyear had operated numerous stores in New York State, employing thousands of New York workers. (R. 24) Goodyear’s organization of facilities in New York State, engaged in day-to-day activities, and Goodyear’s activities within New York

¹ Although not a part of the record below, a search of Goodyear’s public website conducted in June 2017 using Goodyear’s website “Stores Near You” search function shows: (1) 36 registered Goodyear service facilities in Queens County alone; (2) 34 registered Goodyear service facilities within a 5 mile radius of U.S. Tires and Wheels of Queens, LLC (“U.S. Tires”), the registered Goodyear service facility where the Wrangler Tire and Mr. Aybar’s Ford Explorer were serviced (Brief for Non-Party Respondent, U.S. Tires, at 2); and (3) 84 registered Goodyear service facilities within a 10 mile radius of U.S. Tires.

² Goodyear advertises to the public that it has one or more registered Goodyear Tire Stores in at least 325 different cities within New York State. [R. 189-202] See also <https://goodyear.com/en-US/tire-stores/NY>.

State, had been so continuous and systematic as to render Goodyear subject to the general jurisdiction of New York's state courts. (*Id.*) Goodyear denied none of these factual allegations in the court below. (R. 21, 24)

Instead, Goodyear professed that it was merely an Ohio corporation, with its principal place of business located in Akron and that the Wrangler Tire was manufactured in its facilities in Union City, Tennessee. (R. 21) At some point after the Wrangler Tire was manufactured and first sold by Goodyear, Plaintiff acquired the tire and brought it to New York. (R. 21) There, a party unrelated to Goodyear inspected the tire and installed it on Plaintiff's vehicle, approximately two weeks before the accident. (*Id.*) At the time the Wrangler Tire was installed on Plaintiff's vehicle, Goodyear conceded that it still was actively doing business in New York, its Chief Tire Analysis Engineer, part of its Global Tire Analysis Department, acknowledged that at all relevant times, Goodyear owned and operated a tire manufacturing plant located in Tonawanda, New York. (R. 121, at ¶ 8) [“Until September 30, 2015, Goodyear was a member of a limited liability company known as Goodyear Dunlop Tires North America, Ltd. (“GDTNA”) which owned and operated a tire manufacturing plant in Tonawanda, NY.”] Though the Tonawanda plant did not manufacture the specific Wrangler Tire at issue in this case (*id.*), it did manufacture tires for commercial trucks, all terrain vehicles, competition go-carts, and motorcycles there.

Based on these facts, the court below found that Plaintiff had demonstrated “Goodyear’s extensive activities in this state since approximately 1924,” (R. 23), and held that “Goodyear’s activities with the State of New York have been so continuous and systematic that the company is essentially at home here.” (R. 24)

Like co-defendant Goodyear, Ford also professed that it was merely a Delaware corporation, with its principal place of business located in Dearborn, Michigan, and that the Ford Explorer was manufactured in its facilities in St. Louis, Missouri. (R. 73) As to Ford, the court below found that “Ford maintains a continuous and substantial presence in New York[.]” noting that Ford owns property in New York (including having invested \$150 million dollars to upgrade its Hamburg, New York plant [R. 132]), and has hundreds of dealerships selling Ford products under its brand name throughout New York State. (R. 9, 12) The court below summarized that “Ford has an organization of facilities in this state engaged in day-to-day activities.” (R. 12) Significantly, Supreme Court also noted that “Since 1920, Ford has been registered with the New York State Department of State as an active foreign business corporation.” (*Id.*) Based on these facts, Supreme Court found that “Ford’s activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state’s courts. (R. 12) Consequently, Supreme Court found Ford’s motion to dismiss without merit,

and concluded that “[t]his court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York ... [.]” (R. 15)

As a separate and independent matter, Supreme Court found that both Goodyear and Ford had been on notice prior to the time they first registered as a foreign corporation in New York State and designated the Secretary of State as their agent for service of process that “[i]n New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process.” (R. 13, 25) Furthermore, Supreme Court noted that “[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff’s cause of action need not have arisen out of any business conducted by the foreign corporation in New York.” (R. 13 [quoting Alexander, Practice Commentaries, McKinnney’s Con. Law of NY, Book 7B, C301:6[c], p. 21])

ARGUMENT

I. Goodyear and Ford Knowingly and Voluntarily Consented to the Jurisdiction of New York State Courts.

The court below correctly applied the holdings of the Court of Appeals, the weight of a myriad of courts which followed, and the recognition of this settled law by the Supreme Court of the United States in finding that under New York law, Goodyear and Ford had knowingly and voluntarily consented to general personal

jurisdiction in this state. Specifically, the court correctly interpreted Goodyear's and Ford's registration and authorization to do business in New York, together with each corporation's appointment of the New York Secretary of State as its local agent for service of process under CPLR 301 and Business Corporation Law §§ 304 and 1304, as conferring general jurisdiction over that foreign corporation. (R. 13-15, 25-26)

A. Foreign Corporations Have Been on Notice Since 1916 that Registration and Designation of an Agent for Service of Process Under New York's Business Corporation Law is Interpreted by New York State Courts as Consent to General Personal Jurisdiction

“In New York,” the court explained, “it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process.” (R. 9) [citing *Bagdon v. Phil. and Reading C. & I. Co.*, 217 N.Y. 432, 436 (1916)]. In *Bagdon*, the Court of Appeals definitively spoke on the issue through Judge Cardozo. Indeed, the Supreme Court recognized this, stating that “the scope and meaning of such a designation as part of the bargain by which [a foreign corporation] enjoys the business freedom of the State of New York” has been “authoritatively determined[.]” *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939).

‘The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. ... The contract deals with jurisdiction of the person. It does not enlarge or

diminish jurisdiction of the subject-matter. It means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.¹

Neirbo, 308 U.S. at 175 [citing and quoting with approval, *Bagdon*, 217 N.Y. at 436-37]; see also *Roger v. A. H. Bull & Co.*, 170 F.2d 664, 665 (2d Cir. 1948) [“Here, as in the *Neirbo* case, the corporation by filing the certificate consented to make itself amenable to process in the state courts through service upon its designated agent.”].

In *Bagdon*, Judge Cardozo recited, and then rejected, the same faulty reasoning argued by that defendant foreign corporation resurrected by the unsuccessful defendant corporations here: “The defendant concedes that it is engaged in business in New York.[³] It concedes that its appointment of an agent has never been revoked.[⁴] It insists, however, that his agency must be limited to actions

³ Here, Goodyear also has conceded that it is engaged in business in New York, with a vast organization of facilities engaged in day-to-day activities impacting, involving, and employing New Yorkers on a daily basis (R. 5, 8), even to the extent of “[a]t all relevant times,” recognizing its subsidiary has “owned and operated a tire manufacturing plant located in Tonawanda, New York.” (R. 39, at ¶ 5). Likewise, Ford has conceded that it is engaged in business in New York on a day-to-day basis, including owning a plant in Hamburg, New York in which it recently invested an additional \$150 million in upgrades [R. 132], has hundreds of dealerships selling Ford products under its brand name throughout New York State. (R. 9, 12; Joint Brief for Defendants-Appellants (“*Appellants’ Br.*”), at 11).

⁴ Compare R. 224, ¶ 16 [conceding in the course of its argument that Goodyear “is registered to do business [in New York] and has designated an agent for service of process within the state.”]; R. 228, ¶ 26 [same]; Appellants’ Br., at 18 [conceding in the course of its argument that Ford and Goodyear “compli[ed] with Business Corporation Law § 304, which requires companies to register with the Secretary of State and appoint the Secretary as their agent for service of process”]; *id.*, at 22, 34

which arise out of the business transacted in New York.^[5] It says that any other construction would do violence to its rights under the federal Constitution.^[6]" 217 N.Y. at 433-34. Indeed, Judge Cardozo contradicted this argument directly:

when a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted. ... We think there is nothing to the contrary either in the decision of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution.

Bagdon, 217 N.Y. 438-39. The Court of Appeals further underscored the *voluntary* nature of this registration and designation by considering the consequences to a foreign corporation who does not register and designate an agent for service of process.

[same]; R. 212-13, at ¶ 12 [Ford conceding that it had appointed the Secretary of State as its agent under Section 304].

⁵ Compare Appellants' Br., at 5 ["Neither Ford nor Goodyear had any contacts in New York with Plaintiffs, the Explorer, or the Goodyear tire installed on it."]; Attorney Affirmation in Support of Ford Motor Company's Pre-Answer Motion to Dismiss, R. 31, at ¶¶ 5, 15, 30, 32; see also Reply Attorney Affirmation in Support of Ford Motor Company's Pre-Answer Motion to Dismiss, R. 137, at ¶ 3. Notably, even Goodyear and Ford appear to have abandoned this argument in their joint brief in this Court, arguing to the contrary here that "[b]y definition, general jurisdiction is agnostic as to a case's facts or their connection to the forum; a claims factual connection to a state matters only for *specific jurisdiction*." (Appellants' Br., at 16) [citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926, 131 S.Ct. 2846 (2011)]

⁶ Compare Appellants' Br., at 4 ("a statute that attempts to impose general jurisdiction as a condition of registration to do business in a particular state would be plainly unconstitutional").

“[T]he corporation may withhold its stipulation and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege, it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract.”

Bagdon, 217 N.Y. at 438 [emphasis added].

The Supreme Court agreed with this characterization. “A statute calling for such a designation [of a local agent for service of process] is constitutional, and the designation of the agent ‘a voluntary act.’” *Neirbo*, 308 U.S. at 175 [citing and quoting *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917)]; *id.* [“finding an actual consent by [the foreign corporation] to be sued in the courts of New York” because even where the Business Corporation Laws do not explicitly state that registration confers general jurisdiction, judicial interpretation of the statutes is what matters].⁷ This voluntary, actual consent by registration and

⁷ So voluntary is the consent to New York’s registration and designation statute that an unregistered/unauthorized foreign corporation who wishes to assert its interests in the courts of this state may actually bring an action *before registering to comply with the statute*, as New York courts have held that in such a circumstance, it is proper for the court to grant a stay or conditional dismissal until the foreign corporation is able to comply with the registration and designation statute. See *SD Protection, Inc. v. Del Rio*, 498 F. Supp. 2d 576, 581 (E.D.N.Y. 2007) [holding that New York state “case law [] indicate[s] a strong opposition of New York courts to dismissing a Complaint on the ground that the plaintiff lacks a certificate, and a preference for giving the plaintiff a chance to remedy this defect”] [citing *Uribe v. Merchants Bank of New York*, 266 A.D.2d 21, 697 N.Y.S.2d 279, 280 (1st Dep’t 1999)] [“the failure of plaintiff to obtain a certificate pursuant to BCL 1312 may be cured prior to the resolution of the action”] and *Tri-Terminal Corp. v. CITC*

designation was recognized by the Court of Appeals as “a true consent” rather than an imputed or implied one; the difference “between a fact and a fiction[.]” *Bagdon*, 217 N.Y. at 437; *Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 280 (1944) [“a designation of a public officer upon whom service may be made has the same effect as a voluntary consent”] [citing *Bagdon* and *Neirbo*]; *id.* [“A foreign corporation filing such designation or consent cannot complain that the courts of the State have given a broader construction to such consent than the corporation intended, if its language ‘rationally might be held to go to that length.’”] [citing *Pennsylvania Fire Ins. Co.*, 243 U.S. at 95, 37 S. Ct. at 345]; *see also Moss v. Atlantic Coast Line R. Co.*, 149 F.2d 701, 701 (2d Cir. 1945) [citing *Bagdon*, noting that the registration required by the General Corporation Law of New York State was “a consent which subjects it to service upon all claims wherever arising”]; *id.* at 702 [noting that “a state like New York[...]... exacts a submission to personal service in suits upon every kind of claim.”]; *id.* [citing *Neirbo*, stating that it “seems to us to leave no doubt that only an actual consent of the foreign corporation makes it a ‘resident’ of the district,” and discussing “the designation under state law which is the basis of consent” as a foreign corporation “deliberately domesticat[ing] itself.”]. Ford and Goodyear are simply incorrect when they argue that “Ford and Goodyear’s supposed ‘consent’ to

Industries, Inc., 78 A.D.2d 609, 432 N.Y.S.2d 184, 185 (1st Dep’t 1980)]; *Nasso v. Seagal*, 263 F. Supp. 2d 596, 606 (E.D.N.Y. 2003) [same, collecting cases].

general jurisdiction is a fiction.” (Appellant’s Br. at 33). In New York, it has never been as such.

The Restatement (Second) of Conflict of Laws summary of this consent doctrine is illustrative, as it also recognizes the validity of consent to general personal jurisdiction by registration and designation.

A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends.

Restatement (Second) of Conflict of Laws § 44 (1971). The comments to Section 44 further bolster the solidity of these concepts. *Id.*, § 44 cmt. a [“By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. *This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.*”] [emphasis added]; *id.* § 44 cmt. b [“It is commonly provided by statute that a foreign corporation shall not do business in a state until it has procured a license to do so from some public official. As a condition precedent to obtaining such a license, it is commonly provided that the corporation shall authorize an agent or public official to accept service of process for it in actions brought against it in the state. Once such authorization has been given and service of process made

upon the designated agent or official, the state may exercise judicial jurisdiction over the corporation as to all causes of action which fall within the terms of the authorization. *This is true even though such authorization was a condition precedent to the corporation being permitted to do business in the state.”*] [emphasis added]; *id.* § 44 cmt. c [“If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. ... By qualifying under one of these statutes, the corporation renders itself subject to whatever suits may be brought against it within the terms of the statutory consent as interpreted by the local courts provided that this interpretation is one that may fairly be drawn from the language of the enactment.”] [emphasis added].

Appellants’ own argument coupled with Ford’s and Goodyear’s past conduct demonstrates the calculated and knowing bargain that they made in consenting to personal jurisdiction in New York, not for the purpose of doing business in New York, but in order to obtain the privilege of *suing* on their own behalf in New York courts to enforce their contracts and support their own causes. Appellants argue that “if Ford and Goodyear did business in New York without registering, they could no longer sue in the New York courts, even if New York was the only forum in which they could obtain personal jurisdiction over a defendant.” (Appellant’s Br. at 35) As

an initial, and practical matter, this is untrue and belied by standing New York jurisprudence.⁸

But further, this is the essence of the bargain that Goodyear and Ford made with the State of New York: In order to exercise the privilege of suing in its state courts (which Goodyear and Ford have exercised countless times to enforce their contracts), Goodyear and Ford must themselves consent to being brought into those same courts. This is precisely the “corresponding benefit to offset this substantial burden” of consenting to personal jurisdiction in suits brought in New York trial courts. Appellants’ Br., at 36. In sum, it is not only entirely consistent with over a century of New York jurisprudence, but also equitable, that in exchange for the privilege of asserting its rights in New York, Ford and Goodyear themselves should remain subject to the possibility that others might assert their own rights against them in those same forums.

Moreover, this is the same covenant that domestic corporations make with the state and its citizens. Goodyear registered as a foreign corporation in New York State in 1956 and, accordingly, was on notice for forty years *after* the Court of Appeals decided *Bagdon* that registration and designation of the Secretary of State as its agent for service of process is interpreted by New York’s courts as constituting consent to

⁸ See *SD Protection*, 498 F. Supp. 2d at 581; *Uribe*, 266 A.D.2d 21, 697 N.Y.S.2d at 280; *Tri-Terminal*, 78 A.D.2d 609, 432 N.Y.S.2d at 185; *Nasso*, 263 F. Supp. 2d at 606.

general personal jurisdiction. Conversely, Ford first registered with the New York State Department of State as an active foreign business corporation in 1920, a mere four years after Judge Cardozo issued the landmark *Bagdon* opinion. (R. 12) Since registering nearly a century ago, Ford has never revoked that consent or sought to withdraw its authorization; so too has Goodyear never revoked its consent or sought to withdraw its authorization since first registering over sixty years ago. *See, e.g.*, *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) [“In maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction.”]

In sum, Goodyear and Ford consented to submitting to general personal jurisdiction knowingly, and voluntarily, with full notice through *Bagdon* and the consistent jurisprudence of New York courts interpreting the state’s registration and designation statutes in the sixty to one hundred years since; they made this bargain with New York State in order to secure the benefit of being able to sue to enforce their business contracts and further their business interests here. There was no error below when the court read Ford’s and Goodyear’s voluntary acts of registration precisely as such an act had been read in *Bagdon*, as a voluntary consent to general personal jurisdiction in New York. Its decision should be affirmed.

B. The United States Supreme Court Did Not Intend for *Daimler* and *BNSF* to Abrogate Jurisdiction by Consent Under New York Law

There have been only three personal jurisdiction decisions by the United States Supreme Court that bear upon general personal jurisdiction by consent: *Neirbo, Pennsylvania Fire Ins. Co.*, and *BNSF Ry. Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017). The two decisions that dealt squarely with the consent issue, *Neirbo* and *Pennsylvania Fire Ins. Co.*, came down firmly in support of *Bagdon*. As explained in greater detail below, the third decision, *BNSF*, not only implied that consent was still a valid basis for general personal jurisdiction, but expressly did not reach this issue as it had not been raised in the court below.

Thus, although its recent decisions in *Daimler*, *A.G. v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014) and *BNSF Ry. Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017) have reshaped much of general jurisdiction jurisprudence, resulting in no little consternation, confusion, and controversy, the Supreme Court has chosen not to disturb the principle of general personal jurisdiction by consent on constitutionality, or any other, grounds, in these decisions. To the contrary, the Court has either implied that the concept of consent to jurisdiction remains valid, or has explicitly stated that it was issuing no ruling on the question of general jurisdiction by consent.

In *Daimler*, the Court quoted its opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, (2011), stating that its

“1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum.*” *Daimler*, 134 S. Ct. at 755-56 [quoting *Goodyear*, 564 U.S. at 928, 131 S. Ct. at 2856] [emphasis added]. In this one instance in which the Court mentioned consent to jurisdiction, it carefully and purposefully distinguished it from the circumstances presented in *Daimler*. Not only does *Daimler* not say *anything* about overruling or abrogating *Bagdon*, but what the Court does says suggests the contrary conclusion: That *Bagdon* and consent to general personal jurisdiction under New York State law survives to this day, untouched by *Daimler* or *Goodyear*.

In the *BNSF* opinion issued just last month, the Court’s “hands off” approach to general jurisdiction by consent was both implicit and express. First, continuing to write for the Court in this area, Justice Ginsburg carefully noted that “*absent consent*, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.” *BNSF*, 581 U.S. ___, 137 S. Ct. at 1556 [emphasis added]. Following this implicit recognition that consent remains a valid basis for the exercise of personal jurisdiction, Justice Ginsburg expressly stated that because the Montana Supreme Court did *not* address the argument that *BNSF* has consented to personal jurisdiction in Montana, “we do not reach it.” *Id.*, at 1559.

In consideration of *Daimler*, *BNSF*, and New York's own jurisprudence, the court below "agree[d] with those courts that hold that general jurisdiction based on consent through registration and appointment survives [*Daimler*]. (R. 9) [citing *Doubet LLC v. Trustees of Columbia Univ. in City of New York*, 99 A.D.3d 433 (1st Dep't 2012); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173 (3d Dep't 1983); *Bailen v. Air & Liquid Systems Corp.*, No. 190318/2012, 2013 WL 1369452 (Sup. Ct., N.Y. Co. April 1, 2013)]; *Bailen v. Air & Liquid Systems Corp.*, 2014 WL 3885949, at *4 (Sup. Ct., N.Y. Co. August 5, 2014) ["a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."] [citing *Neirbo*, 308 U.S. at 170, 175 and *Rockefeller Univ.*, 581 F. Supp. 2d at 466 ["the majority of federal district courts and New York courts ... hold that a filing for authorization to do business in New York is sufficient to subject a foreign corporation to general personal jurisdiction in New York."]] [additional citations omitted].⁹ The court held that Goodyear's consent to general

⁹ But see *Famulari v. Whirlpool Corp.*, 2017 WL 2470844, at **4-5 (S.D.N.Y. June 7, 2017) [holding, in backwards fashion, that it could not exercise general personal jurisdiction due to consent by registration and designation "because of the unclear constitutional status of the consent-by-registration theory in light of *Daimler*," thus ignoring the mandate of the large body of cases from the past century establishing the validity of general personal jurisdiction by consent, though inexplicably recognizing that "the Second Circuit has explicitly avoided the issue" in *Brown v. Lockheed Martin Corp.*, 814 F.3d at 637, and expressly disregarding the post-*Daimler* decision in *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014), holding that "a corporation may consent to jurisdiction in New York ... by registering as a foreign corporation and designating

personal jurisdiction in New York State was knowing and voluntary: “When, … the basis for jurisdiction is the voluntary compliance with a state’s registration statute, *which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state’s courts*, the corporation can have no uncertainty as to the jurisdictional consequences of its actions.” (R. 9) [citing *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp.3d 572, 591 (D. Del. 2015)], *aff’d on other grounds*, 817 F.3d 755 (D.C.Cir. 2016) [emphasis added].

Moreover, Goodyear and Ford are wrong, both in their interpretation of *Daimler* and *BNSF* and in their characterization of the text of the New York state statutes: Silence is not the same thing as contradiction.¹⁰ First, this argument by

a local agent.”]; *Minholz v. Lockheed Martin Corp.*, --- F. Supp. 3d ---, 2016 WL 7496129, at *9 (N.D.N.Y. December 30, 2016) [acknowledging that “Plaintiff correctly points out that many New York courts have held that registration under N.Y. Business Corporation Law § 1304 subjects foreign companies to personal jurisdiction in New York, *see STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) (collecting cases), these cases predate *Daimler*[,]” but refusing to apply the guiding New York state court precedents on the grounds of the “likely” constraints articulated in *Daimler*]. Plaintiff respectfully asserts that the decisions in *Famulari* and *Minholz* were not only errors of analysis, but also contrary to the admonishment of *Eberhart v. United States*, 546 U.S. 12, 14–15, 19–20 (2005) that, rather than issuing a ruling contrary to prior Supreme Court precedent that had not been expressly overruled, the “prudent course” for a court was to *continue to apply that Supreme Court precedent*, 546 U.S. at 14–15, 19–20, as well as that of the highest courts of the state whose law is being applied.

¹⁰ Goodyear and Ford argue that “nothing in Business Corporation Law § 304 – or any other provision of the Business Corporation Law, for that matter – even mentions consent to general jurisdiction. The Supreme Court’s consent by

Appellants also flies in the face of the Supreme Court's caution that no precedent should be overruled in the absence of an explicit statement by the Court to that effect. *See Eberhart*, 546 U.S. 12, 14–15, 19–20 (noting that it was a “prudent course” for a lower court to apply prior Supreme Court precedent that had not been expressly overruled). And second, this argument as to the “silence” of the New York registration and designation statutes ignores the further instruction of the Supreme Court that federal courts should first look to how *state* courts have *interpreted their own state registration statutes* in order to determine whether a corporation’s compliance with the statute grants the court personal jurisdiction over that corporation. *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 215-16 (1921) [the Court clarified its holding in *Pennsylvania Fire* and explained that when a foreign corporation appoints an agent for service of process, a court will properly construe that appointment as extending to suits respecting business transacted by that foreign corporation elsewhere if the “state law either expressly or by local construction gives to the appointment a larger scope”] [emphasis added].¹¹

registration theory is therefore at odds with the plain text of the statute that it purports to interpret.” (Appellants’ Br., at 3-4)

¹¹ Compare *Justiniano v. First Student Management LLC*, 2017 WL 1592564, at *6 (E.D.N.Y. Apr. 26, 2017) (slip op.) [citing *Minholz*, 2016 WL 7496129, at *9 for the proposition that because NY BCL § 1301 does not contain explicit text regarding consent, the court cannot exercise general jurisdiction over the defendants]. In *Justiniano*, however, the District Court made the same error of analysis urged by

In addition to these principles of construction, the court below properly adhered to the longstanding interpretation of New York's registration and designation statutes by local courts, both trial and appellate; controlling and persuasive. In New York, for over a century, from *Bagdon* to *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir 2016) (concluding that New York's registration statute has been construed to confer general jurisdiction), courts tasked with interpreting New York's registration and designation statutes¹² overwhelmingly have held that they confer general personal jurisdiction over foreign corporations who enter into the contract with the state to allow themselves to be haled into New York state courts in exchange for the privilege of doing the same. See, e.g., *STX*

Ford and Goodyear here: that on the issue of consent, only the text of the registration and designation statutes is of consequence. This erroneous conclusion ignores the effect of over a century of local New York jurisprudence that has interpreted compliance with the registration and designation statutes of the BCL as true consent to general personal jurisdiction. This century of jurisprudence is not of mere precedential value in the courts; this longstanding local interpretation of New York law is what puts any foreign corporation seeking to benefit from doing business in New York *on notice* of the bargain it is making in exchange for that benefit. This longstanding notice is what transforms New York's BCL from a "run of the mill registration and appointment statute" into true, knowing consent.

¹² A key distinguishing feature of *Brown v. Lockheed Martin Corp.* is that the Connecticut statute being considered by the Court had *neither* any explicit mention of consent to general personal jurisdiction *nor was there local Connecticut precedent interpreting the Connecticut statute* to confer such jurisdiction by consent. 814 F.3d at 629 ("[W]e find it prudent—*in the absence of a controlling interpretation by the Connecticut Supreme Court*, or a clearer legislative mandate than Connecticut law now provides—to decline to construe the state's registration and agent-appointment statutes as embodying actual consent....") [emphasis added].

Panocean, 560 F.3d at 131 [collecting many cases in which New York courts have held that registration under N.Y. Business Corporation Law § 1304 subjects foreign companies to personal jurisdiction in New York]; *Muollo v. Crestwood Vill., Inc.*, 155 A.D. 2d 420, 421, 547 N.Y.S.2d 87, 88 (2d Dep’t 1989) [“It is true that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304”] [citations omitted] … the statute imposes no limitation upon this appointment; the Secretary of State may receive process for any purpose.”]; *Augsbury*, 470 N.Y.S.2d at 789 [“The privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction.”]; *Bailen*, 2014 WL 3885949, at *4-5; *Trounstine v Bauer, Pogue & Co.*, 44 F.Supp. 767, 770 (S.D.N.Y. 1942), *aff’d* 144 F.2d 379 (2d Cir. 1944), *cert. den.* 323 U.S. 777; *see also Spiegel v. Schulman*, 604 F.3d 72, 77 n. 1 (2d Cir. 2010) [discussing consent by registration in dicta]; Alexander, Practice Commentaries, *McKinney’s Con. Law of NY*, Book 7B, 1989 Pocket Part, CPLR c301:5, at 7.

Because the doctrine of jurisdiction by consent remains valid and in force in New York after *Daimler* and *BNSF*, the court below properly followed the “prudent course” of applying prior Supreme Court and Court of Appeals precedent that had not been expressly overruled. The denials of Goodyear’s and Ford’s motions to

dismiss below were the result of a correct and faithful application of New York law, and should be affirmed.

C. Consent by Registration and Designation is an Independent and Sufficient Basis for General Personal Jurisdiction, and Does Not Require Any “At Home” Analysis under *Daimler* and *BNSF*

After finding general jurisdiction over Goodyear and Ford based on consent by registration and designation, the court below further noted that “where a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff’s cause of action need not have arisen out of any business conducted by the foreign corporation in New York.” (R. 13, 25) [citing Alexander, Practice Commentaries, McKinnney’s Con. Law of NY, Book 7B, C301:6[c], p. 21]. This holding is directly in line with the controlling precedent of this Court and the Court of Appeals. Accordingly, once the court below found that Goodyear and Ford each had consented to general personal jurisdiction, no further analysis was needed to investigate whether Goodyear or Ford should have been considered “at home” in New York under *Daimler* and *Goodyear*. This decision may properly be affirmed without proceeding to evaluate whether Goodyear’s or Ford’s affiliations with New York State are so ‘continuous and systematic’ as to render them essentially “at home” in this forum;

consent by registration is all that is needed in New York,¹³ unless and until the Court is directed otherwise by the Court of Appeals or the United States Supreme Court, both of which have declined to do so.

However, should the Court exceed those parameters and advance to consider this separate and independent basis for finding general jurisdiction over Goodyear and Ford, the court below also was correct in holding that Goodyear's and Ford's longstanding affiliations with New York render both "essentially at home" here.

II. Even if Goodyear and Ford Had Not Consented to General Jurisdiction in New York, Goodyear and Ford are "At Home" in New York

While *Goodyear*, *Daimler*, and *BNSF* all left general personal jurisdiction by consent under New York State law untouched, they did shift the parameters under which general jurisdiction over foreign corporations may be found *absent consent*.

All three cases stand for the proposition that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 131 S. Ct. at 2851; *id.* at 2853-54; *Daimler*, 134 S. Ct. at 754; *BNSF*, 137 S. Ct. at 1558. "The "paradigm" forums in which a corporate defendant is 'at home,' ... are

¹³ See *Bailen*, 2014 WL 3885949, at *5 ["In other words, a New York court may exercise general personal jurisdiction over a corporation, regardless of whether it is 'at home' in New York, so long as it is registered to do business here as a foreign corporation and designates a local agent for service of process."].

the corporation's place of incorporation and its principal place of business." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. at 1558 [citing *Daimler*, 134 S.Ct. at 760; *Goodyear*, 564 U.S., at 924, 131 S.Ct. 2846]. As the court below recognized, "[g]eneral jurisdiction requires affiliations so continuous and systematic as to make the foreign corporation essentially at home in the forum state, i.e., similar to a domestic enterprise in that state." (R. 6) [citing *Daimler*, *supra*]. Thus, "[t]he exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.'" *BNSF*, 137 S. Ct. at 1558 [quoting *Daimler*, 134 S. Ct. at 761, n. 19]. The ultimate determination as to where a corporation is "at home" "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, at 762 n.20.

As to Goodyear, the court below examined the record of "Goodyear's extensive activities in this state since approximately 1924," and determined that "a finding of 'a continuous and systematic course of doing business' in New York can easily be made." (R. 7) After meeting this statutory standard, the court below continued its analysis, in light of the fact that "the Due Process Clause of the 14th Amendment limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State[.]" (*Id.*) [citations omitted]. Once again,

in view of the same set of “Goodyear’s extensive activities,” the court below “concluded that neither *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, nor *Daimler A.G. v. Bauman (supra)*, nor the New York State appellate cases require the dismissal of the case at bar.” (*Id.*) “[B]ecause of the level of Goodyear’s activities within New York[,]” the court found “that [t]he New York State appellate cases decided after [*Daimler*] which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar,” and that “defendant Goodyear’s activities with the State of New York have been so continuous and systematic that the company is essentially at home here.” (R. 8) [citation omitted]

Indeed, as the court below correctly recognized, Goodyear’s presence in New York is special: It has made itself “at home” in New York State for nearly a century. Goodyear has been “so heavily engaged in activity” here that it has been “render[ed] essentially at home” in New York State [*BNSF*, 137 S. Ct. at 1559] by, among other things which may not have been discovered in the case below, owning real estate and operating a chemical plant here since the 1940s;¹⁴ bringing suit as a plaintiff in

¹⁴ (R. 39, at ¶ 5) [“During “all relevant times, [Goodyear Dunlop Tires North America, Ltd. (“GDTNA”)] owned and operated a tire manufacturing plant located in Tonawanda, New York.”]

both New York State courts¹⁵ and local federal district courts¹⁶; leasing and subleasing real estate;¹⁷ manufacturing and supplying commercial tires and related products for the New York City Transit Authority bus fleet since 1987; maintaining a network of Goodyear dealers for its products; owning and operating service centers within New York State, including registered Goodyear tire and service centers spanning at least 365 different New York cities; maintaining its active foreign corporation/authorized to do business status with the New York State Department of State; and employing thousands of New York State residents since 1924. This is no *BNSF* train passing in the night. Goodyear presents the truly “exceptional case” where a foreign corporation has spent nearly a century engrained in the day-to-day activities of a state and its citizens, availing itself of the privilege of bringing suit on its own behalf and in its own interest in our courts, and supplying a major state municipality with commercial tires (which it may have also manufactured in its New York State factory) for nearly three decades. For all of these reasons, it does no

¹⁵ See, e.g., *Goodyear Tire & Rubber Co. v. Vulcanized Prod. Co.*, 228 N.Y. 118, 121–22 (1920); *Goodyear Tire & Rubber Co. v. Hershenstein*, 224 N.Y.S. 501 (App. Div. 1927); *Goodyear Tire & Rubber Co. v. Azzaretto*, 962 N.Y.S.2d 220 (2d Dep’t 2013).

¹⁶ See, e.g., *Goodyear Tire & Rubber Co. v. Kirk’s Tire & Auto Servicecenter of Haverstraw, Inc.*, No. 02 CIV. 0504 (RCC), 2003 WL 22110281 (S.D.N.Y. Sept. 10, 2003); *Goodyear Tire & Rubber Co. v. N. Assur. Co.*, 92 F.2d 70 (2d Cir. 1937).

¹⁷ See, e.g., *Azzaretto*, 962 N.Y.S.2d 220; *Kirk’s Tire & Auto Servicecenter of Haverstraw*, 2003 WL 22110281.

violence to the general jurisdiction standards set forth by the United States Supreme Court in *Daimler* and *BNSF* for this Court to affirm Supreme Court's determination that Goodyear should be considered essentially "at home" in New York State.

The court below also found that, like Goodyear, Ford had become woven into the fabric of New York state domestic activity, "[i]n view of [its] extensive activities in this state since approximately 1920," [R. 9]. Factors that the court below recited as evidence of Ford's "continuous and systematic course of doing business" include Ford having maintained its active foreign corporation/authorized to do business status in New York since 1920 through regular registration with the New York State Department of State [R. 9]; operating "an organization of facilities in this state engaged in day-to-day activities," [R. 12]; "maintain[ing] a continuous and substantial presence in New York[,]" [R. 9], as Ford itself concedes [Appellants' Br., at 17]; owning property in New York it spends at least \$150 million to maintain [R. 9, 132] and employs significant numbers of New York citizens; and franchising its brand, contracting with hundreds of dealerships to sell its products under the Ford brand name, throughout New York State. (R. 9, 12) Having made itself "at home" in New York State for nearly a century, Supreme Court found that "Defendant Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts."³ [R. 12] The court below also used the specific terminology that has become central to the general jurisdiction

inquiry mandated by the United States Supreme Court in the absence of consent [*BNSF*, 137 S. Ct. at 1559]: Ford has been “so heavily engaged in activity” here that it has been “render[ed] essentially at home” in New York State. [R. 13]. Further, not recited by the court below but a key example of Ford availing itself of the privileges it earned by subjecting itself to general personal jurisdiction, on countless occasions Ford has been a litigant in New York trial courts, including bringing suit as a plaintiff in contract, tort, and intellectual property in both New York State courts¹⁸ and local federal district courts.¹⁹

Considering the significant stature enjoyed by both Goodyear and Ford as historic “big business” American brands, it is not surprising that both have engaged

¹⁸ See, e.g., *Ford Motor Co. v. C.N. Cady Co.*, 124 Misc. 678, 208 N.Y.S. 574 (Sup. Ct. Onondaga County 1925) [Ford brought trademark action]; *Ford Motor Co. v. O.W. Burke Co.*, 59 Misc. 2d 543, 299 N.Y.S.2d 946 (Sup. Ct. New York County 1969) [Ford brought an action for breach of contract, breach of warranty, negligence and fraudulent misrepresentation arising out of the construction of a number of Ford’s buildings]; *Alba v. Ford Motor Co.*, 111 A.D.2d 68 (1st Dep’t 1985) [Ford proceeded as third-party plaintiff in an action arising out of a death of an operator of a Ford Tractor].

¹⁹ See, e.g., *Ford Motor Co. v. Helms*, 25 F.Supp. 698 (E.D.N.Y. 1938) [Ford brought action for injunction regarding defendants’ neon sign over the street in front of Ford’s building]; *Ford Motor Co. v. West Seneca Ford*, 1994 WL 263822 (W.D.N.Y. 1994) [Ford brought action alleging breach of contract]; *Ford Motor Co. v. The Russian Federation*, 2010 WL 2010867 (S.D.N.Y. 2010) [Ford brought suit against the foreign sovereign for breach of contract and indemnification arising out of a vehicle lease agreement between itself and the Russian Federation, under which it had entered into a \$4.65 million settlement with a passenger injured while riding in the vehicle the Russian Mission had leased from Ford].

so heavily and systematically in activity in the Empire State so as to satisfy the “exceptional” case for which *Daimler* and *BNSF* made allowance.

III. If There is Insufficient Evidence as to Goodyear’s or Ford’s Contacts with New York State to Find Them “At Home” in New York on the Present Record, This Case Should Be Remanded for Fact Intensive Discovery on This Topic

In *BNSF*, Justice Sotomayor, in her concurrence and dissent, cautioned that by adopting the “at home” test of *Daimler*, the Court was “grant[ing] a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions.” 137 S.Ct. at 1560. The “at home” standard means that such corporations, like Goodyear and Ford here, will only be subject to general jurisdiction where they are incorporated or set their principal places of business. *Id.*

Practically speaking, however, and of concern should the Court change the direction of the law in this state notwithstanding the pronouncements of the Supreme Court and the Court of Appeals which remain unwavering, it ought not be done in the case at bar on this limited record. A period of jurisdictional discovery must be set to allow the parties to focus on the “at home” issues that such a decision by the Court would require. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 628, fn. 8 (2d Cir. 2016)²⁰ [court did not decide “at home” question under *Daimler* under

²⁰ In *Brown*, the Second Circuit had explicitly declined to decide the efficacy of consent-by-registration in light of *Daimler*’s avoidance of the issue. *Famular v. Whirlpool Corporation*, 16 CV 944 (VB), 2017 WL 2470844, *4 (S.D.N.Y. June 6, 2017), citing *Brown*, 814 F.3d at 624.

Connecticut law until undisputed facts developed during period of jurisdictional discovery]; *BNSF*, 137 S. Ct. at 1562 (Sotomayor, J., concurring in part and dissenting in part) [asserting that the Court should have “remanded to the Montana Supreme Court to reevaluate the due process question under the correct legal standard,” under which “that court could have examined whether this is such an ‘exceptional case’”]. Although Plaintiff contends that the facts taken into consideration by the court below were sufficient for it to conclude that Goodyear and Ford are essentially at home in New York, Plaintiff did not have the opportunity to conduct full discovery regarding Goodyear’s and Ford’s jurisdictional contacts here, much less the full discovery that might be necessary to engage in the sort of “comparative contacts” analysis discussed in *Daimler* and *BNSF* regarding Goodyear’s and Ford’s activities here compared with other states and worldwide. See *Daimler*, 134 S. Ct. at 762 n. 20. Consequently, and only in the alternative, should the Court reverse, Plaintiff would ask that the matter be remanded with the direction that a period of jurisdictional discovery be directed by the court below.

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CONCLUSION

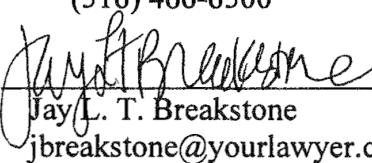
The order below should be affirmed in all respects, together with such other, further and different relief as is just and proper within the premises.

Dated: June 19, 2017

Respectfully submitted,

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**EXHIBIT D TO SAEZ AGUIRRE AFFIRMATION -
(II) BRIEF FOR NON-PARTY RESPONDENT, DATED FEBRUARY 15, 2017 [800 - 839]**

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*To be Argued by:
ADAM C. CALVERT
(Time Requested: 15 Minutes)*

**New York Supreme Court
Appellate Division—Second Department**

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Docket Nos.:
2016-06194
2016-07397

Plaintiffs-Respondents,

— against —

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

— and —

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Appellants.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Respondent.

BRIEF FOR NON-PARTY RESPONDENT

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Counterstatement of Questions Presented

1. Whether the trial court correctly found that there was personal jurisdiction in New York over Ford and Goodyear based on their continuous and systematic contacts in New York?

Yes, because Ford and Goodyear are "at home" in New York.

2. Whether the trial court correctly found that there was personal jurisdiction in New York over Ford and Goodyear because they are registered to do business in the state and appointed an agent for service of process?

Yes, because registering to do business in the state and appointing an agent for service of process confers general jurisdiction over Ford and Goodyear.

3. Whether the trial court correctly found that there was no personal jurisdiction over Ford and Goodyear based on specific jurisdiction under CPLR 302?

No, there is specific jurisdiction under CPLR 302(a)(1) and CPLR 302(a)(3)(i) & (ii).

Counterstatement of Facts

The Claims

The plaintiffs are a family from New York who were driving back to New York from Disney World when one of the Goodyear tires on their Ford Explorer blew. R.21. The Ford Explorer ran off the road, killing three of the passengers and injuring three other passengers and the driver. R.21.

The plaintiffs claim that the accident happened because of a defective design in their Ford Explorer, which was purchased and registered in New York. R.8-9. They also claim that the accident happened because of a defective Goodyear tire. R.21. The Goodyear tire and the Ford Explorer were allegedly serviced at U.S. Tires, a garage in Queens, New York. U.S. Tires is a registered Goodyear service facility on Goodyear's website.¹

The passenger-plaintiffs sued Ford and Goodyear in Queens County Supreme Court in one action. R.44-71. The driver-plaintiff sued Goodyear in Queens County Supreme Court in another action, from which there was a related motion and pending appeal under Docket No. 2016-07396. All plaintiffs sued U.S. Tires in Queens County Supreme Court in a third action. U.S. Tires commenced a third-party action

¹ This fact was not part of the record below, but can be made available to the court at oral argument.

against Ford and Goodyear for contribution and indemnity for their role in causing the accident.²

Ford and Goodyear's Motions to Dismiss

Ford and Goodyear moved to dismiss the complaints against them for lack of personal jurisdiction. R.27-43, 75-92. They argued that there was no general personal jurisdiction because under the recent U.S. Supreme Court case *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), general personal jurisdiction can only be obtained in states where a corporation is "at home," which Ford and Goodyear argue are limited to a corporation's state of incorporation and principal place of business. R.27-43, 75-92. They also argued that there was no specific personal jurisdiction under CPLR 302(a) because they did not commit a tortious act in the State or a tortious act outside the State causing injury within the State. R.27-43, 75-92.

In support of their motions, Ford and Goodyear offered two incomplete and conclusory affidavits that downplay New York's interest in this case. R.72-74, 119-21. Ford's affidavit states that its principal place of business is Michigan and that it is incorporated in Delaware. R.72-74. It states that the Ford Explorer was assembled in Missouri and shipped to a dealer in Ohio. R.72-74. There has been no discovery

² The pleadings and third-party action in the case involving U.S. Tires was not part of the Record on Appeal. Moreover, the third-party action was brought after the motions to dismiss were decided. These documents can be provided to the court at oral argument.

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of the chain of purchase of the Ford Explorer or Ford's relationship to New York in general. Similarly, Goodyear's affidavit states that its principal place of business and state of incorporation are Ohio, the tire was designed in Ohio, and the tire was manufactured in Tennessee. R.119-21. Goodyear knows nothing about the chain of custody of the tire, not even where it was shipped to initially after it was manufactured. R.119-21. There has been no discovery of the chain of purchase of the tire or Goodyear's relationship to New York in general.

Although no jurisdictional discovery was conducted, in opposition, the plaintiffs argued that Ford has hundreds of dealerships in New York and a manufacturing plant in New York. Ford Explorers were extensively marketed in New York. And the Ford Explorer at issue was sold, registered, and used primarily in New York. R.122-35. Similarly, Goodyear owns and operates hundreds of service centers throughout New York, it has been the exclusive provider of tires to the New York City Transit Authority since 1987, it has been the exclusive provider of tires to New York State agencies since at least 2010, and it has at least one manufacturing facility in New York. R.152-204. The plaintiffs and U.S. Tires also argued that Ford and Goodyear consented to jurisdiction by registering to do business in New York and appointing an agent for service of process. R.205-07. Finally, they argued that there was specific jurisdiction under CPLR 302(a). R.122-35, 152-204.

The Supreme Court's Orders

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The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions in separate, but substantially identical, orders. R.5-26. The court found that there was no specific personal jurisdiction under CPLR 302(a)(1) & (3) because the Goodyear tire and Ford Explorer were manufactured out of state and the injuries were sustained out-of-state. R.10, 22. The court found that there was general personal jurisdiction over Ford and Goodyear because its "activities with the State of New York have been so continuous and systematic that the company is essentially at home here." R.13, 24. It also found that there was general personal jurisdiction because Ford and Goodyear consented to jurisdiction as registered foreign corporations that designated an agent for service of process, thereby consenting to jurisdiction. R.13-15, 25-26.

Ford and Goodyear's Appeals

The Queens County Clerk entered the orders on May 31, 2016, and the plaintiffs served the orders with notice of entry on June 10, 2016. R.5, 18. Ford and Goodyear timely appealed the Supreme Court's orders on June 13 & 23, 2016. R. 3, 16.

Argument Summary

The Supreme Court correctly found that it has personal jurisdiction over Ford and Goodyear.

First, the court has personal jurisdiction under a general jurisdiction analysis because Ford and Goodyear are "at home" in New York. They sell their products throughout New York, own and operate dealers and service centers throughout New York, and operate manufacturing facilities in New York.

Second, there is general personal jurisdiction over Ford and Goodyear because they are registered foreign corporations authorized to do business in New York, with an appointed agent for service of process. This registration is a consent to general personal jurisdiction in New York.

Third, there is personal jurisdiction over Ford and Goodyear under a specific jurisdiction theory. They are subject to personal jurisdiction under CPLR 302(a)(1) because they "transact any business within the state or contract anywhere to supply goods or services in the state." They are also subject to personal jurisdiction under CPLR 302(a)(3)(i) or (ii) because they committed "a tortious act without the state causing injury to person or property within the state" and "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state" or "expects

or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

If this Court agrees with Ford and Goodyear, the results would be disastrous. There would be one suit against Ford in Michigan or Delaware, another against Goodyear in Ohio, and a third against U.S. Tires in New York. Inconsistent verdicts are all but guaranteed in this scenario and judicial resources would be wasted.

Finally, while this Court should find that there is jurisdiction over Ford and Goodyear on the current record, if the Court is inclined to agree with Ford and Goodyear it should at least order jurisdictional discovery.

Argument

POINT I—THERE IS GENERAL JURISDICTION OVER FORD AND GOODYEAR, EVEN AFTER THE SUPREME COURT'S DECISION IN DAIMLER

The trial court correctly held that Ford and Goodyear are subject to general jurisdiction in New York, even after the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Ford and Goodyear's activities in New York are so continuous and systematic to render them "at home" in New York, even though New York is not their state of incorporation or principal places of business.

Daimler's facts are much different than the facts of this case. The defendant in *Daimler* was a German corporation that was being sued based on the conduct of its subsidiary that conducted business in California. Here, Ford and Goodyear are

U.S. corporations, each of which conducts significant business in New York directly, not only through a subsidiary. Ford has hundreds of dealerships in New York and a manufacturing plant in New York. Ford Explorers were extensively marketed in New York. And the Ford Explorer at issue was sold, registered, and used primarily in New York. Similarly, Goodyear owns and operates hundreds of service centers throughout New York, it has been the exclusive provider of tires to the New York City Transit Authority since 1987, it has been the exclusive provider of tires to New York State agencies since at least 2010, and it has at least one manufacturing facility in New York. U.S. Tires is one of Goodyear's authorized service centers. Both Ford and Goodyear are registered foreign corporations in New York.

General jurisdiction is not limited to the place of incorporation and principal place of business. *Daimler* explicitly stated that a corporation could be "at home" in places other than its principal place of business and state of incorporation in "an exceptional case." *Id.* at 761. The court cited to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as an example of such a situation, which involved a corporation that had a temporary headquarters in the forum state. However, the court's use of *Perkins* as an example does not foreclose the possibility of other exceptions, such as jurisdiction over two of the countries' largest automobile and tire manufacturers.

Another consideration in *Daimler* that absent in our case are the international considerations. *Daimler* (and prior Supreme Court cases involving general jurisdiction) involved non-U.S. corporations where the acts underlying the case took place outside the U.S. and there were no connections to the forum state. Here, Ford and Goodyear are domestic corporations that committed acts in the United States that injured New York residents. Other courts have held that Ford can be subject to general jurisdiction even after *Daimler* for these same reasons. *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 333 (W.Va. 2016).

Therefore, this Court should uphold the trial court's decision that Ford and Goodyear are subject to jurisdiction in New York, even after *Daimler*, because their substantial activities in New York render them "at home" in New York.

POINT II—THERE IS GENERAL JURISDICTION OVER FORD AND GOODYEAR BASED ON THEIR REGISTRATION TO DO BUSINESS IN NEW YORK

General personal jurisdiction has consistently been found based on a defendant's consent to jurisdiction by registering to do business in New York. The trial court correctly held that Ford and Goodyear are subject to jurisdiction because they are registered to do business in New York. *Daimler* does not change this well-settled rule.

A. Consent by registration has been recognized as a valid basis for personal jurisdiction for over a century

A company can always consent to jurisdiction in a state or waive jurisdiction.

See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 703 (1982). Jurisdiction by consent or waiver has been upheld by the U.S. Supreme Court for nearly 150 years. That line of cases began with *Ex parte Schollenberger*, 96 U.S. 369 (1877). In *Schollenberger*, the U.S. Supreme Court first held that a state legislature may require a foreign corporation to consent to general personal jurisdiction as a condition of being granted the right to do business in that state:

[I]f the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent.

Id. at 377. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), the court affirmed that it had "little doubt" that the appointment of an agent by a foreign corporation for service of process could subject it to general personal jurisdiction. *Id.* at 95. This principle was recently reiterated by the U.S. Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011), citing *Compagnie*, and in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). *Burnham* upheld personal jurisdiction based on in-state service on a non-

resident defendant. The court cited a string of cases, most importantly ones applying the in-state service rule to foreign corporate defendants accepting service by agent, to conclude that the in-state service rule "remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government." *Id.* at 615-16.

For over 100 years, New York state courts have recognized that registration to do business in New York and designation of the Secretary of State for service of process under Business Corporations Law 304(b) & 1304 is tantamount to consent to personal jurisdiction in New York. *See Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916); *Muollo v. Crestwood Village, Inc.*, 155 A.D.2d 420 (2d Dep't 1989); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76 (3d Dep't 1983); *Chong v. Healthtronics, Inc.*, 2007 U.S. Dist. LEXIS 45956 at *17 (E.D.N.Y. 2007).

B. *Daimler* did not overrule precedent upholding jurisdiction by consent through registration

Daimler did not address consent by registration and did not overrule the well-settled precedent that registration to do business in New York carries with it consent to be sued in New York. There was no chance to consider whether there was personal jurisdiction based on consent by registration in *Daimler* because California (the subject state in that case) does not interpret its registration statute as subjecting corporations that register to consent to personal jurisdiction. In fact, the court's

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citation to *Perkins*, for the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum," suggests that the *Daimler* court was deciding a case where the corporation had not consented to general jurisdiction via a registration statute. *Daimler*, 134 S. Ct. at 755-56 (quoting) (emphasis added). The two other general jurisdictional cases examined by *Daimler* similarly concerned defendants who were not authorized to do business in the forum state and had not consented to suit. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852 (2011) (stating that defendants were not registered to do business in North Carolina); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984) (noting that defendant had never been authorized to do business in Texas and never had an agent for service of process in Texas). If the U.S. Supreme Court wanted to overrule the existing precedent finding jurisdiction based on consent via registration, it is up to the U.S. Supreme Court to do so explicitly. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (Even if a Supreme Court precedent contains many "infirmities" and rests upon "wobbly, moth-eaten foundations," it remains the

"Court's prerogative alone to overrule one of its precedents."). This rationale was used by a New Jersey federal court to uphold consent to personal jurisdiction by registration in a case decided after *Daimler*. *Senju Pharm. Co., Ltd. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 437-438 (D.N.J. 2015).

C. Cases after *Daimler* have held that consent by registration is still valid

Post-*Daimler* cases have upheld consent by registration jurisdiction. In *Perrigo Co. v. Merial Ltd.*, 2015 U.S. Dist. LEXIS 45214 (D. Neb. 2015), the court upheld general jurisdiction over a defendant based on its registration to do business in the state, finding that *Daimler* did not overrule the consent by registration caselaw. It explained that *Daimler* only applied to cases where a corporation can be compelled to submit to general jurisdiction, whereas the consent by registration caselaw was a separate inquiry because those cases dealt with voluntary consent. Courts in other cases have reached the same result under this rationale. See *Beach v. Citigroup Alternative Invs. LLC*, 2014 U.S. Dist. LEXIS 30032 (S.D.N.Y. 2014) ("Notwithstanding [the limitations on jurisdiction imposed by *Daimler*] a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."); *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 469 (D. N.J. 2015); *Chalkey v. Smithkline Beecham Corp.*, 2016 U.S. Dist. LEXIS 21462 (E.D. Mo. 2016) (holding that consent to general personal jurisdiction via a registration and appointment of agent

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for service was still valid after *Daimler*); *Regal Beloit America, Inc. v. Broad Ocean Motor LLC*, 2016 U.S. Dist. LEXIS 85123 (E.D. Mo. 2016) (same); *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O'Malley, J., concurring) (finding that consent to jurisdiction by registration was still valid after *Daimler*); *Serov v. Kerzner Int'l Resorts, Inc.*, 2016 N.Y. Misc. LEXIS 2818 (Sup. Ct., N.Y. Cty. 2016) (finding general jurisdiction over foreign corporation because of registration). Other cases after *Daimler* have held that similar business registration statutes also entail obligations of the defendant to submit itself to the jurisdiction of New York courts. *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015); *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., Ltd.*, 131 A.D.3d 259 (1st Dep't 2015).

The lack of explicit language in the Business Corporations Law stating that registration and appointment carries with it consent to jurisdiction does not mean that the statute cannot be read this way. *Pennsylvania Fire Ins.*, 243 U.S. at 96 ("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts.") (dealing with consent to jurisdiction by registration). Ford and Goodyear point out that the New York Legislature has proposed a bill that would amend the BCL to include specific language that registration in New York subjects the corporation to general jurisdiction in New York as evidence of the absence of such a standard in the current

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law. However, the Committee Report on the bill states that the purpose of the bill is to "clarify and *confirm* the well-established New York policy on corporate consent," pointing out that New York courts have consistently recognized that consent is a part of the registration. New York Senate Committee Report for S.B. 4846 (Apr. 23, 2015). In other words, the bill is not meant to change the current interpretation of the existing statute, rather it is meant to make that current interpretation explicit and thereby prevent corporations from arguing that consent to general jurisdiction is not a part of the current statute, the very thing that Ford and Goodyear are trying to do in our case.

Ford and Goodyear rely heavily on the Second Circuit's post-*Daimler* decision in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), where the court addressed Connecticut's consent by registration statute. That case is distinguishable. First, *Brown* considered Connecticut's registration statute, not New York's. Second, central to the court's decision in *Brown* was the fact that consent to general jurisdiction in Connecticut was not explicit in either the language of Connecticut's registration statute or in the caselaw interpreting that statute. *Id.* at 622, 626, 633-35. That is not the case for New York's registration statute, which has consistently been interpreted by New York courts as conferring general jurisdiction over a corporation that registers in New York (see above). Notably, the court's analysis in *Brown* focused not only on the explicit language of the statute and absence of

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language stating that corporations consented to general jurisdiction (a point made by Ford and Goodyear), but also on the caselaw interpreting that statute (a point ignored by Ford and Goodyear). Third, the court in *Brown* stated that the result would be different in states where either the registration statute explicitly contains language stating that the corporation would be subject to general jurisdiction *or* in states where the courts have interpreted the registration statute this way, like New York. *Id.* at 640 ("The registration statute in the state of New York has been definitively constructed to [confer general jurisdiction over registered corporations] . . ."). In implicitly accepting the constitutionality of this New York registration caselaw, the court in *Brown* also pointed out another major difference between that case and our case: in *Brown*, the plaintiff was not a Connecticut resident and the underlying tort did not occur in Connecticut. *Id.* at 641. Finally, it is up to the New York Courts to determine the meaning of its registration statute, not the Second Circuit, particularly not in a case that examined Connecticut's registration statute. *Id.* at 636 n.17 (acknowledging that Connecticut Supreme Court has the final say on the meaning of its registration statute).

D. Jurisdiction by registration is not unfair to Ford and Goodyear

Registration to do business is voluntary. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (holding that "[a] statute calling for [designation of an agent for service of process in the forum state] is constitutional, and the designation of the agent 'a voluntary act'" (citing *Pennsylvania Fire*, 243 U.S. 93)). Businesses that register also gain certain rights and privileges as part of registration. The trade-off for those privileges is that they are subject to personal jurisdiction in New York. This is "part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York." Practice Commentaries, CPLR 310:8, citing *Neirbo*, 308 U.S. at 175.

Ford and Goodyear argue that they are forced to register because if they do not register they cannot sue in New York and would be enjoined from operations in New York. This is disingenuous. They complain about the unfairness of being subject to jurisdiction in New York courts when a product they marketed in New York, purchased by a New Yorker, and registered by a New Yorker injures New Yorker. Yet they do not want to give up their ability to sue in New York.

They also argue that conferring general jurisdiction via registration will open the doors to out-of-state plaintiffs suing Ford and Goodyear in New York in cases that have nothing to do with New York. This is unfounded. There was no doubt

before *Daimler* that Ford and Goodyear were subject to general jurisdiction in New York, so these fears would have manifested already, but they have not.

Ford and Goodyear act as if being sued in New York is a substantial burden. They are large, national corporations that do significant business in New York. They have the resources to litigate cases in New York, which they frequently do, not only as defendants, but as plaintiffs. Yet they have no trouble arguing that New Yorkers who are injured by their products must sue them in Delaware, Ohio, or Michigan. There is also the very telling admission of Ford and Goodyear that suit would be proper in Virginia. Virginia has no interest in this case and its only relationship is that the accident occurred there by happenstance. And litigating this case in Virginia would be at least, if not more, burdensome to Ford and Goodyear, not to mention the burden on the plaintiffs and U.S. Tires.

Finally, Ford and Goodyear make the dubious argument that New York has no interest in this case. New Yorkers have been killed and injured, allegedly because of Ford and Goodyear's defective products. These products were sold, registered, and extensively advertised in New York. U.S. Tires, a New York garage, is also a defendant. New York has a substantial interest in this case and should have jurisdiction over Ford and Goodyear.

POINT III—THERE IS SPECIFIC JURISDICTION OVER FORD AND GOODYEAR UNDER CPLR 302

There is also specific general jurisdiction over Ford and Goodyear.

CPLR 302 deals with specific jurisdiction. It reads:

- (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
 4. owns, uses or possesses any real property situated within the state.

In our case, there is jurisdiction under 302(a)(1) and 302(a)(3)(i) or (ii).

A. Ford and Goodyear are subject to specific jurisdiction under CPLR 302(a)(1)

CPLR 302(a)(1) allows for jurisdiction over a foreign corporation if it "transacts any business within the state or contracts anywhere to supply goods or services in the state."

There should be no dispute that Ford and Goodyear transact business in New York and contract to supply goods and services in New York. This requires that the defendant "avails itself of the privilege of conducting activities [in New York], thus invoking the benefits and protections of its laws." *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007); *see also Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014) ("where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)"). Ford and Goodyear sell numerous products throughout New York, including Ford Explorers and the Goodyear Wrangler tires involved in this case.

Jurisdiction under 302(a)(1) requires some connection between the claim and the defendant's transaction of business or supply of goods or services in New York. *See Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005); *LaChapelle v. Torres*, 1 F. Supp. 3d 163, 177 (S.D.N.Y. 2014) (CPLR 302(a)(1) requires an "articulable nexus" between the transaction and the claim). This does not require a "causal link" between the claim and the defendant's New York contacts. *Id.* The nexus requirement is

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“relatively permissive” and does not require causation, but merely “a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim.” *Licci v. Lebanses Can. Bank, SAL*, 20 N.Y.3d 327, 339 (2012). The claim need only be “in some way arguably connected to the transaction.” *Id.* at 340. Presumably, Ford and Goodyear will rely on the fact that the Ford Explorer and the Goodyear tire were not initially sold in New York to argue that the accident is not related to their business in New York. They would be wrong.

The connection requirement of 302(a)(1) is satisfied so long as the product is marketed in New York, even if the specific product that caused the injury was not sold in New York initially. In *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (2016), the Court of Appeals found that 302(a)(1)’s nexus requirement was satisfied where the bank accounts in New York were part of a larger fraud scheme conducted by the defendants that took place elsewhere, just like the sale of the Ford Explorer and Goodyear tire were part of a nationwide marketing for those products. *Id.* at 21-23. See also *Singer v. Walker*, 15 N.Y.2d 443 (1965) (foreign manufacturer was subject to jurisdiction under 302(a)(1) where a New York retailer sold one of its hammers to the plaintiff who was injured in an accident that occurred out-of-state); *Tonns v. Spiegel’s*, 90 A.D.2d 548 (2d Dep’t 1982) (court found jurisdiction under 302(a)(1) where the defendant was an out-of-state manufacturer who made a defective product

sold to the plaintiff through a New York retailer); *Emi Christian Music Grp. v. MP3tunes, LLC*, 840 F.3d 69, 2016 U.S. App. LEXIS 19236 at * 38-39 (2d Cir. 2016) (evidence of the intent to market a product nationwide sufficient for minimum contacts in New York).

In *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W.Va. 2016), Ford made this same argument regarding the nexus requirement for specific jurisdiction under a similar long-arm statute in West Virginia. In *McGraw*, "Ford contends that because the Ford Explorer was manufactured in Kentucky, sold to a dealer in Florida, and entered West Virginia via a third party, Ford's asserted activities in West Virginia do not have anything to do with the West Virginia claim." *Id.* at 342. The court rejected this argument, saying:

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

Id. at 343. Ford had this same argument rejected in *Rhodehouse v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 167780 (E.D.Ca. 2016), a case where it argued that there was no nexus for specific jurisdiction over a California resident injured by a Ford vehicle registered in California because the vehicle was manufactured in Kentucky

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and sold to an independently-owned dealer in Canada. The court rejected Ford's argument, relying on Ford's extensive sales and marketing in the state and that the vehicle was registered in the state and injured a resident of the state. *Id.* at * 11.

In our case, Ford sold this exact same model Ford Explorer in New York with the same design flaws and manufacturing defects as the incident Explorer. Goodyear sold this exact same model tire in New York with the same design flaws and manufacturing defects as the incident tire. That the incident Explorer was not manufactured in New York and that it was initially shipped to a dealer in outside New York are irrelevant. So is the fact that the Goodyear tires were manufactured outside New York. Ford and Goodyear's sale of these products in New York satisfies the nexus requirement of 302(a)(1). In addition, the vehicle was registered in New York and injured New York residents. The tire was on that New York registered vehicle and allegedly serviced by U.S. Tires, an authorized Goodyear service center in Queens.

B. Ford and Goodyear are subject to specific jurisdiction under CPLR 302(a)(3)

The court also has specific jurisdiction in this case under CPLR 302(a)(3).

The first requirement of CPLR 302(a)(3) is that the defendant "commits a tortious act without the state causing injury to person or property within the state."

Here, Ford and Goodyear committed tortious acts without the state—they manufactured and designed the products outside of New York.

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

Traditionally, in the case of personal injury or property damage, whether the injury occurred "within the state" is determined by the location of the accident. *McGowan v. Smith*, 52 N.Y.2d 268 (1981). The courts have consistently held that pain and suffering or discovery of damages in New York after the injury occurs in another state will not suffice. *Id.* On this question, however, the Court of Appeals has indicated that it is open for a reconsideration of this "first injury" rule. In *Ingraham v. Carroll*, 90 N.Y.2d 592 (1997), the court addressed the question of jurisdiction under CPLR 302(a)(3) over a Vermont physician who examined the plaintiff in Vermont, but continued to send instructions to her New York physicians. The court decided the question under CPLR 302(a)(3)(ii), by "assuming, without deciding, that the alleged tortious conduct in Vermont caused injury within New York." *Id.* at 597. The dissenting opinion that the majority's choice not to affirm the lower court's ruling that the place of injury was New York signaled the court's willingness to reconsider the place of injury rule in "a more propitious and better assembled case, that may be otherwise determinative of outcome and contributive to

the dispositional analysis and developing jurisprudence." *Id.* at 604. This is that case.

If there was ever a case to reconsider the first injury rule, this is the case. CPLR 302(a)(3) was enacted precisely to prevent the untenable situation Ford and Goodyear propose: allowing national manufacturers to avoid the jurisdiction of New York courts where a New York resident is injured by a product marketed in New York. When CPLR 302 was amended in 1966 to add CPLR 302(a)(3), the legislature did so in response to the Court of Appeals' determination in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443 (1965), that CPLR 302(a)(2) did not encompass products liability actions where the plaintiff was injured by a product manufactured outside New York. L. 1966, ch. 590, effective September 1, 1966; Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 339-344. The amendment was meant to be broad enough to provide legal redress to New York residents who are injured by foreign tortfeasors and yet, not so broad as to burden unfairly nonresidents, whose connection with the state is remote and who could not reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York. See Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 340-344. Denying jurisdiction under CPLR 302(a)(3) in our case would subvert the purpose of the statute.

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

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

i. **There is jurisdiction under 302(a)(3)(i)**

Subsection 302(a)(3)(i) requires that the tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state."

There should be no dispute that this subsection is satisfied. Ford and Goodyear engage in regular business in the state and derive substantial revenue from goods sold in the state.

Jurisdiction under this section does not require the same quantity of contacts required for general jurisdiction under CPLR 301. See *Ingraham v. Carroll*, 90 N.Y.2d 592, 597 (1997). Just because the sales in New York might be only a small percentage of the defendant's total sales does not mean that it does not "derive substantial revenue" under this section. *Allen v. Canadian General Electric Co., Ltd.*, 65 A.D.2d 39 (3d Dep't 1978), *aff'd*, 50 N.Y.2d 935. Rather, this subsection is intended to apply to defendants "who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere." *Ingraham*, 90 N.Y.2d at 597, citing 12th Ann Report of NY Jud Conf, at 343.

Ford and Goodyear engage in regular business in New York and derive substantial revenue from goods sold in New York; therefore, jurisdiction is proper under CPLR 302(a)(3)(i).

ii. There is jurisdiction under 302(a)(3)(ii)

Jurisdiction is also proper under CPLR 302(a)(3)(ii), which requires that the defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Again, there should be no dispute that Ford and Goodyear "derives substantial revenue from interstate or international commerce."

Ford and Goodyear may argue that the other portion of this subsection is not satisfied—that they "expect or should reasonably expect the act to have consequences in the state"—because the Ford Explorer and Goodyear tire were not shipped to New York initially.

Courts have consistently held that "the place where delivery or transfer of title occurs is, under the terms of 302 (a)(3)(ii), not relevant to whether the out-of-state act was tortious with foreseeable in-state consequences." *Dingeldey v. VMI-EPE-Holland B.V.*, 2016 U.S. Dist. LEXIS 138041 (W.D.N.Y. 2016) (finding jurisdiction under 302(a)(3)(ii) over manufacturer from Netherlands). In *Darrow v. Deutschland*, 119 A.D.3d 1142 (3d Dep't 2014), the court found jurisdiction under CPLR 302(a)(3)(ii) over a German manufacturer that sold a product in New York and other states via a distributor. This "rendered it likely that its products would be sold in New York" and the defendant should have "reasonably expected a manufacturing defect to have consequences in the state." *Id.* at 1144.

In *LaMarca v. Pak-Mor Manufacturing Co.*, 95 N.Y.2d 210 (2000), the Court of Appeals found jurisdiction under 302(a)(3)(ii), rejecting a similar argument focused on the point of the initial sale of the product. The plaintiff was a New York resident that was injured by a defective product. The defendant-manufacturer was a Texas corporation and the product was manufactured in Virginia. The defendant had no property or presence in New York, although it did advertise and sell products in New York. The defendant focused on the fact that title for the product was passed to a distributor in Virginia to argue that they could not have reasonably expected consequences in New York. The court rejected that argument because the defendant marketed the product in New York and knew that its products would be sold in New York. See also *Darienzo v. Wise Shoe Stores, Inc.*, 74 A.D.2d 342 (2d Dep't 1980) (jurisdiction under 302(a)(3)(ii) over foreign manufacturer because it knew that some of its products would be sold in New York stores and therefore it "did or should have reasonably expected forum consequences to arise in New York."); *Napolitano v Mastic Bicycles & Fitness Co.*, 279 A.D.2d 461, 462 (2d Dep't 2001) (holding that a non-domiciliary may be subject to suit if "the sale of one of its products arises from the efforts of the manufacturer or distributor to serve directly the market for its product in other countries or States, and its allegedly defective merchandise has been a source of injury.").

Therefore, Ford and Goodyear should have reasonably expected that these products could result in injury or consequences in New York based on their marketing and sale of the products in New York in general.

C. Specific jurisdiction in this case does not violate due process

In addition to compliance with CPLR 302, the exercise of jurisdiction must also comply with federal due process requirements. *See Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000).

A state may constitutionally exercise jurisdiction over non-domiciliary defendants provided they had "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). "Minimum contacts" with the forum state depends on whether the defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant may reasonably foresee the prospect of defending a suit in the forum state if it "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.*

In *LaMarca*, the Court of Appeals found that due process requirements were satisfied where the defendant-manufacturer was incorporated in another state and

did not have any direct New York connections other than a New York distributor.

The court relied on the fact that the defendant was a United States corporation, fully familiar with New York law, adding that "New York has an interest in providing a convenient forum for [the plaintiff], a New York resident who was injured in New York and may be entitled to relief under New York law." *LaMarca*, 95 N.Y.2d at 218. The court then said the following, which applies especially well to Ford and Goodyear:

When a company of [defendant's] size and scope profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in this State. Considering that [defendant's] long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm. In all, we conclude that asserting jurisdiction over [defendant] in New York would not offend traditional notions of fair play and substantial justice.

Id. at 218-19; *see also Darienzo*, 74 A.D.2d 342 (due process was satisfied because product manufacturer placed the product in the stream of commerce with the expectation that they will be purchased in New York).

The U.S. Supreme Court has stated that jurisdiction in similar cases comport with due process requirements. *Ashai Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 112 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" while also "designing the product for the market in the forum State,

advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World-Wide Volkswagen*, 444 U. S. at 297 ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.").

In this case, finding that the New York courts have jurisdiction over Ford and Goodyear does not violate due process. They marketed and sold the products in New York and therefore they should reasonably expect the products defects to have consequences in New York.

POINT IV—THE RESULT PROPOSED BY FORD AND GOODYEAR WOULD HAVE DISASTROUS CONSEQUENCES ON THIS CASE AND OTHERS

If this Court agrees with Ford and Goodyear and holds that they are not subject to personal jurisdiction in this case that decision would have disastrous consequences. It would result in one lawsuit against Ford in Michigan or Delaware, another against Goodyear in Ohio, and a third against U.S. Tires in New York. U.S. Tires would also need to prosecute its cross-claims against Ford and Goodyear in

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some forum. Inconsistent verdicts are almost guaranteed under this scenario. Discovery could not be coordinated between the various actions, resulting in duplicity and wasting judicial resources. *See LaMarca*, 95 N.Y.2d at 219 (“[I]t would be orderly to allow plaintiff to sue all named defendants in New York. A single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy.”).

Ford and Goodyear cry prejudice at the prospect of litigating this case in New York, apparently blind to the fact that their products, which were sold, registered, and marketed in New York, injured New York residents. Jurisdictional requirements are meant to prevent out-of-state companies from being hauled into court in a state that has no connection with the accident or the defendants. That danger is absent from this case. Ford and Goodyear are large, national corporations that are more than capable of litigating this case in New York. New York has a substantial interest in seeing that injured New York residents are provided with a forum to sue manufacturers who sell their products in the New York market injuring New Yorkers. A finding by this Court in favor of Ford and Goodyear would deprive the plaintiffs of that forum.

POINT V—IF NOTHING ELSE, JURISDICTIONAL DISCOVERY IS WARRANTED

The court should find that there is jurisdiction over Ford and Goodyear on the current record. However, if the court finds that it cannot decide the jurisdictional issue on the current record, it should, at a minimum, order jurisdictional discovery.

To obtain jurisdictional discovery, the party asserting jurisdiction "need only demonstrate that facts may exist" or "make a "sufficient start in demonstrating" the basis for personal jurisdiction over the defendants "to warrant further discovery on the issue of personal jurisdiction." *Peterson v. Spartan Industries*, 33 N.Y.2d 463, 466 (1974); *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, 85 A.D.3d 665, 666 (1st Dep't 2011).

Here, there are many unanswered questions that warrant jurisdictional discovery. There has been no discovery about the extent of Ford and Goodyear's overall operations in New York or their marketing and sale of these products in general. Moreover, there has been no discovery about the manufacture or sale of the specific products involved in this accident.

Conclusion

This Court should find that New York has personal jurisdiction over Ford and Goodyear. Their contacts with New York are substantial enough to render them "at home" in New York under the U.S. Supreme Court's decision in *Daimler*. They also consented to personal jurisdiction because they are registered foreign corporations authorized to do business in New York. Finally, there is specific jurisdiction under

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CPLR 302(a)(1) and 302(a)(3)(i) & (ii). If the court rules that there is no jurisdiction over Ford and Goodyear the result would be multiple lawsuits in different states, all but guaranteeing inconsistent verdicts and the waste of judicial resources. This would impose a substantial burden on the plaintiffs and U.S. Tires. New York has a substantial interest in hearing this case. Products sold by Ford and Goodyear killed and injured New Yorkers. Ford and Goodyear should be required to answer those allegations in a New York court.

Dated: New York, New York
 February 15, 2017



Adam C. Calvert

**APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
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Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 8,058.

Dated: New York, New York
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EXHIBIT E TO SAEZ AGUIRRE AFFIRMATION -
(I) BRIEF FOR PLAINTIFFS-RESPONDENTS,
DATED JUNE 19, 2017
(REPRODUCED HEREIN AT PP. 759-799)

(II) BRIEF FOR NON-PARTY RESPONDENT,
DATED FEBRUARY 15, 2017
(REPRODUCED HEREIN AT PP. 800-839)

**EXHIBIT F TO SAEZ AGUIRRE AFFIRMATION -
JOINT BRIEF FOR DEFENDANTS-APPELLANTS,
DATED AUGUST 30, 2016 [841 - 900]**

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*To be Argued by:
SEAN MAROTTA
(Time Requested: 15 Minutes)*

**New York Supreme Court
Appellate Division—Second Department**

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal
guardian on behalf of K.C., an infant over the age of fourteen (14) years,
JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS,
JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant
under the age of fourteen (14) years and ANNA AYBAR, as Administratrix
of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Docket Nos.:
2016-06194
2016-07397

Plaintiffs-Respondents,

— against —

JOSE A. AYBAR, JR. and “JOHN DOES 1 THRU 30,”

Defendants,

— and —

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Appellants.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Respondent.

JOINT BRIEF FOR DEFENDANTS-APPELLANTS

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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court
Appellate Division—Second Department

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C., a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs-Respondents,

— against —

JOSE A. AYBAR, JR. and “JOHN DOES 1 THRU 30,”

Defendants,

— and —

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Appellants.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party Respondent.

-
1. The index number of the case in the court below is 706909/15.

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2. The full names of the original parties are as set forth above. There have been no changes.
3. The action was commenced in Supreme Court, Queens County.
4. The action was commenced on or about June 30, 2015 by filing of a Summons and Complaint. Issue was joined by Defendant The Goodyear Tire & Rubber Company on or about August 12, 2015 by service of a Verified Answer. Issue was joined by Jose A. Aybar, Jr. on or about November 18, 2015 by service of a Verified Answer. Issue was joined by Defendant Ford Motor Company on or about June 8, 2016 by service of a Verified Answer.
5. The nature and object of the action is to recover damages for personal injuries allegedly sustained due to negligence.
6. This appeal is from (i) the Decision and Order of the Honorable Thomas D. Raffaele, dated May 25, 2016, which denied Defendant Ford Motor Company's Motion to Dismiss and (ii) the Decision and Order of the Honorable Thomas D. Raffaele, dated May 25, 2016, which denied Defendant The Goodyear Tire & Rubber Company's Motion to Dismiss.
7. This appeal is on the full reproduced record.

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QUESTIONS PRESENTED

1. Whether Ford Motor Company (“Ford”—a Delaware corporation with its headquarters in Dearborn, Michigan—is “at home” in New York such that it is subject to general jurisdiction in the State.

The Supreme Court held that Ford is “at home” in New York.

2. Whether The Goodyear Tire & Rubber Company (“Goodyear”—an Ohio corporation with its headquarters in Akron, Ohio—is “at home” in New York such that it is subject to general jurisdiction in the State.

The Supreme Court held that Goodyear is “at home” in New York.

3. Whether Ford and Goodyear validly consented to general jurisdiction in New York by registering as foreign corporations and appointing the Secretary of State as their respective agent for service of process—both steps required by Business Corporation Law § 304 for Ford and Goodyear to do business in New York.

The Supreme Court held that Ford and Goodyear validly consented to general jurisdiction in New York by complying with the Business Corporation Law.

PRELIMINARY STATEMENT

This is a product liability lawsuit that was filed in New York, despite having no connection to the State. Plaintiffs allege that they were injured in a rollover crash after the tread on a Goodyear tire installed on their 2002 Ford Explorer

separated. The accident occurred in Virginia; Plaintiffs sustained their alleged injuries in Virginia; and neither the Explorer nor the Goodyear tire was manufactured, designed, or first sold by either Ford or Goodyear in New York. Ford and Goodyear therefore moved to dismiss Plaintiffs' claims against them for lack of personal jurisdiction.

The Supreme Court agreed in part. It correctly held that New York did not have specific jurisdiction under either the state long-arm statute or the federal Due Process Clause. But the court held that New York had general—or dispute-blind—jurisdiction over Ford and Goodyear because they had “continuous and systematic” contacts with the State and each had “consented” to general jurisdiction by registering to do business with the Secretary of State and appointing the Secretary as their respective agent for service of process. The impact of the Supreme Court’s two holdings is pronounced. They mean that any plaintiffs with grievances originating anywhere in the country can file suit in New York against Ford or Goodyear—or any company similarly situated—simply because the companies registered to do business in the State.

That troubling consequence proves precisely why the Supreme Court’s decision cannot be correct. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court emphasized that general jurisdiction over a company does not exist

in every State in which it does business—even where the company does a lot of business. *Daimler* rejected as “unacceptably grasping” the argument that any time a company has “substantial, continuous, and systematic course of business” in a State, the defendant is subject to general jurisdiction there. *Daimler*, 134 S. Ct. at 761. The Court held that the “inquiry . . . is not whether a foreign corporation’s in-forum contacts can be in some sense ‘continuous and systematic,’ it is whether that corporation’s affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State. *Id.* (citation omitted; alteration in original.)

The paradigmatic examples of where a corporation is “at home”—reiterated in both *Daimler* itself and the New York appellate case law applying *Daimler*—are the corporation’s state of incorporation and its principal place of business. Ford is incorporated in Delaware and headquartered in Michigan. Goodyear is both incorporated and headquartered in Ohio. Neither can be considered “at home” in New York absent exceptional circumstances that Plaintiffs have not proved.

The Supreme Court’s consent by registration holding is similarly flawed. The Supreme Court based its decision on Business Corporation Law § 304, which requires an out-of-state corporation to register with the Secretary of State and appoint the Secretary the company’s agent for service of process as a condition of doing business in New York. Significantly, however, nothing in Business

Corporation Law § 304—or any other provision of the Business Corporation Law, for that matter—even mentions consent or general jurisdiction. The Supreme Court’s consent by registration theory is therefore at odds with the plain text of the statute that it purports to interpret.

In any event, a statute that attempts to impose general jurisdiction as a condition of registration to do business in a State would be unconstitutional. The consent by registration theory was developed before *Daimler*’s narrowing of permissible places for a corporation to be subject to general jurisdiction—and, indeed, before the modern era of personal jurisdiction. That is why, post-*Daimler*, most courts have rejected the Supreme Court’s consent by registration theory, including courts in New York. This Court should do the same. At the very least, the Court should hold that the serious constitutional questions presented by the Supreme Court’s consent by registration theory counsel in favor of applying the constitutional-avoidance canon and rejecting the Supreme Court’s expansive interpretation of the Business Corporation Law.

STATEMENT OF FACTS AND NATURE OF THE CASE

Plaintiffs’ Accident and Suit. Plaintiffs allege that on July 1, 2012, while traveling in Brunswick, Virginia, the 2002 Ford Explorer in which they were passengers left the roadway and rolled over following a tread detachment event involving a Goodyear tire installed on the vehicle. R. 51-52. Plaintiffs allege the

accident caused them various personal injuries, and they sued Ford and Goodyear in the Queens County Supreme Court, asserting product liability claims. R. 54-69. As to Ford, Plaintiffs claim that the Explorer had “certain defective, unsafe, and defective condition(s) in [its] design, manufacture, fabrication, and/or assembly” that caused the roll-over and rendered Ford liable for their injuries. R. 49. With respect to Goodyear, Plaintiffs allege that the subject tire was “dangerous, hazardous, and defective, and otherwise unsuitable for the use for which it was intended.” R. 51.

Neither Ford nor Goodyear had any contacts in New York with Plaintiffs, the Explorer, or the Goodyear tire installed on it. Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. R. 73. The Explorer was not designed or manufactured in New York. *Id.* Ford assembled the vehicle at its St. Louis, Missouri plant, and first sold it to Team Ford Lincoln, an independently owned Ford dealership in Steubenville, Ohio. *Id.* Team Ford Lincoln then sold the Explorer to a retail consumer. *Id.* According to Ford’s records, the Explorer entered New York in 2009, when it was purchased by an individual named Jose Velez without Ford’s involvement. *Id.* Defendant Jose Aybar, Jr. then purchased the Explorer sometime in late 2011. R. 51.

Goodyear is an Ohio corporation with its principal place of business in Akron, Ohio. R. 120. The tire identified by Plaintiffs was not designed or

manufactured in New York. R. 121. Nor could it have been, as Goodyear does not have any Wrangler AP-model tire manufacturing plants in New York. *Id.* Instead, the tire was designed in Akron, Ohio and manufactured at Goodyear's Union City, Tennessee plant. *Id.* Although tires do not have unique identification numbers and are not tracked the way vehicles are, Goodyear's records and the evidence below indicate that Goodyear was not involved in bringing the tire into New York. R. 120. Jose Aybar, Jr. apparently bought the tire used and brought it to New York, where a party unrelated to Goodyear inspected and installed it on the Explorer two weeks before the Virginia accident. R. 21. Goodyear had no known ties with the tire after it left Goodyear's possession and control at the Tennessee manufacturing plant during the fourth week of 2002. R. 120.

Ford and Goodyear's Motions to Dismiss and the Supreme Court's Orders. Ford and Goodyear moved to dismiss Plaintiffs' claims against them for lack of personal jurisdiction. R. 27-28, 75-76. Ford and Goodyear argued that the Supreme Court did not have specific jurisdiction over them under the New York long-arm statute, CPLR 302(a)(2)-(3), because they did not commit a tortious act in the State or a tortious act outside the State causing injury within the State. R. 33-34, 91. Ford and Goodyear also argued that the Supreme Court did not have specific jurisdiction under the U.S. Constitution's Due Process Clause because Plaintiffs' claims did not arise out of or relate to any of Ford or Goodyear's New

York contacts. R. 40-43, 89-91. Ford and Goodyear finally argued that the Supreme Court did not have general jurisdiction over them under the Due Process Clause because neither is headquartered or incorporated in New York. R. 36-39, 79-88.

Plaintiffs and U.S. Tire and Wheels of Queens, a defendant in a related action brought by Plaintiffs arising from the same accident, opposed Ford and Goodyear's motions. R. 122-135, 152-169, 205-207. Plaintiffs argued that Ford and Goodyear's contacts with New York were sufficiently continuous and systematic to render both "at home" in New York for general jurisdiction purposes. *See* R. 121-130, 153-166. U.S. Tires, meanwhile, argued that Ford and Goodyear had consented to general jurisdiction in New York by registering as a foreign corporation with the Secretary of State and appointing the Secretary as their agent for service of process. *See* R. 206.

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions to dismiss in separate, but substantively identical, orders. R. 7-15, 20-26. The court first held that Ford and Goodyear's "activities with the State of New York have been so continuous and systematic" that the companies are "essentially at home" in New York. R. 13, 24. The court also pointed to Jose Aybar, Jr.'s purchase, registration, and use of the Explorer in New York as distinguishing Ford from the

defendants in the U.S. Supreme Court and New York appellate cases where general jurisdiction was rejected. R. 9-13.

The Supreme Court further held that Ford and Goodyear had “consent[ed] to general jurisdiction” in New York by registering as foreign corporations and appointing the Secretary of State as their agent for service of process. R. 13, 25. The court recognized, however, that “the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes” and that “[t]here is no New York state court appellate authority directly on point.” *Id.* Yet the court “[a]greed with those courts that hold general jurisdiction based on consent through registration and appointment” is constitutional. R. 14, 25.

Ford and Goodyear’s Appeals. The Queens County Clerk entered the Supreme Court’s orders on May 31, 2016, and Plaintiffs served the orders with notice of entry on June 10. R. 5, 18. Ford and Goodyear timely appealed the Supreme Court’s orders on June 13 and June 23, respectively. R. 3-4, 16-17.

ARGUMENT

I. FORD AND GOODYEAR ARE NOT “AT HOME” IN NEW YORK.

The Supreme Court held that Ford and Goodyear are “at home” and subject to general jurisdiction in New York because they each have “continuous and systematic” contacts with the State. R. 13, 24. In doing so, the court misconstrued the U.S. Supreme Court’s recent decisions retiring the “doing business” test in

favor of a much simpler and predictable approach: the “at home” test. *See generally Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Goodyear* and *Daimler*’s “at home” standard reflects the Court’s recognition of the evolution of the global economy, and marked a decided change from the pre-*Daimler* standard the lower court used.

Under *Goodyear* and *Daimler*, “as a matter of due process,” general jurisdiction over a non-resident corporation like Ford and Goodyear “exists only if the corporation is ‘essentially at home in the forum State.’” *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 160 n.4 (2014) (quoting *Daimler*, 134 S. Ct. at 761). A corporation’s homes are “typified by ‘the place of incorporation and principal place of business.’” *Id.* (quoting *Daimler*, 134 S. Ct. at 761). These are the “paradigm” places for general jurisdiction because they “have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.” *Daimler*, 134 S. Ct. at 760 (internal quotation marks and alteration omitted). Applying this rule, New York appellate courts routinely hold that they lack general jurisdiction over defendants that are neither incorporated nor headquartered in New York. *See D&R Global Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 487 (1st Dep’t 2015) (“As defendant neither is incorporated in New York State nor has its principal place of business here, New York courts may not

exercise [general] jurisdiction over it"); *Magdalena v. Lins*, 123 A.D.3d 600, 600 (1st Dep't 2014) ("[T]here is no basis for general jurisdiction . . . , since [the defendant] is not incorporated in New York and does not have its principal place of business in New York.").

The Supreme Court acknowledged the "at home" standard set forth in *Goodyear* and *Daimler*, as well as the New York appellate cases just cited. R. 11-13, 23-24. The Supreme Court's general jurisdiction analysis thus should have been easy. Neither Ford nor Goodyear is incorporated or headquartered in New York; therefore, they are not "at home" in the State. R. 73, 120. The Supreme Court nevertheless found that the cases were inapposite—and the general jurisdiction outcome different—because in the prior cases, the contacts between the corporation and the forum state were minimal, whereas the contacts between Ford and Goodyear and New York here are, in its view, more significant. *Id.*

Daimler considered—and rejected—this line of reasoning, emphasizing that "the general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' " *Daimler*, 134 S. Ct. at 762 n.20 (citation omitted; alteration in original). "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* Many corporations, like Daimler, Ford, and Goodyear, do significant business across the

United States. But “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” *Id.*

Under *Daimler*’s comparative analysis, Ford’s plant in New York and its franchise agreements with independent dealers in the State (R. 9) do not add up to Ford being “at home” in New York. Ford *also* has plants and franchise agreements with independent car dealers in the rest of the world. In fact, Ford has 62 plants and 11,980 franchise agreements with independent dealerships worldwide. R. 144-145. Ford’s economic contacts with New York are therefore not so substantial as compared to its contacts elsewhere so as to make Ford “at home” in New York.

The same is true of Goodyear. Although Goodyear had an unrelated plant in New York and has service centers in the State (R. 24, 121), it also has plants and service centers across the country and around the world. Goodyear has more than 15 plants in the United States alone and 50 plants and 1,200 retail tire outlets worldwide. R. 235-237. Like Ford, Goodyear’s economic contacts with New York are not so great as compared to its contacts elsewhere so as to make Goodyear “at home” in New York.

Daimler's facts prove as much. Daimler had a regional headquarters, a vehicle-preparation center, and a classic-car center in California.¹ Daimler was also the largest supplier of luxury vehicles to the California market and made 2.4% of its worldwide sales in California. *Daimler*, 134 S. Ct. at 752. The U.S. Supreme Court nonetheless found that *Daimler* was not “at home” in California. *Id.* at 761-762. To hold Daimler subject to general jurisdiction in California, the Court held, would be “unacceptably grasping.” *Id.* at 761.

So too for Ford and Goodyear in New York. Indeed, Justice Sotomayor pointed out in her separate *Daimler* opinion that the majority’s rule would result in no general jurisdiction over defendants like Ford and Goodyear that are “large corporation[s] that own[] property, employ[] workers, and do[] billions of dollars’ worth of business in the State.” *Id.* at 773 (Sotomayor, J., concurring in judgment). But that criticism did not change the Court’s decision in *Daimler*, and it cannot support the Supreme Court’s decision here.

To be sure, *Daimler* recognized that a corporation could be “at home” somewhere other than its State of incorporation and the State in which its principal place of business is located—but only in “exceptional case[s].” *Id.* at 761 n.19. A corporation will be “at home” outside of the two paradigm places *only* when its

¹ Many of Daimler’s contacts discussed in text were those of Daimler’s wholly-owned subsidiary, Mercedes Benz USA. See *Daimler*, 134 S. Ct. at 752. The Court assumed, without deciding, that Mercedes Benz’s contacts could be imputed to Daimler for general jurisdiction purposes. *Id.* at 759-760.

relationship with the forum State is so strong as to be “comparable to a domestic enterprise.” *Id.* at 758 n.11. To illustrate just how rare those exceptions are, the *Daimler* Court provided only a single example of an “exceptional” case: *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, general jurisdiction was appropriate in Ohio because the defendant, a Philippine mining company, temporarily transferred its management activities to Ohio during World War II. *See Daimler*, 134 S. Ct. at 756 & n.8. In that sense, *Perkins* is hardly an exception at all, given that “Ohio was the corporation’s principal, if temporary, place of business.” *Id.* at 756 (citation omitted).

Following *Perkins*, courts have recognized that a company cannot be “at home” outside of the States where it is incorporated or headquartered unless “the corporation’s activities in the forum closely approximate the activities that ordinarily characterize a corporation’s place of incorporation or principal place of business.” *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1205 (11th Cir. 2015). Put differently, the company’s activities in the forum State must be a “surrogate for the place of incorporation or head office.” *Daimler*, 134 S. Ct. at 756 n.8 (citation omitted).

The Supreme Court did not find that Ford’s and Goodyear’s operations in New York were equivalent to either company being incorporated or headquartered in the State, nor could it on this record. Instead, the court proceeded as if

“regularly engag[ing] in commercial activity” in New York is sufficient to subject a company to general jurisdiction in its courts. *See R. 12, 24.* Federal courts applying New York law, however, have repeatedly held the opposite. 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). Similarly, 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 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-CV-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); *see also SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 168 (S.D.N.Y. 2015) (same). In short, engaging in “continuous

business” in New York is “insufficient to establish general jurisdiction after *Daimler*.” *Karoon*, 2016 WL 815278, at *3.

Courts have held that even Ford is not subject to general jurisdiction in States where it has significant business dealings. One court held that Ford was not subject to general jurisdiction in Mississippi because the plaintiffs “demonstrate[d] that Ford is at most ‘doing business’ in Mississippi”—a finding that was not sufficient to render Ford “‘at home’ in Mississippi.” *Pitts v. Ford Motor Co.*, 127 F. Supp. 3d 676, 683 (S.D. Miss. 2015) (citation omitted). Another held that Ford was not subject to general jurisdiction in California, observing that the plaintiffs’ “reliance on pre-*Daimler* cases that use a ‘continuous and systematic’ analysis must be reconsidered” in light of *Daimler*. *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015) (citation omitted). The court found that “[e]ven if Ford’s business contacts with California are continuous and systematic, approving the exercise of general jurisdiction in every state in which [Ford] does business would be ‘unacceptably grasping.’” *Id.* (citation omitted). And yet another court applied *Daimler* to deny the exercise of general jurisdiction over Ford in Utah. Order Granting Ford’s Mot. to Transfer 3-5, *Oversen v. Kelle’s Transp. Serv., Inc.*, No. 2:15-cv-535-JNP-DBP (D. Utah May 12, 2016) (reprinted in the addendum to this brief). Although there was “no doubt that Ford’s contacts with Utah are extensive,” the “same can be said of Ford’s operations in every state

across the country.” *Id.* at 5. The plaintiff’s arguments relying on the “substantial” business conducted by Ford in Utah were “indistinguishable from those raised by the plaintiff in *Daimler*”—and firmly rejected by the U.S. Supreme Court. *Id.* Courts have applied similar logic to find that Goodyear is not subject to general jurisdiction in States where it has significant business dealings, as well. *See, e.g.*, *Clark v. Lockheed Martin Corp.*, No. 15-CV-995-SMY-PMF, 2016 WL 67265, at *2 (S.D. Ill. Jan. 6, 2016).

In its ruling below, the Supreme Court thought that these cases and the others like them were still distinguishable—at least as to Ford—because Jose Aybar, Jr.’s Explorer was purchased, used, registered, and primarily operated in New York. R. 12. But this distinction is irrelevant. By definition, general jurisdiction is agnostic as to a case’s facts or their connection to the forum; a claim’s factual connection to a state matters only for *specific* jurisdiction. *See Goodyear*, 564 U.S. at 926. Here, the Supreme Court (correctly) held that there was no specific jurisdiction over Ford or Goodyear on Plaintiffs’ claims. R. 10, 22. By importing specific jurisdiction concepts such as place of purchase into its general jurisdiction analysis, the court committed the same analytical mistake that

the U.S. Supreme Court warned against in *Goodyear*. See *Goodyear*, 564 U.S. at 926-928.²

The Supreme Court's order is directly contrary to these decisions. Ford and Goodyear's contacts with New York are no different than their contacts with these other States. Under the Supreme Court's order, Ford and Goodyear would be subject to general jurisdiction in every State where their contacts are continuous and systematic—that is, virtually every State. Such a result would be directly contrary to *Daimler*'s core teaching: “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” *Daimler*, 134 S. Ct. at 762 n.20. The Supreme Court's holding that Ford and Goodyear are “at home” in New York was wrong.

² None of this is to say that the Supreme Court's cited contacts are, in fact, relevant to specific jurisdiction in this case or any other. Ford did not sell the Explorer in New York, and there is no evidence that Goodyear sold the tire in the State, either. The “unilateral 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.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). That the Explorer was owned by a New York resident and driven by him there is similarly irrelevant. “[H]owever significant the plaintiff's contacts with the forum may be, those contacts cannot be ‘decisive in determining whether the defendant's due process rights are violated.’” *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)) (emphases added).

II. FORD AND GOODYEAR DID NOT CONSENT TO GENERAL JURISDICTION IN NEW YORK BY REGISTERING TO DO BUSINESS HERE.

The Supreme Court was also incorrect in holding that Ford and Goodyear each consented to general jurisdiction in New York by registering to do business in New York and appointing the Secretary of State as their respective agent for service of process. Nothing in the Business Corporation Law requires a corporation to consent to general jurisdiction as a condition of doing business in New York. And the Business Corporation Law would be unconstitutional if it did. In light of these significant constitutional questions, the Court should apply the constitutional-avoidance canon and construe the Business Corporation Law as consistent with the constitution—just as other courts have.

A. The Business Corporation Law Does Not Deem A Foreign Corporation's Registration To Do Business In New York As Consent To Be Sued In The State For All Causes Of Action.

The Supreme Court concluded that “a foreign corporation may consent to general jurisdiction in this state under CPLR 301”—the New York general jurisdiction statute—“by registering as a foreign corporation and designating a local agent for service of process.” R. 13, 25. The Court found Ford and Goodyear’s purported consent in their compliance with Business Corporation Law § 304, which requires companies to register with the Secretary of State and appoint

the Secretary as their agent for service of process before they do business in New York. R. 14, 25.

The Business Corporation Law does not expressly require a foreign corporation to consent to jurisdiction in order to be authorized to do business in New York.³ Business Corporation Law § 304 is silent regarding jurisdiction and consent. All it says is that “[t]he secretary of state shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served” and that “[n]o . . . foreign corporation . . . may be . . . authorized to do business in this state under this chapter unless in its . . . application for authority it designates the secretary of state as such agent.” BCL § 304(a)-(b). Similarly silent is Business Corporation Law § 1304, which the Supreme Court also cited. R. 14, 25. Business Corporation Law § 1304 specifies the required contents of a foreign corporation’s application for authority—none of which reference general jurisdiction. The application needs to contain only “[a] designation of the secretary of state as [the corporation’s] agent upon whom process against it may be served

³ Some lawmakers have proposed a bill to amend Business Corporation Law §1301 to state what the Supreme Court believed it already says: that a foreign corporation’s application for authority to do business constitutes consent. *See* NY S04846, 2015-2016 N.Y. General Assembly (June 25, 2015). There is no indication, however, that the measure will pass the Legislature or be signed by the Governor. And it is being vigorously opposed by multiple groups, including the New York City Bar Association, on economic and constitutional grounds. *See e.g.*, Lanier Saperstein et al., *New York State Legislature Seeks to Overturn ‘Daimler’*, N.Y. Law J., May 20, 2015, available at <http://goo.gl/1T4WUI>.

and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it.” BCL § 1304(a)(6). Consistent with that statute, the Secretary of State’s form application for authority to do business in New York states nothing about general jurisdiction. *See* N.Y. Dep’t of State, Div. of Corps., State Records & Uniform Commercial Code, *Application for Authority of _____ Under Section 1304 of the Business Corporation Law* (Apr. 2016), <http://goo.gl/e6kwO3>.

The remainder of the Business Corporation Law is similarly silent on the subject of general jurisdiction. Business Corporation Law § 1305—which addresses the “effect” of an application for authority—states that “[u]pon filing by the department of state of the application for authority the foreign corporation shall be authorized to do in this state any business set forth in the application.” Business Corporation Law § 1306—which addresses the “[p]owers of authorized foreign corporations”—states that the corporation shall “have such powers as are permitted by the laws of the jurisdiction of its incorporation but no greater powers than those of a domestic corporation.” Neither provision references the obligations or burdens placed on an authorized foreign corporation.

Given the Business Corporation Law’s silence on general jurisdiction, the Supreme Court’s reading of Business Corporation Law § 304 cannot be the right one. When a court is “presented with a question of statutory interpretation,” its

“primary consideration ‘is to ascertain and give effect to the intention of the Legislature.’” *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) (quoting *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000)). In turn, “the clearest indicator of legislative intent is the statutory text” and “the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.” *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

The plain meaning of the Business Corporation Law here is unambiguous; nothing in it deems a corporation’s executed application for authorization to do business in New York as consent to be sued on all causes of action in the State. Further, the Supreme Court’s reading of the statute adds a nonexistent proviso that “by appointing the secretary of state as agent for service of process, every authorized foreign corporation consents to jurisdiction in New York for all claims, regardless of their connection to New York.” And it is a fundamental tenet of statutory interpretation that the Court “ought not to add to words having a definite meaning or interpret a statute when there is no need to do so.” *People v. Tatta*, 196 A.D.2d 328, 331 (2d Dep’t 1994); *see also Distribution Nat’l Fuel Gas Corp. v. Pub. Serv. Comm’n of N.Y.*, 277 A.D.2d 981, 981 (4th Dep’t 2000) (“Courts are not free to amend a statute by adding words that do not appear therein.”).

The Supreme Court's holding appears to be founded on the premise that Ford and Goodyear's designation of the Secretary of State as agent for service of process also constitutes consent to general jurisdiction. But service of process and personal jurisdiction are separate concepts; a plaintiff must prove both proper service of process *and* personal jurisdiction before the New York courts may exercise jurisdiction over the defendant. As this Court has held, "a challenge to the basis of the court's jurisdiction is distinct from a claim of defective service of process." *Hatch v. Tran*, 170 A.D.2d 649, 650 (2d Dep't 1991); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant be given adequate notice of the suit *and* be subject to the personal jurisdiction of the court.") (citation omitted; emphasis added); 62B Am. Jur. 2d *Process* § 258 ("While service of process and personal jurisdiction both must be satisfied before a suit can proceed, they are nonetheless distinct concepts that require separate inquiries"). Ford and Goodyear's consent to service through the Secretary of State was not also consent to general jurisdiction in New York.

To the extent that there is any doubt about the Business Corporation Law's proper construction, the presumption against waiving constitutional rights resolves it in Ford and Goodyear's favor. "There is a presumption against the waiver of constitutional rights," *People v. Howard*, 50 N.Y.2d 583, 593 (1980), and personal

jurisdiction is an “individual liberty interest preserved by the Due Process Clause,” *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). As a result, “[i]t is the duty of the court to indulge every reasonable presumption against the waiver of fundamental constitutional rights.” *People v. Jenkins*, 85 A.D.2d 265, 276 (1st Dep’t 1982). Because there is no clear statement in the Business Corporation Law that a corporation waives its Due Process protections against general jurisdiction by registering to do business in New York, the presumption against waiver prevents the Court from construing the statute in that manner.

The Supreme Court cited two appellate cases—both from outside this Department—holding that registration to do business as a foreign corporation constitutes consent to general jurisdiction. R. 14, 25 (citing *Doubet LLC v. Trustees of Columbia Univ. in City of N.Y.*, 99 A.D.3d 433, 434-435 (1st Dep’t 2012) and *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-176 (3d Dep’t 1983)). These opinions are not persuasive. Neither opinion analyzed the Business Corporation Law’s text or addressed its silence on jurisdiction. Also, neither opinion addressed the jurisdictional issue in any depth. *Doubet* resolved the jurisdictional question with a single sentence citing *Augsbury*. *Doubet*, 99 A.D.3d at 434-435. In turn, *Augsbury* cited only a Special Term and a trial court opinion

in support of its conclusions. 97 A.D.2d at 176. That is too slender a reed to subject Ford and Goodyear to jurisdiction in New York on all causes of action.

Moreover, both *Doubet* and *Augsbury* appear to have addressed whether registration constituted consent to general jurisdiction under the long-arm statute, CPLR 301. *See Doubet*, 99 A.D.3d at 434-435; *Augsbury*, 97 A.D.2d at 175-176. But even if registration to do business in New York constitutes consent to jurisdiction under the long-arm statute, it does not follow that registration constitutes consent under the Due Process Clause. A plaintiff must prove that there is jurisdiction over the defendant under both the long-arm statute *and* the Due Process Clause. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). That distinction is particularly relevant because New York courts have doubted that a finding of general jurisdiction under CPLR 301 satisfies the federal due-process analysis after *Daimler*. *See Sonera Holding*, 750 F.3d at 224 n.2 (noting that there is “some tension” between CPLR 301’s and *Daimler*’s tests for general jurisdiction); *Continental Indus. Grp., Inc. v. Equate Petrochemical Co.*, 586 Fed. App’x 768, 769-770 (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*).

In the end, it makes no sense for the Legislature to have intended a corporation’s registration to do business to serve as consent to general jurisdiction

in New York. Again, such an interpretation would mean that any plaintiff anywhere in the country with any grievance against Ford and Goodyear could file suit in New York. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 n.6 (2014) (general jurisdiction “permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit.”) Under such an expansive interpretation, a disgruntled employee in Washington State, a personal-injury plaintiff in California, and a Lemon Law claimant in Texas could all impose upon New York’s already taxed judicial resources to resolve their suits against the companies. The Supreme Court gave no reason why the Legislature would have intended that result in enacting the Business Corporation Law, nor is there one. *See People v. Santi*, 3 N.Y.3d 234, 242 (2004) (courts “will not blindly apply the words of a statute to arrive at an unreasonable or absurd result”) (citation omitted); Statutes § 145 (“A construction which would make a statute absurd will be rejected.”)

B. The Supreme Court’s Interpretation Of The Business Corporation Law Renders It Unconstitutional.

The Supreme Court’s finding that Ford and Goodyear consented to general jurisdiction by registering as a foreign corporation not only misreads the statute, but is also unconstitutional. Consent by registration cannot be squared with *Daimler*’s holding that a corporation is not subject to general jurisdiction everywhere it does business or the U.S. Supreme Court’s unconstitutional-

conditions doctrine, which forbids States from forcing corporations to waive Due Process protections in return for the privilege of doing business within their borders.

1. Consent By Registration Cannot Be Reconciled With *Daimler* Or The Cases Before It.

It violates due process for a State to subject a company to general jurisdiction by requiring the company to file the routine paperwork necessary to conduct business in the State. Every State requires registration similar to New York as a condition of doing business. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1345 (2015) (*Fallacy of Consent*). If the Supreme Court’s reasoning is allowed to stand, every state and federal court could be converted into an all-purpose forum with respect to every claim against every corporation registered to do business in the jurisdiction.

The Supreme Court’s reasoning would virtually wipe out *Daimler*’s holding that “at home” is not “synonymous with ‘doing business.’ ” 134 S. Ct. at 762 n.20. Under it, New York would revert back to the pre-*Daimler* principle that doing business in New York—combined with the statutorily required step of registering with the Secretary of State—is enough for general jurisdiction in the New York courts. *See Brown*, 814 F.3d at 640 (if consent by registration were constitutionally permissible, “*Daimler*’s ruling would be robbed of meaning by a

back-door thief"). In other words, "*Daimler's* limitation on the exercise of general jurisdiction to those situations where 'the corporation is essentia[ly] at home' would be replaced by a single sweeping rule: registration equals general jurisdiction." *Display Works, LLC v. Bartley*, ___ F. Supp. 3d. ___, No. 16-583, 2016 WL 1644451, at *9 (D.N.J. Apr. 25, 2016) (citation omitted). That "cannot be the law." *Id.*

The Supreme Court's consent by registration holding is contrary to other aspects of *Daimler*, as well. The *Daimler* Court emphasized the importance of the notice function created by its limited approach to general jurisdiction. A corporation's place of incorporation and principal place of business are "unique" and "easily ascertainable." 134 S. Ct. at 760. Despite those limitations, *Daimler's* approach still "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.* The "exorbitant exercise[] of all-purpose jurisdiction" entailed in Supreme Court's theory "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Numerous courts have recognized and applied these *Daimler* principles in refusing to find general jurisdiction simply because the corporate defendant has

appointed an agent. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 (Del. 2016) (observing that “[t]he majority of federal courts that have considered the issue of whether consent by registration remains a constitutional basis for general jurisdiction after *Daimler* have taken the position” that it is not). The Southern District of New York explained that “[a]fter *Daimler*, . . . the mere fact of [the foreign corporation] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.” *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015). The Second Circuit, too, has cast doubt on the constitutionality of consent by registration. Consent by registration theories, it noted, “risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely.” *Brown*, 814 F.3d at 639. Or, as a Missouri federal court put it, if registering to do business were sufficient to “create[] jurisdiction, national companies would be subject to suit all over the country,” which would be “contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction.” *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015); *see also Neeley v. Wyeth LLC*, 4:11-cv-00325-JAR, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015) (stating that if plaintiff’s

consent by registration argument were correct, “every foreign corporation transacting business in the state of Missouri would be subject to general jurisdiction here. *Daimler* clearly rejects this proposition.”).

Even before *Daimler*, many courts have recognized that asserting general jurisdiction based on “mere service on a corporate agent . . . displays a fundamental misconception of corporate jurisdictional principles” and is “directly contrary to the historical rationale of” the Supreme Court’s personal-jurisdiction decisions. *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-183 (5th Cir. 1992).⁴ This Court should hold the same.

The Supreme Court’s contrary ruling rested largely on *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916). R. 13, 25. But

⁴ See also, e.g., *Consol. Dev. Co. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (“Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation.”); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 89 n.6 (1st Cir. 1990) (rejecting the argument that the defendant’s “licensure and appointment of an agent for service of process constituted a consensual submission to the jurisdiction of Maine’s courts”); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (a corporation’s compliance with a State’s registration act “cannot satisfy—standing alone—the demands of due process”); *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require [more than] mere compliance with state [registration] statutes.”); *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) (“Service on a designated agent alone does not establish minimum contact.”); *Freeman v. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000) (“[C]ourts and legal scholars have agreed that the mere act of appointing an agent to receive service of process, by itself, does not subject a non-resident corporation to general jurisdiction.”)

that hundred-year-old case has been abrogated by more recent U.S. Supreme Court personal jurisdiction decisions, beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). At the time of *Bagdon*, personal-jurisdiction inquiries were governed by *Pennoyer v. Neff*, 95 U.S. 714 (1877), which held that “a tribunal’s jurisdiction over persons reaches no farther than the geographic bounds of the forum.” *Daimler*, 134 S. Ct. at 753; *see also Pennoyer*, 95 U.S. at 722 (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”). Courts therefore created “fictions” like those in *Bagdon*, under which a corporation’s appointment of an agent for service of process was deemed consent to suit in the State. *See* 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1066 (4th ed. 2010); *see also Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

The U.S. Supreme Court did away with the “fictions of implied consent to service on the part of the foreign corporation and of corporate presence,” *Shaffer*, 433 U.S. at 202, in its “pathmarking” decision in *International Shoe*. *Goodyear* 564 U.S. at 915; *see also Burnham v. Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion) (“As many observed, however, the consent and presence were purely fictional. Our opinion in *International Shoe* cast those fictions aside”) (citation omitted). With *International Shoe*, *Pennoyer*’s “strict territorial approach yielded to a less rigid understanding, spurred by ‘changes in

the technology of transportation and communication, and the tremendous growth of interstate business activity.’” *Daimler*, 134 S. Ct. at 753-754 (citation omitted).

From then on, “the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.” *Shaffer*, 433 U.S. at 204. The U.S. Supreme Court explained that “*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,” and explicitly held that “[t]o the extent that prior decisions are inconsistent with [*International Shoe*], they are overruled.” *Id.* at 212 & n.39. That is a holding that *Daimler* repeated, admonishing that cases from before *International Shoe* “should not attract heavy reliance today.” 134 S. Ct. at 761 n.18. Pre-*International Shoe* cases like *Bagdon*, holding that consent by registration is consistent with Due Process, are “now simply too much at odds with the approach to general jurisdiction adopted in *Daimler* to govern as categorically as [the Supreme Court] suggest[ed]”; their “holding[s] . . . cannot be divorced from the outdated jurisprudential assumptions of [their] era.” *Brown*, 814 F.3d at 639; *see also Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at *10 (D. Vt. July 24, 2009) (observing that “to the extent that early cases such as *Bagdon* . . . hold that compliance with a registration requirement alone establishes personal jurisdiction—whether based on

‘consent,’ ‘presence,’ or some other theory—the viability of such holdings is cast in doubt by . . . *International Shoe.*”).

To its credit, the Supreme Court acknowledged that post-*Daimler* cases have undermined *Bagdon*. See R. 13 (“After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes.”). The Supreme Court also acknowledged that “[t]here is no New York state court appellate authority directly on point.” *Id.* But it cited one post-*Daimler* case from Delaware, *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 78 F. Supp. 3d 572, 591 (D. Del. 2015), *aff’d on other grounds*, 817 F.3d 755 (Fed. Cir. 2016), as supporting its conclusion that consent by registration is constitutional. R. 14, 25-26.

The Supreme Court did not mention, however, that the Delaware Supreme Court expressly rejected *Acorda Therapeutics*’ interpretation of the Delaware registration statute. Reversing prior precedent, the Delaware Supreme Court concluded that there was a “stark tension” between *Daimler* and cases, like those cited by the Supreme Court, holding that consent by registration was constitutional. *Genuine Parts*, 137 A.3d at 145. The Delaware high court thus held that *Acorda Therapeutics*’s reading of its registration statute was not the correct one. *Id.* at 140-141. The case is no longer good law.

The Supreme Court's consent by registration holding is all the more untenable because Ford and Goodyear's supposed "consent" to general jurisdiction is a fiction. *See Shaffer*, 433 U.S. at 202; *Burnham*, 495 U.S. at 617-618 (plurality opinion). To the extent that the Business Corporation Law implicates general jurisdiction at all, *see supra* at 18-25, it is through legislative fiat—not Ford and Goodyear's freely given consent. And "[c]onsent requires more than legislatively mandated compliance with state laws. Routine paperwork to *avoid* problems with a state's procedures is not a wholesale submission to its powers." *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 891 (S.D. Tex. 1993). In other words, "[a] waiver through consent must be willful, thoughtful, and fair. 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process." *Id.* at 889; *see also Fallacy of Consent, supra*, at 1388 ("The idea that a corporation can fill out certain state-mandated forms that a court may deem to constitute consent to all-purpose jurisdiction, without the corporation knowing about that consequence in advance, is repugnant to any basic understanding of consent.").

The Supreme Court therefore cannot evade the Due Process Clause's limitations on general jurisdiction through the fiction of implied consent. "A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear*, 564 U.S. at 919; *see also World-*

Wide Volkswagen, 444 U.S. at 291 (“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.”). The “reach of that coercive power, even when exercised pursuant to a corporation’s purported ‘consent,’ ” is still constrained by the Due Process Clause. *Brown*, 814 F.3d at 641. The Supreme Court’s holding that Ford and Goodyear consented to general jurisdiction in New York by registering to do business here goes further than *Goodyear*, *Daimler*, and Due Process allow.

2. Consent By Registration Is An Unconstitutional Condition That Burdens Interstate Commerce.

Requiring Ford and Goodyear to consent to general jurisdiction in New York to do business here would also constitute an unconstitutional condition burdening interstate commerce. 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.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)).

In *Denton*, the U.S. Supreme Court invalidated a Texas law barring companies, as a condition of doing business in Texas, from exercising their federal right to remove suits filed against them in state court. 146 U.S. at 206-207. The Supreme Court’s holding below works the same impermissible way: it would read

New York law to bar companies, as a condition of doing business in New York, from asserting their federal due process rights to resist state-court jurisdiction over matters unconnected to their activities in the State.

The Supreme Court reasoned that Ford and Goodyear could always cancel their registrations to avoid general jurisdiction in New York. R. 14, 26. But if Ford and Goodyear did business in New York without registering, they could no longer sue in the New York courts, even if New York was the only forum in which they could obtain personal jurisdiction over a defendant. *See BCL § 1312(a)*. Worse still, the Attorney General could sue to enjoin Ford and Goodyear's operations. *See BCL § 1303*. The companies have no way to both avoid general jurisdiction and continue doing business in New York.

If the Supreme Court meant that Ford and Goodyear should stop doing business in New York to avoid Plaintiffs' lawsuit here, that only underscores the unconstitutionality of consent by registration. The U.S. Supreme Court has warned that "States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses." *United States v. Lopez*, 514 U.S. 549, 579-580 (1995). In measuring state statutes' imposition on commerce, the Court has specifically held that "[r]equiring a foreign corporation . . . to defend itself with reference to all transactions, including those in which it did not have the minimum contacts

necessary for supporting personal jurisdiction, is a significant burden.” *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988); *see also Fallacy of Consent, supra*, at 1390 (“The option of refraining from doing business in the state is not really a viable one for most corporations. Since all fifty states have the same laws requiring registration, this ‘option’ really amounts to a corporation simply not doing business *at all* in the United States.”). Thus, “exacting such a disproportionate toll on commerce” through a state statute “is itself constitutionally problematic.” *Genuine Parts*, 137 A.3d at 142.

There is no corresponding benefit to offset this substantial burden. *See Dolan v. City of Tigard*, 512 U.S. 374, 394-395 (1994) (a State may not condition a government benefit on waiver of a constitutional right where there is no “reasonable relationship” between the burden imposed on the right and the benefit obtained from the waiver); *cf. Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (“There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.”). New York has “no conceivable interest in adjudicating a dispute that does not involve the state in any way or does not involve a defendant who has made the state its home.” *Fallacy of Consent, supra*, at 1398; *see also Charles W. Rhodes, Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 443 (2012) (“The state has no sovereign interest in

regulating conduct without any connection to the corporation's activities, and the potential exposure exceeds forum benefits when the corporation is not acting as a local domiciliary.”). The Constitution therefore prohibits New York from conditioning Ford and Goodyear’s right to do business in New York on their consent to be sued here on cases with no connection to the State.

C. Constitutional-Avoidance Principles Counsel In Favor Of Rejecting The Supreme Court’s Expansive Reading Of The Business Corporation Law.

This Court need not interpret the Business Corporation Law as working in these unconstitutional ways. Under settled rules of statutory construction “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 (1963); *see also Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118, 123 (2d Dep’t 1974) (“[W]e are also obliged to construe statutes so as to avoid constitutional doubts.”) (citation omitted). And there is a perfectly logical—and constitutional—way to read Business Corporation Law § 304’s requirement that Ford and Goodyear designate the Secretary of State as their agent for service of process. It can be construed as “requiring a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but not as a consent to general jurisdiction.” *Genuine Parts*, 137 A.3d at 142.

Numerous courts have adopted similar service-only readings of States' corporate-registration statutes by interpreting the statute in a manner that does not conflict with the Due Process Clause. The Second Circuit interpreted the Connecticut corporate-registration statute as only governing service of process in light of the "constitutional concerns" raised by consent by registration. *Brown*, 814 F.3d at 626. The Seventh Circuit, too, concluded that interpreting the Indiana corporate-registration statute as embracing consent by registration "would render [the statute] constitutionally suspect," and therefore "decline[d] to give it such a reading." *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). And the Delaware Supreme Court, reversing prior precedent interpreting its corporate-registration statute, held that a "far-reaching" consent by registration interpretation of its corporate-registration statute would "collide[] directly with the U.S. Supreme Court's holding in *Daimler*" and limited the statute to only service. *Genuine Parts*, 137 A.3d at 127 & n.8, 140-141.

This Court should join these others and hold the Business Corporation Law controls only how a registered foreign corporation is served. *See supra* at 18-25. But if the Court concludes that the Business Corporation Law must be read to encompass general jurisdiction as well, it should hold that the statute is unconstitutional. *See supra* at 25-37.

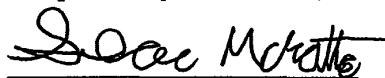
CONCLUSION

For the foregoing reasons, the Supreme Court's orders should be reversed.



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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

GREGG M. OVERSEN,

Plaintiff,

v.

KELLE'S TRANSPORT SERVICE, INC., a Utah corporation; KELLE'S TRANSPORT SERVICE, LLC, a foreign limited liability company; SHAWN A. DAWESE; and FORD MOTOR COMPANY, a foreign corporation;

Defendants.

ORDER GRANTING FORD'S MOTION FOR TRANSFER AND DENYING PLAINTIFF'S MOTION FOR TRANSFER AND MOTION FOR JURISDICTIONAL DISCOVERY

Case No. 2:15-cv-00535-JNP

District Judge Jill N. Parrish

Before the court are a Motion for Transfer or to Dismiss filed by defendant Ford Motor Company ("Ford"), a Motion for Jurisdictional Discovery and an Alternative Motion for Transfer, both filed by plaintiff Gregg M. Oversen. (Dockets 24, 35 & 36). The court also notes that it received and reviewed the supplemental authority and responses filed by the parties. (Dockets 51–54, 56–57). The court held oral argument on the motions on April 29, 2016. At the conclusion of the hearing, the court took the motions under advisement. After considering the written submissions and the arguments presented at the hearing, the court issues this Order Granting Ford's Motion to Transfer and Denying Mr. Oversen's Motion to Transfer and Motion for Jurisdictional Discovery. Accordingly, the Motion to Dismiss is moot.

INTRODUCTION

Mr. Oversen brought this suit seeking to recover for injuries he sustained in an automobile accident involving a 1997 Ford F-250 pickup truck he was driving. The truck was built in Kentucky and was first sold in Washington. Mr. Oversen is an Arizona resident, and the accident occurred in California on Interstate 5 near Fresno. The accident also involved a semi-truck driven by defendant Shawn A. Deweese, and owned by defendant Kelle's Transport Company. Ford brings its Motion to Dismiss the claims against it arguing that it is not subject to general personal jurisdiction in Utah. In the event that the court lacks personal jurisdiction over Ford, both parties have requested the case be transferred. Ford requests that the claims against it be severed and transferred to Michigan or Delaware. Mr. Oversen requests that the entire case be transferred to California.

DISCUSSION

I. The Court Cannot Exercise Personal Jurisdiction Over Ford

Ford argues that this court lacks personal jurisdiction over it. Where, as in Utah, "the state long arm statute supports personal jurisdiction to the full extent constitutionally permitted, due process principles govern the inquiry." *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011); *Starways, Inc. v. Curry*, 980 P.2d 204, 206 (Utah 1999) (explaining that the Utah long arm statute extends to the fullest extent permitted by due process). The plaintiff bears the initial burden of establishing personal jurisdiction.

Under federal law, "a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend notions of fair play and substantial justice.'" *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 923 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). These minimum contacts may give rise to either

general or specific personal jurisdiction. Mr. Oversen does not argue that the court may exercise specific personal jurisdiction over Ford in this case. Accordingly, the court's analysis is confined to general personal jurisdiction.

The Supreme Court has explained that "only a limited set of affiliations with a forum will render a defendant subject to [general personal jurisdiction] there." *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014). For corporations, the place of incorporation and principal place of business are the paradigm bases for general jurisdiction. *Id.* This is advantageous because "[t]hose affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* But it does not mean "that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business." *Id.* Rather, a party is subject to general personal jurisdiction when its "affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* (quoting *Goodyear*, 564 U.S. at 919).

In arguing that Ford is "at home" in Utah, Mr. Oversen focuses on the business it conducts here. Mr. Oversen's first argument is that Ford registered to do business in Utah and appointed an agent for acceptance of service of process. Under Utah law, "[a] foreign corporation may not transact business in [Utah] until its application for authority to transact business is filed." Utah Code § 16-10a-1501(1). The parties agree that Ford has registered to do business in Utah as required by Utah law.

Second, Mr. Oversen points to the fact that Ford regularly sends agents into Utah on a regular basis in order to solicit business. Mr. Oversen alleges that Ford has at least seventeen local dealers in the Salt Lake City area. Likewise, Mr. Oversen points to the fact that "Ford's volume of business in Utah is substantial." He alleges that "Ford's vehicles, parts, advertising,

etc. are everywhere in Utah.” Finally, Mr. Oversen contends that Ford “holds itself out as doing business in Utah through advertisements, listings, and/or bank accounts.” Mr. Oversen alleges that Ford spent nearly \$800 million on television advertising in the United States in 2013. And many of those advertisements appeared in Utah.

Even taking all of Mr. Oversen’s factual allegations as true, Ford is not subject to general jurisdiction in Utah. The recent, and analogous, Supreme Court case of *Daimler AG v. Bauman*, makes this clear. 124 S. Ct. at 760–62. In that case, the plaintiff argued that the defendant, the car manufacturer Daimler AG, was subject to general personal jurisdiction in California because one of Daimler’s subsidiaries, Mercedes-Benz USA (“MBUSA”), had continuous and systematic contacts with California.

The plaintiff argued that the Court should “approve the exercise of general jurisdiction in every State in which a corporation ‘engages in substantial, continuous, and systematic course of business.’” *Id.* at 761. The Supreme Court rejected that “formulation . . . [holding that it was] unacceptably grasping.” *Id.* Although MBUSA undoubtedly did significant business in California, it was not “at home” in California. The Supreme Court clarified that “the inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.’” *Id.* (quoting *Goodyear*, 564 U.S. at 919).

The Supreme Court reasoned that “if Daimler’s California activities sufficed to allow jurisdiction of this . . . case in California, the same global reach would presumably be available in every State in which MBUSA’s sales are sizable.” *Id.* And “[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary

conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Mr. Oversen’s arguments are indistinguishable from those raised by the plaintiff in *Daimler*. What Mr. Oversen has demonstrated is that Ford conducts a “substantial, continuous, and systematic course of business” in Utah. *Id.* at 761. There can be no doubt that Ford’s contacts with Utah are extensive. But the same can be said of Ford’s operations in every state across the country. Similarly, the same facts (registrations to do business, substantial advertising, substantial sales, etc.) could be demonstrated for almost every automobile manufacturer with respect to every state in the nation, including BMW, Audi, Mercedes-Benz, GM, Chevrolet, Subaru, Honda, Toyota, Volkswagen and Hyundai, to name just a few. But Utah cannot fairly be considered the “home” of all of those companies. Accordingly, the court holds that it may not exercise general personal jurisdiction over Ford.

At oral argument, Mr. Oversen attempted to distinguish this case from *Daimler* by arguing that Ford has “consented to jurisdiction in Utah” by registering to do business in Utah and appointing an agent for service in Utah. Under Utah law, “[t]he registered agent of a foreign corporation authorized to transact business in this state is the foreign corporation’s agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.” Utah Code § 16-10a-1511(2). In the only paragraph of Mr. Oversen’s memorandum devoted to this argument, he requests that this court interpret that statute to conclude that any foreign corporation that has appointed an agent for service has consented to general personal jurisdiction in Utah.

But Mr. Oversen admitted at oral argument that the Utah Supreme Court has never interpreted this statute or its predecessor in such a way as to support that conclusion, although he

points to a 1971 case from that court interpreting a repealed version of the statute. *See Hill v. Zale Corp.*, 482 P.2d 332 (Utah 1971). And Mr. Oversen has not explained why the statute should not be interpreted consistent with its actual language. That language provides only that a foreign corporation must appoint an agent to accept service. Nothing in the text suggests that such an act will give rise to general personal jurisdiction or, for that matter, specific personal jurisdiction in any particular case. Finally, Mr. Oversen has not even attempted to address the constitutional questions that would arise if the statute were interpreted to require that all entities must consent to general personal jurisdiction in Utah before being allowed to conduct any business in the state. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) (explaining that a states' ability to require a foreign corporation to consent to general personal jurisdiction may be limited by the Fourteenth Amendment). In short, Mr. Oversen has not met his burden of establishing that this court may exercise general personal jurisdiction over Ford.

Mr. Oversen has also requested, in a two paragraph motion, that he be allowed to conduct limited jurisdictional discovery in this case. (Docket 36). But his motion does not provide any explanation as to how jurisdictional discovery could affect the case. Likewise, it does not provide the court with any indication as to what information he seeks to discover. Given the instructions provided by the Supreme Court in *Daimler*, the court does not see how any additional discovery could result in a different outcome in this case. Accordingly, the court denies Mr. Oversen's motion for jurisdictional discovery.

II. The Court Orders that the Case be Transferred to Delaware

Having held that the court cannot exercise personal jurisdiction over Ford in this case, the court will now address the requests for transfer. Mr. Oversen argues that the entire case should be transferred to the Eastern District of California. Ford argues that the claims against it should be severed from the claims against the other defendants and transferred to Michigan or Delaware.

“The federal transfer statute, 28 U.S.C. § 1631, provides that if a federal court determines that it lacks personal jurisdiction over a civil action or appeal, ‘the court shall, if it is in the interests of justice, transfer such civil action or appeal to any other court in which the action or appeal could have been brought at the time it was filed.’” *Grynberg v. Ivanhoe Energy, Inc.*, 490 Fed. App’x 86, 105 (10th Cir. 2012) (quoting 28 U.S.C. § 1637). Before ordering a transfer, the court must “satisfy itself that the proposed transferee court has personal jurisdiction over the parties.” *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 793 n.16 (10th Cir. 1998). The burden of demonstrating jurisdiction in the transferee venue is on the party requesting the transfer. *Id.* And the “the phrase ‘if it is in the interest of justice’ . . . grants the [transferor] court discretion in making a decision to transfer an action or instead to dismiss the case without prejudice.”” *Grynberg*, 490 Fed. App’x at 105 (quoting *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008)).

Mr. Oversen argues that the entire case should be transferred to the Eastern District of California because that is the only jurisdiction with the ability to hear all of the claims against all of the parties. He asserts that “a California court would have specific personal jurisdiction over Ford” because Ford has placed its products into the “stream of commerce” and thus has “purposefully availed itself of the California Auto Market.” Ford disagrees. It argues that it would not be subject to specific personal jurisdiction for Mr. Oversen’s claims in the Eastern District of California because specific personal jurisdiction can be exercised only when the Plaintiff’s claims arise out of the defendant’s contacts with California. See *Int’l Shoe*, 326 U.S. at 316. Ford contends that Mr. Oversen’s claims do not arise out of Ford’s contacts with California. Mr. Oversen responds by requesting that he be allowed to conduct jurisdictional discovery with respect to Ford’s contacts with California.

The court finds that Mr. Oversen has not met his burden of demonstrating that a transfer to the Eastern District of California is in the interests of justice. There is considerable uncertainty with respect to whether a court in the Eastern District of California would have specific personal jurisdiction over Ford. And the answer may very well depend on Ninth Circuit law (that Mr. Oversen has not provided to the court), as well as further factual discovery. This Utah court is unpersuaded that it is the best forum to oversee factual discovery related to Ford's California contacts and to determine whether a California court has personal jurisdiction over Ford under Ninth Circuit law. Accordingly, it declines to exercise its discretion to transfer the case to the Eastern District of California.

Ford argues that the claims against it should be severed from the claims against the other defendants and transferred to either Michigan or Delaware, the two states where it is admittedly subject to general personal jurisdiction. At oral argument, counsel for Mr. Oversen requested that the case be transferred to Delaware in the event that the court declines to transfer the case to California. Because both parties have stipulated that severing the claims against Ford and transferring them to Delaware would be appropriate and preferable to simply dismissing the claims against Ford, the court orders that the claims against Ford be severed and transferred to Delaware pursuant to 28 U.S.C. section 1631.

CONCLUSION

The court holds that it may not exercise general personal jurisdiction over Ford. The court finds that transferring this case to the Eastern District of California would be inappropriate. Accordingly, the court GRANTS Ford's Motion to Transfer and ORDERS that the claims against Ford be transferred to Delaware. Because, Mr. Oversen has not demonstrated that further discovery could yield a different result, Mr. Oversen's Motion for Jurisdictional Discovery is

DENIED. And Ford's Motion to Dismiss for lack of personal jurisdiction is denied as moot in light of the transfer to Delaware. (Dockets 24, 35 & 36).

Signed May 12, 2016.

BY THE COURT



Jill N. Parrish
United States District Court Judge

EXHIBIT G TO SAEZ AGUIRRE AFFIRMATION -
AFFIRMATION OF ADAM C. CALVERT, FOR DEFENDANT/THIRD-PARTY
PLAINTIFF, IN OPPOSITION TO THIRD-PARTY DEFENDANT THE GOODYEAR
TIRE & RUBBER COMPANY'S MOTION TO DISMISS THE THIRD-PARTY
COMPLAINT, DATED JUNE 5, 2018
(REPRODUCED HEREIN AT PP. 150-155)

**EXHIBIT H TO SAEZ AGUIRRE AFFIRMATION -
AFFIRMATION IN OPPOSITION, DATED JANUARY 7, 2016 [902 - 906]**

FILED: QUEENS COUNTY CLERK 01/25/2016 02:56 PM
NYSCEF DOC. NO. 1844

INDEX NO. 706909/2015

RECEIVED NYSCEF: 01/25/2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X

ANNA AYBAR, ORLANDO GONZALEZ,
JESENIA AYBAR, as legal guardian on behalf of
KEYLA CABRAL, an infant over the age of
fourteen (14) years; JESENIA AYBAR,
as Administratrix of the ESTATE OF NOELIA OVLIERAS,
JESENIA AYBAR, as Administratrix of the
ESTATE OF TIFFANY CABRAL, a deceased infant
under the age of fourteen (14) years,
and ANNA AYBAR, as Administratrix of the
ESTATE OF CRYSTAL CRUZ-AYBAR,

Index No. 706909/15

**AFFIRMATION IN
OPPOSITION**

Plaintiffs,

-against-

JOSE A. AYBAR, JR., FORD MOTOR COMPANY,
THE GOODYEAR TIRE & RUBBER CO., and
"JOHN DOES 1 THRU 30"

Defendants,

-----X

Adam C. Calvert, an attorney admitted to practice law in the New York State Courts,
affirms the following under penalty of perjury:

1. I am an attorney for U.S. Tires and Wheels of Queens, LLC, a defendant in a related action brought by the plaintiffs arising from the same accident as the instant action.¹ I submit this affirmation in opposition to Ford and Goodyear's motions to dismiss for lack of personal jurisdiction.

2. The court should deny the defendants' motion. Goodyear and Ford's position is that under *Daimler A.G. v. Bauman*, 134 S. Ct. 746 (2014), they are not subject to personal jurisdiction in New York because they are only subject to general jurisdiction in the states where

¹ The action is under Index No. 9344/14 and there is a motion to consolidate it with this action and another related action under Index No. 706908/15.

they are incorporated or have a principal place of business (i.e., Ohio or Delaware/Michigan).

That is absurd, both legally and practically.

3. Goodyear and Ford ignore the fact that they are registered to do business with the New York Secretary of State and designated an agent for service of process within New York State. Under CPLR 301, they are subject to personal jurisdiction in New York State based on this fact alone.

4. *Bauman* does not change the fact that Goodyear and Ford are subject to personal jurisdiction under CPLR 301. In fact, *Bauman* specifically recognizes that the "at home" test, allowing for general jurisdiction only where the corporation is incorporated or has a principal place of business, does not apply where the corporation has consented to suit in the jurisdiction.

Id. at 756.

5. Post-*Bauman* decisions has recognized that *Bauman* does not change CPLR 301 and its exercise of general jurisdiction over a corporation that has consented to jurisdiction by registering to do business with the New York Secretary of State and designating an agent for service of process within New York State. *Beach v. Citigroup Alternative Invs., LLC*, 2014 U.S. Dist. LEXIS 30032, at *17-18 (S.D.N.Y. 2014) ("Notwithstanding [the limitations from *Bauman*] a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."); *Bailen v. Air & Liquid Sys. Corp.*, 2014 N.Y. Misc. LEXIS 3554 (Sup. Ct., N.Y. Cty. 2014); *Vera v. Republic of Cuba*, 91 F.Supp.3d 561 (S.D.N.Y. 2015). Goodyear and Ford cannot avail themselves of the protections of New York State by registering to do business and then claims that they are not subject to this court's jurisdiction.

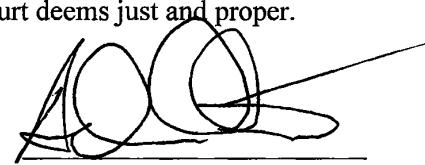
6. Goodyear and Ford's position is not only legally incorrect, but as a practical matter it perverts *Bauman* into an unworkable requirement. If Goodyear and Ford are correct, they could only be sued in Ohio or Delaware/Michigan. U.S. Tires and Wheels is a New York company with a principal place of business in New York. Therefore, under Goodyear and Ford's reasoning, there would be one lawsuit in this court against U.S. Tires, one lawsuit in Ohio against Goodyear, and a third lawsuit against Ford in Delaware or Michigan, all for the same accident.

7. Under that framework, inconsistent verdicts are all but guaranteed, not to mention duplication of discovery and wastes of judicial resources. It also ignores the need for U.S. Tires to assert claims for indemnity and contribution against Goodyear and Ford should the three cases not be consolidated or if the plaintiffs' direct claims against Goodyear and Ford are dismissed. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992); *Mowczan v. Bacon*, 92 N.Y.2d 281 (1998).

8. Simply put, Goodyear and Ford's perversion of the *Bauman* decision is legally incorrect under *Bauman* and CPLR 301 and would result in an unworkable standard that would result in inconsistent verdicts and duplicative actions.

WHEREFORE, the court should issue an order denying Goodyear and Ford's motions in their entirety, together with such other and further relief as the court deems just and proper.

Dated: January 7, 2016
New York, New York



Adam C. Calvert

FILED: QUEENS COUNTY CLERK 03/25/2019 07:54 PM

NYSCEF DOC. NO. 184

INDEX NO. 703632/2017

RECEIVED NYSCEF: 03/25/2019

STATE OF NEW YORK)
 :
 COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICERE: *Jose Aybar et al*

Index No.: 9344/14

Lynel J. Taylor, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, am employed by Marshall, Dennehey, Warner, Coleman & Goggin, Wall Street Plaza, 88 Pine Street, 21st Floor, New York, New York 10005 and resides in Hudson County, New Jersey.

On January 7, 2016, I served a true copy of the within **AFFIRMATION IN OPPOSITION** in the following manner:

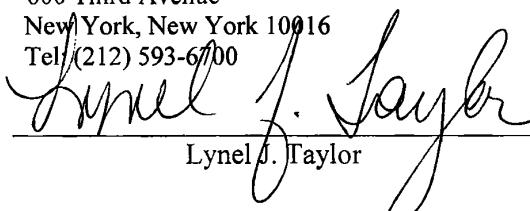
by mailing same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal service by first class mail, addressed to the last known address of the addressee(s) indicated below:

Omrani & Taub, P.C.
 Attorneys for Plaintiffs
 909 Third Avenue, 28th Floor
 New York, New York 10022
 212-599-5550

Certain & Zilberg
 Attorneys for Defendant
 Jose Aybar
 909 3rd Avenue
 New York, New York 10022
 (212) 687-7800

DLA Piper LLP (US)
 Attorneys for Defendant
 The Goodyear Tire & Rubber Co
 1251 Avenue of the Americas – 27th Floor
 New York, New York 10020
 Tel: (212) 335-4500

Aaronson, Rappaport, Feinstein
 & Deutsch, LLP
 Attorneys for Defendant
 Ford Motor Co.
 600 Third Avenue
 New York, New York 10016
 Tel: (212) 593-6700



Lynel J. Taylor

Sworn to before me this
 7th day January, 2016



Notary Public

DEBORAH McINTOSH-LECONTE
 Notary Public, State of New York
 No.01MC5060400
 Qualified in Kings County
 Commission Expires May 20, 2018

FILED: QUEENS COUNTY CLERK 03/25/2019 07:54 PM

NYSCEF DOC. NO. 184

INDEX NO. 703632/2017

RECEIVED NYSCEF: 03/25/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X Index No.: 706909/15
ANNA AYBAR, ORLANDO GONZALES, JESENIA
AYBAR, as legal guardian on behalf of KEYLA CABRAL,
an infant over the age of fourteen (14) years; JESENIA
AYBAR, as Administratrix of the ESTATE OF NOELIA
OLIVERAS, JESENIA AYBAR, as Administratrix of the
ESTATE OF TIFFANY CABRAL, a deceased infant
under the age of fourteen (14) years, and ANNA AYBAR,
as Administratrix of the ESTATE OF CRYSTAL CRUZ-
AYBAR,

Plaintiffs,

-against-

JOSE A. AYBAR, JR., FORD MOTOR COMPANY, THE
GOODYEAR TIRE & RUBBER CO., and "john does 1
THRU 30",

Defendants.

-----X

AFFIRMATION IN OPPOSITION

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

Attorneys for Defendant

U.S. Tires and Wheels of Queens, LLC i/s/h/a US Tires and Wheels of Queens, LLC
(**In a Related Action – Index No. 9344/2014)

Wall Street Plaza, 88 Pine Street, 21st Floor
New York, New York 10005
(212) 376-6400

EXHIBIT I TO SAEZ AGUIRRE AFFIRMATION -
SUMMONS AND VERIFIED COMPLAINT
OF ANNA AYBAR, ET AL., DATED JUNE 30, 2015
(REPRODUCED HEREIN AT PP. 182-209)

EXHIBIT J TO SAEZ AGUIRRE AFFIRMATION -
AMENDED THIRD-PARTY SUMMONS AND AMENDED
THIRD-PARTY COMPLAINT, DATED MARCH 13, 2019
(REPRODUCED HEREIN AT PP. 688-701)

EXHIBIT K TO SAEZ AGUIRRE AFFIRMATION -
AFFIRMATION OF ADAM C. CALVERT, FOR DEFENDANT/
THIRD-PARTY PLAINTIFF, IN SUPPORT OF CROSS-MOTION AND
IN OPPOSITION TO MOTIONS TO DISMISS THE THIRD-PARTY
COMPLAINT, DATED MARCH 13, 2019
(REPRODUCED HEREIN AT PP. 510-539)

EXHIBIT L TO SAEZ AGUIRRE AFFIRMATION -
AFFIRMATION OF MICHAEL A. TAUB, FOR PLAINTIFFS,
IN OPPOSITION TO CROSS-MOTION TO DISMISS CAUSE OF
ACTION AGAINST THIRD-PARTY DEFENDANT FORD
MOTOR COMPANY, DATED MARCH 15, 2019
(REPRODUCED HEREIN AT PP. 702-715)

**AFFIRMATION OF WALSY K. SAEZ AGUIRRE, FOR THIRD-PARTY
DEFENDANT FORD MOTOR COMPANY, IN OPPOSITION
TO CROSS-MOTION, DATED MARCH 25, 2019 [908 - 915]**

FILED: QUEENS COUNTY CLERK 03/25/2019 11:26 PM

NYSCEF DOC. NO. 189

INDEX NO. 703632/2017

RECEIVED NYSCEF: 03/25/2019

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,

**AFFIRMATION IN OPPOSITION
TO CROSS-MOTION**

Index No. 703632/2017 [E-Filed]

Plaintiffs,

Previously Index No. 9344/2014

- 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.

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

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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 opposition to the Cross-Motion submitted by Third-Party Plaintiff US Tires and Wheels of Queens, LLC ("US Tires") for an Order granting US Tires leave to amend its Third-Party Complaint. Ford does not take a position with respect to US Tires' request for a stay of this action.

3. It must be noted that most of US Tires' purported Affirmation in support of its Cross-Motion does not pertain to its request for leave to amend or for a stay. The first twenty-seven pages of the Affirmation in Support by Adam C. Calvert only discuss US Tires' arguments in opposition to Ford's Motion to Dismiss based on lack of personal jurisdiction (Motion Sequence No. 002). Ford addresses those opposition arguments in a separate Reply Affirmation, a copy of which is annexed as **Exhibit "C."** Accordingly, this Affirmation only addresses the last three pages of US Tires' purported Cross-Motion filing.

4. This Court should deny US Tires' cross-motion to amend as futile because, even accepting US Tires' newly proposed jurisdictional allegations, Ford is not subject to specific jurisdiction in this case because it *does not* have any case-specific contacts with New York. Notably, the New York Appellate Division, Second Department, has already ruled that Ford is not subject to personal jurisdiction under the facts of this case. *See 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) [hereinafter *Aybar*] (**Exhibit "A"**). As fully argued in Ford's Affirmation in Support (**Exhibit "B"**) and Reply Affirmation (Exhibit C) in support of its Motion to Dismiss, which are fully incorporated herein, this Court is compelled to follow *Aybar* as binding Appellate Division precedent. *See Gutin v. Frank Mascali & Sons, Inc.*, 11 N.Y.2d

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97, 99, 181 N.E.2d 449, 450 (Ct. App. 1962); *Stewart v. Volkswagen*, 181 A.D.2d 4 (2d Dep't 1992).

5. Further, even before the *Aybar* appeal, this Court found that New York's long-arm statute *does not* provide a basis for asserting specific jurisdiction over Ford in this action. See *Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, at *5, 2016 N.Y. Slip. Op. 31139(U), 3 (Exhibit "D") (Sup. Ct., NY County 2016). US Tires' proposed amendments to jurisdictional facts asserted against Ford are inconsequential. Ford is not subject to specific jurisdiction in this matter under New York's long-arm statute because this action *does not* arise out of, or even relate to Ford's contacts with New York. Also, exercising specific jurisdiction over Ford in this action would offend Due Process.

6. As US Tires cannot establish a basis for specific jurisdiction even through its proposed amendments, an Order granting US Tires leave to amend would be a waste of judicial time and resources, and would cause prejudice to Ford by forcing it to expend resources litigating meritless issues. Accordingly, this Court must deny US Tires' request for leave to amend.

ARGUMENT

US Tires' Cross-Motion to Amend Must Be Denied Because Amendment Is Futile and the Proposed Amendments Lack Merit.

7. While New York courts ordinarily give free leave to amend pleadings in the absence of prejudice or surprise resulting from delay, such leave must be denied if the proposed amendments would be futile. See *Castillo v. Starrett City, Inc.*, 4 A.D.3d 320 (2d Dep't 2004); *Leszczynski v. Kelly & McGlynn*, 281 A.D.2d 519, 520 (2d Dep't 2001); *Staines v. Nassau Queens Med. Grp.*, 176 A.D.2d 718, 718 (2d Dep't 1991). New York courts routinely deny leave to amend pleadings where the proposed amendments lack merit and would be wasteful of

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judicial resources. *See, e.g., Parisi v. Leppard*, 237 A.D.2d 419, 420 (2d Dep’t 1997); *ICC Bridgeport Ltd. Pshp. V. Primrose Dev. Corp.*, 221 A.D.2d 417, 418 (2d Dep’t 1994). *See also Gitseg v. Herbst*, 220 A.D.2d 380, 381 (2d Dep’t 1995) (“While leave to amend a complaint should be freely given . . . a meritless application should not be granted.”).

8. Here, US Tires seeks leave to amend allege the following:

14. Third-party defendant Ford Motor Company is a foreign corporation registered to do business in New York and appointed an agent for service of process with the Secretary of State.
15. Third-party defendant Ford Motor Company transacts business within the state of New York or contracts anywhere to supply goods or services in the state.
16. Third-party defendant Ford Motor Company committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective vehicle.
17. Third-party defendant Ford Motor Company regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York.
18. Third-party defendant Ford Motor Company expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.
(US Tires’ Proposed Amended Third-Party Complaint, Exhibit “E” ¶¶ 14-18.)

9. These proposed amendments are futile because they fail to provide a basis for asserting personal jurisdiction over Ford. The proposed amendments do not change the fact that Ford is *not* essentially “at home” in New York and therefore cannot be subjected to general personal jurisdiction. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *11-26 (Ex. A). The proposed amendments also fail to provide a basis to assert specific jurisdiction over Ford under New York’s long-arm statute because they do not change the fact that US Tires’ third-party claims against Ford *do not arise from* any contact Ford had with New York. *See C.P.L.R. § 302; Aybar v. Aybar*, 2016 N.Y. Misc. LEXIS 2263, at *5 (Ex. D). Lastly, the proposed allegations do not

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establish the necessary “minimum contacts” to establish specific jurisdiction over Ford, because the allegedly tortious conduct by Ford did not occur in New York and Ford did not create any case-related contacts with New York.

(a) Even with the Proposed Amendments, US Tires Cannot Establish that Ford is Subject to General Jurisdiction in New York.

10. US Tires seeks to assert that Ford “is a foreign corporation registered to do business in New York and appointed an agent for service of process with the [New York] Secretary of State” (*id.* at ¶ 14). Presumably, this is an attempt to establish grounds to argue that there is general jurisdiction over Ford under the theory of “consent-by-business-registration.” This amendment is meritless, however, because that the Second Department has already rejected that theory, based on the standard for personal jurisdiction the U.S. Supreme Court established under *Daimler A.G. v. Bauman*, 134 S. Ct. 746, 571 U.S. 117 (2014) and reaffirmed in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 198 L. Ed. 36 (2017). See *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *15 (Ex. A). Further, this Court is bound by the Second Department’s holding in *Aybar* that New York courts cannot assert general jurisdiction over Ford. See, e.g., *D’Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep’t 2014) (“It is axiomatic that [the]Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department.”). Indeed, *all trial courts in New York are bound* and not just guided by *Aybar*. See *Mountain View Coach v. Storms*, 102 A.D.2d 663, 664 (2d Dep’t 1984).

11. Ford respectfully refers the Court to Section IV of its original Affirmation in Support of its Motion to Dismiss (Exhibit B), and Section I(a) of its Reply Affirmation (Exhibit C) for a complete analysis of why compliance with Section 304 of the Business Corporation Law (“B.C.L.”) cannot be construed as consent to be subject to general jurisdiction in New York.

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12. Additionally, US Tires seeks leave to assert that Ford “transacts business within the state” and “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state of New York.” (See Prop. Am. Third-Party Compl., Ex. E ¶¶ 15, 17-18.) Through these proposed allegations, US Tires also attempts to argue that the Court can exercise general jurisdiction over Ford. However, the U.S. Supreme Court has established that a corporation can only be subject to general jurisdiction if its 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 Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *Daimler*, 134 S. Ct. at 761; *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016); *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 truly exceptional circumstances which are not present here.¹ *BNSF*, 137 S. Ct. at 1552; *Daimler*, 134 S. Ct. at 760.

13. Here, US Tires cannot dispute that Ford is not “at home” in New York because it is not incorporated in and does not have its principal place of business in New York. Even assuming US Tires’ proposed amendments to be true, US Tires cannot show that Ford is at “essentially ‘at home’” in New York either. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *14 (Ex. A). This is because an evaluation of the magnitude of Ford’s activities in New York in the context of Ford’s activities worldwide establishes that Ford cannot be considered to be “at home” in New York. *Id.* Indeed, in *Aybar*, the Second Department unequivocally concluded that “it

¹ For a full discussion of the reasons this case does not present the exceptional circumstances discussed in *Daimler*, please refer to Section I(c) of Ford’s Reply Affirmation (Exhibit C).

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cannot be said that Ford is at home in New York” and therefore cannot be subject to personal jurisdiction here. US Tires’ proposed new allegations cannot alter that conclusion.

(b) US Tires’ Proposed Amendments Also Fail to Provide a Basis for the Court to Exercise Specific Jurisdiction Over Ford.

14. In an attempt to establish specific jurisdiction under New York’s long-arm statute, US Tires seeks leave to assert that Ford “committed a tortious act without the state of New York causing injury to person or property within the state in its manufacturing and sale of the allegedly defective vehicle.” (Prop. Am. Third-Party Compl., Ex. E ¶ 16.) US Tires also seeks leave to assert that Ford “expects or should reasonably expect the act . . . to have consequences in the state,” as to try to claim specific jurisdiction under the “stream of commerce” theory. *Id.* ¶ 18.

15. But US Tires’ attempts to assert specific jurisdiction are also misguided. The Court cannot exercise specific jurisdiction over Ford in this action without violating Ford’s rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Specific jurisdiction is appropriate only where the defendant has certain “minimum contacts” with the forum and the plaintiffs’ claims “arise out of or relate to” those contacts. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017). Here, Ford’s third-party claims do not *arise out of* or *relate to* any New York actions by Ford. Ford manufactured the Subject Vehicle in Tennessee, assembled it in Missouri, and originally sold it in Ohio. (Pascarella Aff., Ex. F ¶¶ 5-10.) See also *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *3-4 (Ex. A). Ford also did not service the Subject Vehicle in New York. (Dwyer Aff., Ex. G, ¶¶ 10-11.) There is no evidence on the record to support US Tires’ inventive presumption that Ford directed the Subject Vehicle to New York in any way.

16. US Tires ignores these facts as well as the requirements for specific jurisdiction as outlined in *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122 (2014). Instead, US Tires confounds

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the “minimum contacts” test for specific jurisdiction and asks the Court to focus on Plaintiffs’ contacts with the State of New York. US Tires emphasizes that Plaintiffs are residents of New York, stored their vehicle here, and had their vehicle serviced here by US Tires, and that US Tires “regularly services Goodyear tires and Ford Explorers.” But these facts are not jurisdictionally relevant here. The relevant contacts are not Plaintiffs’ or US Tires’ contacts with the State; they are Ford’s case-related contacts with New York. See *Walden*, 134 S. Ct. at 1125 (noting that an approach to the “minimum contacts” analysis for specific jurisdiction which allows “a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis” is improper). As the U.S. Supreme Court has established, “however significant the plaintiff’s contacts with the forum may be, those contacts *cannot be ‘decisive* in determining whether the defendant’s due process rights are violated.”” *Walden*, 134 S. Ct. at 1115, 1125 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)) (emphasis added). The Due Process “minimum contacts” analysis for specific jurisdiction must focus on the contacts the *defendant creates with the forum State itself*. *Walden*, 134 S. Ct. at 1121; *Bristol-Myers*, 137 S. Ct. at 1781-1782.

17. For the reasons provided in this Affirmation in Opposition, and the reasons set forth in Ford’s Affirmation in Support (Exhibit B) and Reply Affirmation (Exhibit C) in support of its Motion to Dismiss, US Tires’ proposed amendments patently lack merit. Accordingly, US Tires’ Cross-Motion to amend must be denied as a matter of law. *Staines*, 176 A.D.2d at 718.

Dated: New York, New York
March 25, 2019



Walsy K. Sáez Aguirre

**EXHIBIT A TO SAEZ AGUIRRE AFFIRMATION -
APPELLATE DIVISION, SECOND DEPARTMENT DECISION,
DATED JANUARY 23, 2019
(REPRODUCED HEREIN AT PP. 417-441)**

**EXHIBIT B TO SAEZ AGUIRRE AFFIRMATION -
NOTICE OF MOTION, DATED FEBRUARY 26, 2019, WITH AFFIRMATION
IN OPPOSITION, DATED JANUARY 7, 2016 AND CONFIRMATION NOTICE [917 - 926]**

FILED: QUEENS COUNTY CLERK 02/25/2019 05:28 PM
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INDEX NO. 703632/2017
RECEIVED NYSCEF: 03/25/2019

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,

Index No. 703632/2017 [E-Filed]

Previously Index No. 9344/2014

Plaintiffs,

NOTICE OF MOTION

- against -
US TIRE AND WHEELS OF QUEENS, LLC,
Defendant.

Oral Argument Requested

US TIRE 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.

COUNSELORS:

PLEASE TAKE NOTICE, that upon the Affirmation of WALSY KARINA SAEZ AGUIRRE, ESQ. dated February 26, 2019, and upon all the pleadings and proceedings heretofore had and held herein, Third-Party Defendant FORD MOTOR COMPANY ("Ford") will move this Court at the Queens County Courthouse, Part 12, Courtroom 42, located at 88-11 Sutphin Boulevard, Jamaica, New York 11435, on the 26th day of March at 9:30 a.m., or as soon

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thereafter as counsel may be heard, for an Order:

- (i) dismissing the Third-Party Complaint of Third-Party Plaintiff US Tire and Wheels of Queens, LLC ("US Tire") against Ford, pursuant to C.P.L.R. § 3211(a)(8), due to lack of personal jurisdiction; and
- (ii) for such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days prior to the return date of this motion, pursuant to C.P.L.R. § 2214(b).

Dated: New York, New York
February 26, 2019

Yours, etc.



Walsy K. Sacz Aguirre
AARONSON RAPPAPORT FEINSTEIN &
DEUTSCH, LLP
Attorneys for Third-Party Defendant
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FILED: QUEENS COUNTY CLERK 03/25/2015 02:56 PM
NYSCEF DOC. NO. B41

INDEX NO. 706909/2015

RECEIVED NYSCEF: 03/25/2015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-X

ANNA AYBAR, ORLANDO GONZALEZ,
JESENIA AYBAR, as legal guardian on behalf of
KEYLA CABRAL, an infant over the age of
fourteen (14) years; JESENIA AYBAR,
as Administratrix of the ESTATE OF NOELIA OVLIERAS,
JESENIA AYBAR, as Administratrix of the
ESTATE OF TIFFANY CABRAL, a deceased infant
under the age of fourteen (14) years,
and ANNA AYBAR, as Administratrix of the
ESTATE OF CRYSTAL CRUZ-AYBAR,

Index No. 706909/15

**AFFIRMATION IN
OPPOSITION**

Plaintiffs,

-against-

JOSE A. AYBAR, JR., FORD MOTOR COMPANY,
THE GOODYEAR TIRE & RUBBER CO., and
"JOHN DOES 1 THRU 30"

Defendants,

-X

Adam C. Calvert, an attorney admitted to practice law in the New York State Courts,
affirms the following under penalty of perjury:

1. I am an attorney for U.S. Tires and Wheels of Queens, LLC, a defendant in a related action brought by the plaintiffs arising from the same accident as the instant action.¹ I submit this affirmation in opposition to Ford and Goodyear's motions to dismiss for lack of personal jurisdiction.

2. The court should deny the defendants' motion. Goodyear and Ford's position is that under *Daimler A.G. v. Bauman*, 134 S. Ct. 746 (2014), they are not subject to personal jurisdiction in New York because they are only subject to general jurisdiction in the states where

¹ The action is under Index No. 9344/14 and there is a motion to consolidate it with this action and another related action under Index No. 706908/15.

they are incorporated or have a principal place of business (i.e., Ohio or Delaware/Michigan).

That is absurd, both legally and practically.

3. Goodyear and Ford ignore the fact that they are registered to do business with the New York Secretary of State and designated an agent for service of process within New York State. Under CPLR 301, they are subject to personal jurisdiction in New York State based on this fact alone.

4. *Bauman* does not change the fact that Goodyear and Ford are subject to personal jurisdiction under CPLR 301. In fact, *Bauman* specifically recognizes that the "at home" test, allowing for general jurisdiction only where the corporation is incorporated or has a principal place of business, does not apply where the corporation has consented to suit in the jurisdiction.

Id. at 756.

5. Post-*Bauman* decisions has recognized that *Bauman* does not change CPLR 301 and its exercise of general jurisdiction over a corporation that has consented to jurisdiction by registering to do business with the New York Secretary of State and designating an agent for service of process within New York State. *Beach v. Citigroup Alternative Invs., LLC*, 2014 U.S. Dist. LEXIS 30032, at *17-18 (S.D.N.Y. 2014) ("Notwithstanding [the limitations from *Bauman*] a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."); *Bailen v. Air & Liquid Sys. Corp.*, 2014 N.Y. Misc. LEXIS 3554 (Sup. Ct., N.Y. Cty. 2014); *Vera v. Republic of Cuba*, 91 F.Supp.3d 561 (S.D.N.Y. 2015). Goodyear and Ford cannot avail themselves of the protections of New York State by registering to do business and then claims that they are not subject to this court's jurisdiction.

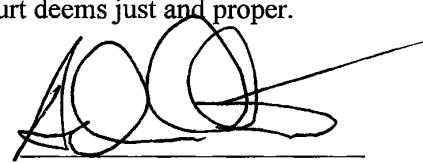
6. Goodyear and Ford's position is not only legally incorrect, but as a practical matter it perverts *Bauman* into an unworkable requirement. If Goodyear and Ford are correct, they could only be sued in Ohio or Delaware/Michigan. U.S. Tires and Wheels is a New York company with a principal place of business in New York. Therefore, under Goodyear and Ford's reasoning, there would be one lawsuit in this court against U.S. Tires, one lawsuit in Ohio against Goodyear, and a third lawsuit against Ford in Delaware or Michigan, all for the same accident.

7. Under that framework, inconsistent verdicts are all but guaranteed, not to mention duplication of discovery and wastes of judicial resources. It also ignores the need for U.S. Tires to assert claims for indemnity and contribution against Goodyear and Ford should the three cases not be consolidated or if the plaintiffs' direct claims against Goodyear and Ford are dismissed. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992); *Mowczan v. Bacon*, 92 N.Y.2d 281 (1998).

8. Simply put, Goodyear and Ford's perversion of the *Bauman* decision is legally incorrect under *Bauman* and CPLR 301 and would result in an unworkable standard that would result in inconsistent verdicts and duplicative actions.

WHEREFORE, the court should issue an order denying Goodyear and Ford's motions in their entirety, together with such other and further relief as the court deems just and proper.

Dated: January 7, 2016
New York, New York



Adam C. Calvert

FILED: QUEENS COUNTY CLERK 03/25/2019 11:26 PM

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INDEX NO. 703632/2017

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STATE OF NEW YORK)
 :
 COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICERE: *Jose Aybar et al*

Index No.: 9344/14

Lynel J. Taylor, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, am employed by Marshall, Dennehey, Warner, Coleman & Goggin, Wall Street Plaza, 88 Pine Street, 21st Floor, New York, New York 10005 and resides in Hudson County, New Jersey.

On January 7, 2016, I served a true copy of the within **AFFIRMATION IN OPPOSITION** in the following manner:

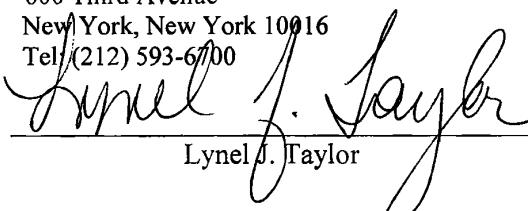
by mailing same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal service by first class mail, addressed to the last known address of the addressee(s) indicated below:

Omrani & Taub, P.C.
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 212-599-5550

Certain & Zilberg
 Attorneys for Defendant
 Jose Aybar
 909 3rd Avenue
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DLA Piper LLP (US)
 Attorneys for Defendant
 The Goodyear Tire & Rubber Co
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 Tel: (212) 335-4500

Aaronson, Rappaport, Feinstein
 & Deutsch, LLP
 Attorneys for Defendant
 Ford Motor Co.
 600 Third Avenue
 New York, New York 10016
 Tel: (212) 593-6700



Lynel J. Taylor

Sworn to before me this
 7th day January, 2016


 Notary Public

DEBORAH McINTOSH-LECONTE
 Notary Public, State of New York
 No.01MC5060400
 Qualified in Kings County
 Commission Expires May 20, 2018

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X Index No.: 706909/15

ANNA AYBAR, ORLANDO GONZALES, JESENIA
AYBAR, as legal guardian on behalf of KEYLA CABRAL,
an infant over the age of fourteen (14) years; JESENIA
AYBAR, as Administratrix of the ESTATE OF NOELIA
OLIVERAS, JESENIA AYBAR, as Administratrix of the
ESTATE OF TIFFANY CABRAL, a deceased infant
under the age of fourteen (14) years, and ANNA AYBAR,
as Administratrix of the ESTATE OF CRYSTAL CRUZ-
AYBAR,

Plaintiffs,

-against-

JOSE A. AYBAR, JR., FORD MOTOR COMPANY, THE
GOODYEAR TIRE & RUBBER CO., and "john does 1
THRU 30",

Defendants.

-----X

AFFIRMATION IN OPPOSITION

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

Attorneys for Defendant

U.S. Tires and Wheels of Queens, LLC i/s/h/a US Tires and Wheels of Queens, LLC
(**In a Related Action – Index No. 9344/2014)

Wall Street Plaza, 88 Pine Street, 21st Floor
New York, New York 10005
(212) 376-6400



NYSCEF - Queens County Supreme Court Confirmation Notice



This is an automated response for Supreme Court cases. The NYSCEF site has received your electronically filed documents for the following case.

703632/2017

JOSE AYBAR et al - v. - US TIRES AND WHEELS OF QUEENS, LLC et al

Assigned Judge: Denis Butler

Documents Received on 02/26/2019 05:28 PM

Doc #	Document Type	Motion #
154	NOTICE OF MOTION Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
155	AFFIDAVIT OR AFFIRMATION IN SUPPORT Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
156	EXHIBIT(S) A Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
157	EXHIBIT(S) B Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
158	EXHIBIT(S) C Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
159	EXHIBIT(S) D Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
160	EXHIBIT(S) E Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
161	EXHIBIT(S) F Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
162	EXHIBIT(S) G Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
163	EXHIBIT(S) H Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002

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INDEX NO. 703632/2017

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**NYSCEF - Queens County Supreme Court
Confirmation Notice**



703632/2017

JOSE AYBAR et al - v. - US TIRES AND WHEELS OF QUEENS, LLC et al

Assigned Judge: Denis Butler

Filing User

Name: **Walsy K. Saez Aguirre**

Phone #:

E-mail Address: **wksaez@arfd.com**

Fax #:

Work Address: **600 3rd Ave
New York, NY 10016**

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 02/26/2019 05:28 PM:

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CERTAIN, GARY TODD - gcertain@certainlaw.com
COUTO, PETER JOHN - Peter.Couto@dlapiper.com
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ZILBERG, MICHAEL - mzilberg@certainlaw.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

Audrey I. Pheffer, Queens County Clerk and Clerk of the Supreme Court - apheffer@nycourts.gov

Phone: 718-298-0173, 718-298-0601 Website: <https://www.nycourts.gov/COURTS/11jd/queensclerk>

NYSCEF Resource Center - Efile@nycourts.gov

Phone: (646) 386-3033 Fax: (212) 401-9146 Website: www.nycourts.gov/efile

**EXHIBIT C TO SAEZ AGUIRRE AFFIRMATION -
REPLY AFFIRMATION OF WALSY K. SAEZ AGUIRRE, FOR THIRD-PARTY
DEFENDANT FORD MOTOR COMPANY, IN FURTHER SUPPORT OF MOTION
TO DISMISS, DATED MARCH 25, 2019, WITH CONFIRMATION NOTICE [927 - 957]**

FILED: QUEENS COUNTY CLERK 03/25/2019 01:56 PM
NYSCEF DOC. NO. 190

INDEX NO. 703632/2017
RECEIVED NYSCEF: 03/25/2019

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,

**REPLY AFFIRMATION IN
FURTHER SUPPORT OF
MOTION TO DISMISS**

Index No. 703632/2017 [E-Filed]

Previously Index No. 9344/2014

- against -

US TIRES AND WHEELS OF QUEENS, LLC,
Defendant.

x

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.

x

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

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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 reply to the opposition papers to Ford's motion to dismiss on jurisdictional grounds that have been submitted by Third-Party Plaintiff US Tires and Wheels of Queens, LLC ("US Tires") and the plaintiffs in this action with the exception of plaintiff Jose Aybar, who has not opposed this motion (hereinafter the "Plaintiffs"). US Tires' opposition to Ford's motion is embodied in a Cross-Motion, which seeks a stay of this action pending the outcome of appellate activities and permission to amend their third-party pleadings. Ford addresses US Tires' request for leave to amend in separate opposition papers. We note that US Tires' inclusion of their opposition arguments in their Cross-Motion does not entitle them to submit further papers, beyond their current submission, on the jurisdictional question. This Court should reject any form of sur-reply US Tires might try to submit on this issue.

PRELIMINARY STATEMENT

3. US Tires' and Plaintiffs' opposition papers improperly rely on stale case law that is no longer controlling on either a federal or state level. Wishing U.S. Supreme Court precedent away and ignoring the binding nature of New York Appellate Division decisions on New York trial courts can hardly be seen as any kind of truly substantive opposition. US Tires repeats *ad nauseam* that the New York Appellate Division, Second Department's decision 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"**) [hereinafter *Aybar*] "will be overturned on appeal." (*See* Adam C. Calvert Affirmation in Support of US Tires' Cross-Motion [hereinafter Calvert Aff.] **Exhibit "K"**, at 2.). That is wishful thinking on their part, but it is not

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the law, and their fantasies about what might happen in the future certainly should not be a basis for overruling what is now binding appellate precedent.

4. Essentially, US Tires' and Plaintiffs' argument is that every court that has overruled the case law they cite in their opposition papers has been wrong. According to US Tires and Plaintiffs, the U.S. Supreme Court entirely got Due Process wrong in *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014) and *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549. US Tires and Plaintiffs also appear to believe that the U.S. Court of Appeals for the Second Circuit and the U.S. District Courts simply do not understand how to apply *Daimler* to large corporations with extensive nationwide and worldwide operations. They also apparently maintain that appellate state courts around the country¹ are wrong and misunderstood *Daimler* in finding that Ford was not subject to general jurisdiction within their States. Further, US Tires and Plaintiffs maintain that the Second Department was even more wrong and misunderstood not just *Daimler* and Due Process constraints on general personal jurisdiction but its own State's Business Corporation Law ("BCL") and long-arm statute when granting Ford's and Goodyear's motions to dismiss on appeal. In other words, their position is that current jurisprudence on personal jurisdiction at a federal and nationwide level is just wrong, and their belief in its "wrongness" should be enough for this Court to ignore what its Appellate Department and what the U.S. Supreme Court mandate.

5. Fortunately, the Court need not waste its time with such self-serving arguments. In spite of US Tires' and Plaintiffs' displeasure, *Aybar* is controlling here and compels this Court to grant Ford's pending motion to dismiss. See *Gutin v. Frank Mascali & Sons, Inc.*, 11 N.Y.2d

¹ See, e.g., *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); *Erwin v. Ford Motor Co.*, No. 8:16-cv-01322-SCB-AEP, 2016 WL 7655398, at *12 (M.D. Fla. Aug. 31, 2016); *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1036, 1039 (Colo. 2016); *Pitts v. Ford Motor Company*, 127 F. Supp. 3d 676, 2015 U.S. Dist. LEXIS 121673 (S.D. Miss. 2015).

97, 99, 181 N.E.2d 449, 450 (Ct. App. 1962) ("It is settled that the discretion of the Supreme Court is controlled by the Appellate Division..."); *Stewart v. Volkswagen*, 181 A.D.2d 4 (2d Dep't 1992) *overturned on other grounds* ("the rule in New York is that the trial courts must follow an Appellate Division precedent..."); *Mountain View Coach v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) ("the doctrine of stare decisis requires trial courts...to follow precedents set by the Appellate Division of another department until the Court of Appeals or [their Department] pronounces a contrary rule"). The fact is that US Tires has not even obtained leave to appeal the decision and, until the New York Court of Appeals decides differently, *Aybar* remains the law.

6. Either way, contrary to US Tires' and Plaintiffs' arguments, there is no basis to find specific jurisdiction over Ford under the facts of this case because US Tires' third-party claims against Ford *do not arise from* any contact Ford has with New York. Indeed, Ford does not have any case-specific contacts with New York and therefore, it cannot be subject to personal jurisdiction under CPLR §§ 302(a)(1), (a)(3)(i), or (a)(3)(ii) or the Due Process Clause. Accordingly, Ford's motion must be granted.

STATEMENT OF RELEVANT FACTS

7. Ford respectfully refers the Court to its original motion papers for a full recitation of the facts relevant to this motion, but wishes to correct key factual inaccuracies stated in US Tires' and Plaintiffs' opposition papers.

8. In its Third-Party Summons and Complaint (annexed as **Exhibit "B"**) US Tires seeks indemnification and contribution from Ford and Goodyear for "affirmative active and primary negligence" based on Plaintiffs' strict products liability, negligence, breach of warranty and deceptive trade practices claims against Ford.

9. As stated in the Affidavit of Robert Pascarella (annexed as **Exhibit "C"**) Ford did not design, manufacture, assemble or sell the Subject Vehicle in New York. (Pascarella Aff., Ex. C ¶¶ 5-7.) Ford does not have any Ford Explorer manufacturing plants in New York. (*Id.* at ¶ 8.) Further, as indicated in the affidavit Ford submitted in support of its motion to dismiss *Anna Aybar, et al. v. Ford Motor Company, et al.*, Index No. 706909/2015 ("Action 3"), Ford did not service the Subject Vehicles in New York. (Affidavit of Elizabeth Dwyer, **Exhibit "D,"** ¶¶ 10-11.)

10. In 2002, Ford sold the Subject Vehicle to an independently-owned Ford dealership in Ohio. (Pascarella Aff., Ex. C ¶ 5; Dwyer Aff., Ex D ¶ 5.) Around 2009, the Subject Vehicle entered New York when it was sold and registered to an individual named Jose Velez, without any involvement by Ford. (Dwyer Aff., Ex D ¶ 6.)

STANDARD

11. Where a defendant objects to the court's exercise of personal jurisdiction, *it is the plaintiff (including a third-party plaintiff) who bears the ultimate burden of proving jurisdiction based on evidence. See Aybar, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *8; Mejia-Haffner v Killington, Ltd., 119 A.D.3d 912, 914, 990 N.Y.S. 2d 561, 564 (2d Dep't 2014).* Plaintiffs seek to obfuscate this standard by arguing in their opposition papers that Ford has the burden to submit evidence showing that it is not subject to personal jurisdiction under CPLR § 302(a)(1), -(2), -(3) or -(4). (See Michael A. Taub's Opposition to Cross-Motion to Dismiss Cause of Action Against Third-Party Defendant, Ford Motor Company [hereinafter Taub Aff.] (**Exhibit "L"**) ¶ 5.) This is simply not Ford's burden. Notably, as Plaintiffs do not assert any claims against Ford in this action, US Tires is the only party required to establish jurisdiction over Ford

here. In any event, as established in *Aybar*, Ford is not subject to personal jurisdiction in this action, and therefore, US Tires' third-party claims against Ford must be dismissed.

ARGUMENT

I. THIS COURT IS BOUND TO FOLLOW *AYBAR*.

12. This Court is compelled to grant Ford's cross-motion to dismiss based on *Aybar*. Plaintiffs' request that the Court "alleviate itself from the constraints of *Daimler*" is absurd because the Court simply does not have discretion to render a different ruling. (Taub Aff. ¶ 14.) Trial courts are bound to apply the law as promulgated by the Appellate Division within their particular Judicial Department. *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014). In fact, at this juncture, *all trial courts in New York are bound* and not just guided by *Aybar*. See *Mountain View*, 102 A.D.2d at 664. Accordingly, Plaintiffs and US Tires cannot ask this Court to depart from the Second Department's decision in *Aybar*.

13. Further, US Tires' self-serving argument that *Aybar* will be overturned cannot be given any weight by this Court. It is not this Court's domain to speculate what the Court of Appeals will or will not decide. Notably, US Tires has not even been yet granted leave to appeal. Further, even if US Tires and Plaintiffs had any arguments for why *Aybar* was wrongly decided (which they do not), "the mere existence" of arguments against judicial precedent "is not sufficient, in and of itself, to compel the court to overturn judicial precedent." *Dufel v. Green*, 198 A.D.2d 640, 640, 603 N.Y.S.2d 624, 625 (3d Dep't 1993), aff'd, 84 N.Y.2d 795 (1995).

14. In *Aybar*, the Second Department held that Ford is not subject to personal jurisdiction in this case after a thorough and well-reasoned historical analysis of personal jurisdictional case law and a methodical application of that case law to the facts presented. *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). In its decision, the Court established that a foreign corporation *does not* become 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. *Id.* at *6-7, 15. *Aybar* also settled that Ford does not have sufficiently “continuous and systematic contacts” with New York as to render it to be “at home” within the state and thus make it subject to general personal jurisdiction. *Id.* at *13-14.

(a) **The Second Department Has Established that Business Registration in Compliance with BCL § 304 Does Not Constitute Consent to be Subjected to Personal Jurisdiction in New York.**

15. In *Aybar*, the Second Department thoroughly analyzed New York and federal jurisprudence construing the act of registering to do business in and designating an agent for service in New York as consent to general jurisdiction. *See id.* at *16-25. The Court ruled that those cases are no longer good law in light of *Daimler*. *Id.* The Court explained that “[t]he consent-by-registration line of cases is predicated on the reasoning that by registering to do business in New York and appointing a local agent for service of process, a foreign corporation has consented to be ‘found’ in New York.” *Id.* at *23-24. But this is no longer permissible because the U.S. Supreme Court’s modern decisions, including *Daimler*, “made clear . . . that general jurisdiction cannot be exercise solely on such presence.” *Id.*

16. The Second Department’s holding is in accord with the vast majority of cases in New York and beyond, before *Daimler* and after. *See, e.g., Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-183 (5th Cir. 1992) (noting that “mere service on a corporate agent . . . displays a fundamental misconception of corporate jurisdictional principles” and is “directly contrary to the historical rationale of” the U.S. Supreme Court’s personal-jurisdiction decisions); *Consol. Dev. Co. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (“Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation.”); *Sandstrom v.*

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ChemLawn Corp., 904 F.2d 83, 89 n.6 (1st Cir. 1990) (rejecting the argument that “licensure and appointment of an agent for service of process constituted a consensual submission to the jurisdiction of Maine’s courts”); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (a corporation’s compliance with a State’s registration act “cannot satisfy-standing alone-the demands of due process”); *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require [more than] mere compliance with state [registration] statutes.”); *Leonard v. USA Petrol. Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) (“Service on a designated agent alone does not establish minimum contact.”); *Freeman v. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000) (“[C]ourts and legal scholars have agreed that the mere act of appointing an agent to receive service of process, by itself, does not subject a non-resident corporation to general jurisdiction.”) Indeed, courts in New York have held that *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939) and the like are improperly grounded in notions of territorialism are no longer good law. See, e.g., *Brown v. Lockheed-Martin Corp.*, 814 F.3d 619, 639, 2016 U.S. App. LEXIS 2763, at *50-52 (2d Cir. 2016).

17. In their opposition, US Tires and Plaintiffs contend that the Second Department somehow misapprehended the binding force of the Court of Appeals’ decision in *Bagdon* and the U.S. Supreme Court’s decision in *Neirbo*. This contention is flawed because it presumes that the U.S. Supreme Court’s most-recent decisions on the exercise of general jurisdiction over seventy years later in *Daimler* and *BNSF* did not overturn *Bagdon* and *Neirbo*.

18. Plaintiffs and US Tires made the exact same arguments in their merits brief before the Second Department. (See Plaintiffs’ Br. at 9-18; US Tires’ Br. at 8-24 (briefs collectively annexed as Exhibit “E”).) They argued that *Bagdon* and *Neirbo* were binding and not abrogated

by *Daimler* or *BNSF*. But the Second Department already considered, addressed, and rejected these arguments. In *Aybar*, the Court acknowledged both *Bagdon* and *Neirbo*, and explained how the U.S. Supreme Court's later personal jurisdiction jurisprudence, from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to *Daimler* and *BNSF*, repudiated the foundations upon which *Bagdon* and *Neirbo* were based. 2019 N.Y. App. Div. LEXIS 444 (Ex. A), *13. The Court specifically found that *Bagdon* was no longer binding because, among other things, the Court of Appeals had not "cited *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided." *Id.* The Court correctly interpreted that as a "strong indicator that its rationale is confined to that era, which was dominated by...territorial thinking, and that it no longer holds in the post-*Daimler* landscape." *Id.* at 14. The Court thus held that the Court of Appeals' failure to rely on *Bagdon* after *International Shoe* confirmed that *Bagdon* did not survive *International Shoe* or the cases decided after, and that *Bagdon has no role in the modern era of personal jurisdiction*. Despite US Tires' and Plaintiffs' insistence, New York courts are no longer bound by Court of Appeals opinions abrogated by intervening Supreme Court precedent. See *Hunt v. Werner Spitz Const. Co.*, 152 A.D.2d 936, 936 (4th Dep't 1989); David D. Siegel, New York Practice § 449 (6th ed.) (Dec. 2018 update).

19. US Tires' and Plaintiffs' specious argument that *Aybar* is "not yet settled" precedent merely because it overturns pre-*Daimler* cases is meritless. (See Taub Aff. ¶ 9.) Simply disagreeing with the Second Department's decision or wanting to appeal *Aybar* cannot overturn the Second Department's case law. A decision by our appellate courts or the U.S. Supreme Court does not have to "age" a certain length of time before it becomes binding. It is binding and controlling from the moment it is issued.

20. Further, US Tires and Plaintiffs misrepresent Ford's arguments as founded on public policy, even though Ford never asked the Second Department to overturn *Bagdon* based on public policy grounds. US Tires claims that Ford "cr[ies] prejudice at the prospect of litigating this case in New York." (Calvert Aff. ¶ 20.) But Ford's argument is not based on prejudice or public policy; it is simply based on the fact that the U.S. Supreme Court has the authority to abrogate precedent by State appellate courts, and it did. Ford argued that the U.S. Supreme Court abrogated *Bagdon* through its intervening personal-jurisdiction case law and the Second Department agreed. (See Ford and Goodyear's Joint Appellate Brief, **Exhibit "F,"** at 29-34.) See also *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *9-14. As discussed in Ford's original papers, there is no basis to interpret compliance with BCL § 304 as consent to general jurisdiction and such interpretation of the statute would render it unconstitutional. (Walsy K. Saez Aguirre Affirmation in Support of Ford's Motion to Dismiss ¶¶ 52-62.)

(b) It is Also Established that Ford Is Not Subject to General Personal Jurisdiction in New York.

21. The Second Department established that Ford does not have sufficient contacts with New York as to permit the exercise of general jurisdiction. *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *4, 8-15. The Court explicitly rejected Plaintiffs' arguments that Ford was subject to general jurisdiction because it:

...has been authorized to do business in New York since 1920, it operates numerous facilities in New York, it owns property in New York and spends at least \$150 million to maintain the property, it employs a significant numbers of New York residents, it contracts with hundreds of dealerships in New York to sell its products under the Ford brand name, and it has frequently been a litigant in New York courts. *Id.* at *13.

22. Citing *BNSF*, the Court noted that since *Daimler*, the Supreme Court has established that "standing alone, mere 'in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims that are unrelated to any activity in [the forum

State].” *Id.* at *11. The Court noted—correctly—that *Daimler* “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide” to assess whether a foreign corporate defendant’s affiliations with the forum state are so “continuous and systematic” as to render it essentially at home in the state. *Id.* at *11-12, 13. Applying this framework, the Court found that an appraisal of the magnitude of Ford’s activities in New York in the context of Ford’s activities worldwide demonstrates that Ford cannot be said to be essentially “at home” in New York. *Id.* at *13.

23. Plaintiffs’ and US Tires’ opposition papers focus on denying the immutable fact that *Daimler* has altered the landscape of *in personam* jurisdiction. *See id.* They cannot present meritorious legal arguments on this issue. Instead, Plaintiffs mistakenly state that “it has been well settled under New York law...that large corporations” like Ford “are subject to both general and specific jurisdiction in New York courts” based on “continuous, systematic, long-standing business in New York” and derivation of “substantial income from such persistent business operations.” (Taub Aff. ¶ 4.) But conjuring “traditional personal jurisdiction” and pretending that *Daimler*, *BNSF* and *Aybar* never occurred does not make it true. The Second Department has already squarely rejected Plaintiffs’ arguments.

24. Similarly, US Tires ignores *Daimler* and focuses on arguing that this Court should have general jurisdiction over Ford in this case because “New York has a substantial interest in this case” and US Tires would not have a forum to pursue its indemnification and contribution claims against Ford. (*See* Calvert Aff. ¶¶ 18, 20.) Substantial interest, however, is simply not the standard to determine whether a foreign corporation is subject to general personal jurisdiction in a State. Personal jurisdiction must be established as to each defendant, respecting each defendant’s Due Process rights. *See Bristol-Myers*, 137 S. Ct. at 1783; *Rush v. Savchuk*, 444

U.S. 320, 332 (1980). Accordingly, US Tires' status as a third-party defendant in this case bears no relevance whatsoever as to whether *in personam* jurisdiction can be asserted over Ford.

(c) **The Second Department Recognized the "Exceptional Circumstances" Envisioned in *Daimler* and Determined that They Did Not Exist in this Case.**

25. In *Aybar*, the Second Department acknowledged and explained the exceptional circumstances envisioned in *Daimler* while discussing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S. Ct. 413 (1952). See 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *4, 8-15. It determined that those exceptional circumstances did not exist in this case. *Id.* at *11-15.

26. Plaintiffs' self-serving claim that this case presents "exceptional circumstances" warranting an outcome different than *Daimler* lacks merit. Plaintiffs cannot cite any case law for their inventive proposition that "exceptional circumstances" exist simply because this is a third-party action. Neither can they show support for their argument that "special circumstances" exist based on their mere speculation that a complex automobile product liability action such as this case may involve manufacturers and suppliers in many different states and may require separate actions in different fora.

27. Once the Court applies *Aybar*, it need not address the balance of this Reply Affirmation. The remainder of this Affirmation addresses US Tires' and Plaintiffs' arguments only in the abundance of caution and to preserve the record.

II. COLLATERAL ESTOPPEL APPLIES TO THE ISSUE OF WHETHER FORD IS SUBJECT TO GENERAL AND SPECIFIC JURISDICTION IN THIS ACTION.

28. Collateral estoppel applies here with respect to the question of whether Ford and Goodyear are subject to personal jurisdiction in New York under the jurisdictional facts of this case. Indeed, before Ford raised this argument, *US Tires agreed that collateral estoppel applies*. US Tires argued in its opposition to Goodyear's motion to dismiss (Motion No. 017) that Ford

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and Goodyear were collaterally estopped from re-litigating the issue of whether this Court has personal jurisdiction over them in this action (even when, back then, the parties had briefed and argued an appeal and were waiting for a decision from the Second Department). (*See US Tires' Affirmation in Opposition to Goodyear Motion to Dismiss [hereinafter Calvert Aff. Goodyear Mot.], Exhibit "G" ¶¶ 2-10.*) Of course US Tires maintained that collateral estoppel applied only when it was convenient. Now it claims collateral estoppel is inapplicable simply because the Second Department happened to rule against it and Plaintiffs in *Aybar*.

29. Collateral estoppel *only* requires two elements: identity of issues, and a full and fair opportunity to contest the decision said to be controlling. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-501, 467 N.E.2d 487, 490 (Ct. App. 1984); *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729 (Ct. App. 1969). The issue must have been “necessarily decided in the prior action” and be “decisive of the present action,” and must be the same issue to be decided in the second action, such that ““a different judgment in the second would destroy or impair rights or interests established by the first.”” *Ryan*, 62 N.Y.2d at 500-501; *see also Schwartz*, 24 N.Y.2d at 71. Further, the party against whom the doctrine would apply must have had a full and fair opportunity to challenge the decision. *Schwartz*, 24 N.Y.2d at 71. The doctrine is based on the principle that “[o]ne who has had his day in court should not be permitted to [re]-litigate the question anew.” *Id.* at 70. It is “insignificant if not irrelevant” whether the party against whom collateral estoppel is sought was actually a named party in the prior action, or whether the parties in both actions were “true adversaries.” *Id.* at 71, 72.

30. US Tires cannot disprove that the first element of collateral estoppel is satisfied here. The only argument US Tires presents to support its contention that the issues in *Aybar* and this case are not identical is that Plaintiffs asserted products liability claims against Ford in

Aybar 3, and here, US Tires asserts third-party claims against Ford for contribution and indemnity. However, this argument confounds issues with claims, and identity of claims is simply not an element of collateral estoppel. The issue in *Aybar* and in this motion is whether the Court can exercise personal jurisdiction over Ford under the facts giving rise to this action (Action 1) and Action 3. Significantly, *US Tires has already admitted that there is identity of issues.* (See Calvert Aff. Goodyear Mot., Ex. G ¶ 7.)

31. In any event, US Tires has admitted that its “third-party [C]omplaint against Goodyear and Ford in this action is based on the plaintiffs’ claims against Ford and Goodyear in the other actions [Action 3].” (*Id.* ¶ 4.) As US Tires’ indemnity and contribution claims against Ford in this action are premised on the very same facts as Plaintiffs’ products liability claims against Ford in Action 3, the difference in the claims asserted against Ford in Actions 1 and 3 is irrelevant for purposes of the issue of this Court has personal jurisdiction over Ford in both actions.

32. The authorities US Tires cites in support of its argument that identity of issue is not present are inapposite and easily distinguishable. Unlike Ford, US Tires fails to cite a single case where personal jurisdiction was the issue. Instead, it cites cases involving liability findings,² and cases where the party seeking to apply collateral estoppel tried to obtain a decision

² *City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124 (2007); *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (1985); *Peresluha v. City of New York*, 60 A.D.2d 226 (1st Dep’t 1977) all deal with the application of collateral estoppel with respect to liability issues. That is not what Ford is trying to do here, as this motion does not concern liability and is not on the merits of the action.

City of New York dealt with the application of collateral estoppel to issues relating to liability, since it concerned an order granting summary judgment (a motion on the merits) in favor of a corporation. That case dealt with whether a granting of summary judgment against a defendant in the first action (based on a finding that he owed no legal duty towards the general public) would estop another party from arguing in a subsequent action that the same defendant did not properly perform contractual duties. *Kaufman* deals with whether jury findings on liability in a prior case had a collateral estoppel effect in a subsequent action. *Perusha* involves the application of collateral estoppel to a finding of negligence.

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on an issue that was starkly different than the one decided in the prior action.³ That is simply not the case here.

33. Further, US Tires cannot dispute that the second element of collateral estoppel is met. US Tires' disingenuous position that it did not have a full and fair opportunity to litigate the issue of personal jurisdiction over Ford is meritless. US Tires argues that it did not have a full and fair opportunity to litigate the issue because (i) it not a named party in Action 3, (ii) was not in privity with Plaintiffs in Action 3, (iii) was never served with the motions, and (iv) Ford and Goodyear opposed its motion for leave to appeal to the Court of Appeals based on lack of standing. These arguments are mere red herrings.

34. First, the fact is that, despite Ford's protestation, this Court not only accepted US Tires' Affirmation in Opposition to Ford's and Goodyear's motions (annexed as **Exhibit "H"**) but also permitted US Tires to present oral arguments on the motions on or about December 9, 2015. Additionally, the Second Department accepted US Tires' brief in opposition to Ford's and Goodyear's motions, permitted US Tires to present oral arguments, and even addressed US Tires' arguments directly in *Aybar*. See *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A), at *7-8, 8 n.1, 15-25. Accordingly, US Tires has no basis to deny that it fully participated *twice* in litigating the issue of personal jurisdiction over Ford in this action. What US Tires wants now is a third bite at the apple.

³ *City of New York, Weiss v. Manfredi*, 83 N.Y.2d 974 (1994) and *Peresluah* all dealt with attempts to apply collateral estoppel where there was no identity of issues. In *City of New York*, the issue in the first action was a finding that a defendant did not owe a (noncontractual) duty to the general public and the issue in the second action was whether the defendant breached contractual duties. In *Weiss*, the issue in the first action was whether the settling defendants engaged in fraud, collusion, mistake of accident, which would vitiate a settlement, and the issue in the subsequent case was whether there was legal malpractice. In *Kaufman*, the issue in the first action was a finding of liability under a theory of negligence, and the issue in the second action was liability under the theory of malicious prosecution. Unlike the parties in *City of New York, Weiss* and *Peresluah*, Ford seeks to apply collateral estoppel to the single issue of whether this Court has personal jurisdiction over it in two actions involving the same facts.

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35. Second, collateral estoppel does not require privity or personal service of papers or motions. It is true that courts scrutinize collateral estoppel “with care [in] any situation where [it] is asserted by a person who was neither a party nor in privity with a party to the first case, to make certain no unfairness will result to the prior litigant if the estoppel is applied.” *Vincent v. Thompson*, 50 A.D.2d 211, 220, 377 N.Y.S.2d 118, 127 (2d Dep’t 1969). But nothing prevents collateral estoppel from being applied in instances where the parties were not the same in both suits. US Tires appears to conflate collateral estoppel with the doctrine of *res judicata*, which *does* require identity of parties. See *City of New York*, 9 N.Y.3d at 127 (“One linchpin of *res judicata* is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim *between* the parties has been previously ‘brought to a final conclusion’.”) (emphasis in original); *Evergreen Bank, N.A. v. Dashnaw*, 246 A.D.2d 814, 815, 668 N.Y.S.2d 256, 257 (3d Dep’t) (“*Res judicata* bars future litigation between the same parties, or those in privity with the parties...”) (emphasis added). See also *Schwartz*, 24 N.Y.2d at 71-72 (discussing that the distinction of whether the parties in the second action were actual adversaries with the parties in the second action is insignificant for determining the application of collateral estoppel).

36. None of the cases US Tires cites support its flawed proposition that privity is required in collateral estoppel. *D’Arata v. New York Century Mutual Fire Insurance Company*, 76 N.Y.2d 659, 664, 564 N.E.2d 634, 637 (Ct. App. 1990) merely notes that privity “is an amorphous concept,” and provides an inclusive, not exclusive list, of instances where privity is generally found. Nowhere does *D’Arata* say that privity is an element of collateral estoppel. Further, US Tires’ reliance on *Taylor v. Sturgell*, 128 S. Ct. 2161, 553 U.S. 880 (2008) and

Evergreen, 246 A.D.2d at 814 is mistaken. Those cases concern *res judicata* and do not even discuss collateral estoppel, which is a distinct doctrine.

37. As privity is simply not an element of collateral estoppel, the Court need not entertain US Tires' discussion of *Shanley v. Callanan Industries*, 54 N.Y.2d 52 (1981) or *Ecumenical Task Force of Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency*, 179 A.D.2d 261 (4th Dep't 1992). Notably, in *Shanley*, the Court of Appeals determined that collateral estoppel was not applicable because there was no identity of issues. The decision was not based on lack of identity of parties. See *Shanley*, 54 N.Y.2d at 57 ("The doctrine of collateral estoppel is not applicable in this case. The issue of Callanan's negligence simply was not litigated or necessarily decided in the first action.")

38. Further, it must be noted that in *Taylor*, the U.S. Supreme Court emphasized that it has "never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case," and declined to elaborate on that issue. 128 S. Ct. at 2179. Although *Taylor* appears to discuss preclusion generally, it only discusses preclusion in the context of the issue of "virtual representation," which is not present here. In that case, the question was whether an individual was precluded from bringing a FOIA claim against the Federal Aviation Administration simply because his friend, independently, had previously brought a FOIA suit against the FAA seeking the same technical documents he sought in the second action. The FAA argued that the petitioner should be precluded because his friend had litigated the issue and his friend was his "virtual representative." That is not the case here. Ford is not arguing in this motion that US Tires should be precluded based on the participation of a possibly related entity or individual in the prior action. US Tires must be precluded from re-

litigating the issue of personal jurisdiction over Ford because US Tires *itself* already participated directly in litigating that issue, and it lost.

39. Lastly, US Tires' argument that collateral estoppel cannot be applied because the Second Department did not rule on whether there is personal jurisdiction is equally devoid of merit. Although the Court stated that it did not consider specific jurisdiction over Ford and Goodyear (because US Tires did not raise that issue before the motion court), its unanimous decision to grant Ford's and Goodyear's motions to dismiss was not equivocal or conditional. The Court clearly reversed Judge Thomas D. Raffaele's May 31, 2016 Order on the law, with costs, and granted Ford's motion to dismiss on appeal. *Id.* at *7-8. That should be the end of it. US Tires' and Plaintiffs' rebuke of *Daimler* and *Aybar* is inconsequential, as it is not a valid standard to deny Ford's instant motion.

III. PLAINTIFFS AND US TIRES CANNOT ESTABLISH SPECIFIC PERSONAL JURISDICTION OVER FORD.

40. Plaintiffs and US Tires maintain that Ford is subject to specific jurisdiction in this case because Ford placed Ford Explorers into New York's stream of commerce; the requirements of CPLR §§ 302(a)(1), 302(a)(2)(i) or 302(a)(2)(ii) are satisfied; and the exercise of specific jurisdiction over Ford in this case comports with Due Process. Once again, these arguments have no legal basis.

41. First, all subsections of CPLR § 302 require the claim over which jurisdiction is to be asserted to *arise from* any of the contacts specifically listed under the statute. See CPLR § 302. Second, specific jurisdiction cannot be asserted consistent with Due Process unless a defendant's *suit-related* conduct creates a *substantial* connection with the forum State. *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122, 571 U.S. 277, 284 (2014). Third, the U.S. Supreme Court has rejected the "stream of commerce" theory as a basis for specific jurisdiction. See *Bristol-*

Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017) (“For specific jurisdiction, a defendant’s general connections with the forum are not enough.”) Here, Ford is not subject to specific jurisdiction in New York because US Tires’ and Plaintiffs’ claims against Ford do not arise from any contact Ford has with New York.

(a) Plaintiffs and US Tires Cannot Establish Specific Jurisdiction Over Ford Under New York’s Long-Arm Statute.

42. Ford is not subject to specific jurisdiction in this matter under New York’s long-arm statute because this action *does not* arise out of, or even relate to Ford’s contacts with New York. In fact, this Court found that New York’s long-arm statute does not provide a basis for asserting specific jurisdiction over Ford in this action. *See Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, at *5, 2016 N.Y. Slip. Op. 31139(U), 3 (Sup. Ct., NY County 2016).

43. The long-arm statute permits New York courts to assert specific jurisdiction over non-domiciliary only “[a]s to a cause of action *arising from* any of the *acts* [by the defendant] enumerated in th[at] section.” CPLR § 302 (emphasis added). *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). This requirement applies to *all* subsections of the long-arm statute. *See* CPLR § 302. Additionally, courts have held that the long-arm statute requires an “articulable nexus” or “substantial relationship” between the plaintiffs’ claims and the defendant’s New York activities. *See Fernandez v. Daimler Chrysler AG*, 143 A.D.3d 765, 767 (2d Dep’t 2016) (holding there was no specific jurisdiction under CPLR § 302 in a case involving automobile product liability claims where the plaintiffs failed to show that their claims “arose from any of [the manufacturer’s] activities in New York”); *Krajewski v. Osterlund, Inc.*, 111 A.D.2d 905, 906 (2d Dep’t 1985) (finding there was no

specific jurisdiction over a defendant manufacturer in an automobile product defect case where the crash occurred in Indiana and there was no nexus between the defendant's "business transacted in New York or the contracts for shipment of defendant's products into New York," and plaintiff's claims).

44. The scope of the New York long-arm statute is *narrower and more restrictive* than the constitutional test for jurisdiction. *See Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 512, 881 N.E.2d 830, 837-838 (Ct. App. 2007). The statute does not extend as far as it is permitted under the Constitution. *See, e.g., Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d. 460, 471, 522 N.E.2d 40, 46 (Ct. App. 1988). Accordingly, if Ford is not subject to personal jurisdiction in this action under the constitutional Due Process test, it cannot be subject to personal jurisdiction under New York's long-arm statute.

45. Here, Plaintiffs and US Tires fail to satisfy the requirements under any branch of CPLR 302 because neither Plaintiffs' nor US Tires' respective claims against Ford arise from acts Ford committed in New York. (*See supra* Section III(b).) Also, Plaintiffs' and US Tires' arguments on specific personal jurisdiction under Sections 302(a)(3)(i) and 302(a)(3)(ii) are meritless because they—like the majority of their arguments—seek support from inapposite cases or rely on wrong legal standards.

i. *US Tires cannot establish specific jurisdiction under CPLR § 302(a)(3)(i).*

46. US Tires asks the Court to assert specific jurisdiction over Ford under CPLR § 302(a)(3)(i) based on its claim that Ford marketed Ford Explorers in New York. This argument fails because, as discussed, the U.S. Supreme Court has abrogated "stream of commerce" theory of personal jurisdiction.

47. The New York cases US Tires cites for this proposition are inapposite, as they either involve different facts, or are no longer good law. *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (Ct. App. 2016) and *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982) are inapposite because they involved defendants who actually had case-specific connections with New York. In *Rushaid*, there was evidence that the defendants knowingly and actively used New York accounts to transfer money from laundered profits to the plaintiff's employees who allegedly took bribes and kickbacks from the plaintiff employers. The employers asserted claims against the defendant banks for aiding and abetting the employees in committing torts against them. Unsurprisingly, the Court of Appeals found that the defendant banks transacted case-specific business in New York and were subject to specific jurisdiction under the long-arm statute.

48. In *Tonns v. Spiegel's*, 90 A.D.2d 548 (2d Dep't 1982) a manufacturer was found to have case-specific contacts with New York based on evidence that the manufacturer sold the allegedly defective product to the plaintiff in New York through a retailer. Unlike the defendants in *Rushaid* and *Tonns*, Ford did not conduct any business in New York with respect to the Subject Vehicle. (See *supra* ¶ 58.)

49. Similarly, *Singer v. Walker*, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964) involves a manufacturer who had case-specific contacts with New York. The manufacturer in *Singer* was found to be responsible for circulating the subject hammer and physically delivering it to the plaintiff in New York. Unlike the plaintiffs in this case, the plaintiff in *Singer* purchased the subject product directly from a New York dealer of the manufacturer by a direct mail order, using a catalogue which the defendant manufacturer had mailed to him. *Id.* at 287-289. In its analysis, the First Department noted that the fact that plaintiff "obtained possession of the hammer in New York [was] an essential nexus to sustain jurisdiction." *Id.* at 290. Here, Ford

was not responsible for circulating the Subject Vehicle into New York. Ford did not ship or deliver the Subject Vehicle to Plaintiffs in New York. Also, Plaintiffs did not order or purchase the Subject Vehicle using a marketing material directly sent to them by Ford. Plaintiff Jose Aybar did not even purchase the Subject Vehicle from Ford. Accordingly, a comparison to *Singer* is completely inapposite.

50. US Tires' citation of *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 2016 U.S. App. LEXIS 23563 (2d Cir. 2016) is also mistaken. *EMI Christian* does not discuss New York's long-arm statute at all and therefore does not support US Tires' argument specific jurisdiction is proper under Section 302(a)(1) applies. Lastly, the out-of-state cases US Tires cites for this proposition do not merit the Court's attention because New York's long-arm statute is unique compared to other State's jurisdictional statutes in that it is narrower and more restrictive than constitutional limits. As explained, US Tires cannot provide a legal basis for its argument that Ford is subject to specific jurisdiction under Section 302(a)(1).

ii. US Tires' Argument that Ford is subject to specific jurisdiction under CPLR § 302(a)(3) is devoid of merit because it relies on the wrong standard for injury.

51. US Tires cannot establish jurisdiction under Section 302(a)(3) because the torts it claims Ford committed did not cause injury in New York within the meaning of CPLR § 302(a)(3). The Second Department has clearly established that under CPLR § 302(a)(3), the location 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).

52. Here, based on *Paterno* as well as Plaintiffs' and US Tires' theories, the only events that may be deemed to have originally caused the injury to Plaintiffs and US Tires are the

accident itself and the defendants' alleged tortious conduct. US Tires is mistaken in arguing that the event causing injury would be a judgment in favor of the plaintiffs. In this third-party pleadings, US Tires claims that if it is "held liable to anyone in this action, its liability and claims will have arise out of the affirmative active and primary negligence" of Ford. (See Third-Party Complaint ¶¶ 4-5.) Also, in its proposed Amended Third-Party Complaint (**Exhibit "J"**) (which has not been approved by the Court, and which Ford opposes through separate papers), US Tires claims that Ford "committed a tortious act without the State of New York causing injury to person or property to person or property within the state in its manufacturing and sale of the allegedly defective vehicle." (Prop. Third-Party Am. Compl. Ex. J ¶ 16.) As a result, as between Ford and US Tires, the injury to US Tires is a finding that US Tires is liable to anyone, and the original event purported to have caused that injury is Ford's alleged "affirmative active and primary negligence" in manufacturing, designing and/or selling the vehicle. (Third-Party Complaint, Ex. B ¶¶ 4-5.) As between Plaintiffs and Ford, the injury to Plaintiffs is the subject accident and the original event purported to have caused that injury is Ford's alleged tortious conduct in manufacturing, designing, assembling and/or selling the Subject Vehicle. (Compl. Action 3, Ex. I ¶¶ 20, 47.) None of Ford's alleged tortious conduct as to US Tires or Plaintiffs happened in New York. As neither the accident nor Ford's alleged tortious conduct occurred within New York, the injury cannot be deemed to have occurred in New York. Therefore, Plaintiffs and US Tires have no basis to argue that Ford is subject to specific jurisdiction under Section 302(a)(3).

(b) The "Stream of Commerce" Theory Is Not a Valid Basis for Specific Jurisdiction.

53. Plaintiffs and US Tires contention that Ford is subject to specific jurisdiction in this case because it generally sold vehicles of the same model as the Subject Vehicle in New

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York, and placed the Subject Vehicle into the stream of commerce, is not supported by the law. In *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1987), which US Tires erroneously cites for this proposition, the U.S. Supreme Court actually held that “the ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about *by an action of the defendant purposefully directed towards the forum State.*” 480 U.S. at 112 (emphasis in original). The Court then explained that “[t]he placement of a product into the stream of commerce, without more, is *not* an act of the defendant purposefully directed toward the forum State.” *Id.* (emphasis added). The Court also noted that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” *Id.*

54. US Tires’ reliance on *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 297 (1980) for this proposition is similarly unavailing. US Tires’ quote from *World-Wide Volkswagen* is dictum. The defendants challenging personal jurisdiction in *World-Wide Volkswagen* were a regional distributor and an individual dealership; the two vehicle manufacturers named as defendants did not challenge personal jurisdiction. The Court’s statement regarding the stream of commerce as applied to personal jurisdiction over vehicle manufacturers was dictum because it had no bearing on the Court’s decision. See *Colonial City Traction Co. v. Kingston C. R. Co.*, 154 N.Y. 493, 495 (Ct. App. 1897) (“If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court.”). As a result, the passage US Tires quotes from *World-Wide Volkswagen* is in no way binding upon this court. See, e.g., *People v. Taylor*, 9 N.Y.3d 129, 164

(Ct. App. 2007) (quoting *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979)) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”); *People ex rel. Abell v. Clarkson*, 217 A.D. 746, 747 (Ct. App. 1926) (noting that anything that was “merely dicta” was “in no way binding upon” the court); *James v. Farina*, No. 450170/2016, 2019 N.Y.L.J. LEXIS 792, at *31 (1st Dep’t March 18, 2019) (noting that the court was not bound by the dicta in two opinions).

55. The U.S. Supreme Court has rejected the “stream of commerce” theory as the sole basis for specific jurisdiction. See, e.g., *Bristol-Myers*, 137 S. Ct. at 1781 (“For specific jurisdiction, a defendant’s general connections with the forum are not enough.”); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011) (nothing that a defendant’s “continuous activity of some sorts within a state is not enough to support the demand that a corporation be amenable to suits unrelated to that activity”); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.) (noting that the stream of commerce theory “does not amend the general rule[s] of personal jurisdiction”). New York federal and appellate courts have also declined to exercise specific personal jurisdiction solely on the basis of the stream of commerce theory. See, e.g., *Ikeda v. J Sisters 57, Inc.*, No. 14-cv-3570 (ER), 2015 U.S. Dist. LEXIS 87783, at *8 (S.D.N.Y. 2015); *Davidson v. Honeywell Int’l Inc.*, No. 14 Civ. 3886 (LGS), 2015 U.S. Dist. LEXIS 40813, at *3 (S.D.N.Y. 2015); *Boyce v. Cycle Spectrum, Inc.*, 303 F.R.D. 182, 186 (E.D.N.Y. 2014); *Williams v Beemiller, Inc.*, 159 A.D.3d 148, 157 (4th Dep’t 2018). As a result, the Court should dismiss Plaintiffs’ and US’ Tires stream of commerce argument.

(c) Exercising Specific Jurisdiction Over Ford Would Violate Due Process.

56. The Due Process “minimum contacts” test for specific jurisdiction is whether the defendant’s suit-related conduct creates a substantial connection with the forum State. *Walden*,

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134 S. Ct. at 1120-1121. The relationship between the forum State and the claims over which jurisdiction is sought “must *arise out of* contacts that the ‘*defendant himself*’ creates” “with the forum State itself, not the defendant’s contacts with persons who reside there.” *Id.* at 1121-1122 (emphasis added). The plaintiffs’ contacts with the forum are not decisive. *Id.*; see also *Bristol-Myers*, 137 S. Ct. at 1780 (“In order for a state court to exercise specific jurisdiction, ‘*the suit*’ must ‘*aris[e]* out of or relat[e] to the defendant’s contacts with the *forum*.’”) (emphasis in original) (citations omitted).

57. US Tires and Plaintiffs ask the Court to focus on Plaintiffs’ contacts with the State of New York, emphasizing that Plaintiffs are residents of New York, stored their vehicle here and had their vehicle serviced here by US Tires (not Ford or Goodyear). US Tires also emphasizes to the Court that it “regularly services Goodyear tires and Ford Explorers.” However, those facts cannot be the only factors driving the Due Process inquiry for specific jurisdiction in this case. See *Walden*, 134 S. Ct. at 1125 (noting that an approach to the “minimum contacts” analysis for specific jurisdiction which allows “a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis” is improper). As the U.S. Supreme Court has established, “however significant the plaintiff’s contacts with the forum may be, those contacts *cannot be* ‘*decisive* in determining whether the defendant’s due process rights are violated.’” *Walden*, 134 S. Ct. at 1115, 1125 (quoting *Rush*, 444 U.S. at 332) (emphasis added). The Due Process “minimum contacts” analysis for specific jurisdiction must focus on the contacts the defendant creates with the forum State itself. *Walden*, 134 S. Ct. at 1121; *Bristol-Myers*, 137 S. Ct. at 1781-1782.

58. As noted in Ford’s original motion papers, Ford’s alleged suit-related conduct—the design, manufacturing and distribution of the Subject Vehicle—bears no connection to New

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York. Ford did not manufacture, design, distribute, sell, or service the Subject Vehicle in New York. (See Pascarella Aff., Ex. C ¶¶ 5-10; Dwyer Aff., Ex D ¶¶ 10-11.) There is no evidence that Ford directed the Subject Vehicle in New York in any way. The fact that Plaintiff Jose Aybar had the Subject Vehicle registered in New York is irrelevant because Ford did not have control over that. Ford did not even have any involvement in bringing the Subject Vehicle to New York. (See Pascarella Aff., Ex. C ¶¶ 5-10; Dwyer Aff., Ex D ¶ 5.)

59. US Tires attempts to get around these facts with the inventive argument that specific jurisdiction is proper because Ford sold, distributed or marketed vehicles of the same model as the Subject Vehicle within the State of New York. This argument conflates general with specific jurisdiction. The defendant's suit-related action here is Ford's design, manufacturing and distribution of the *Subject Vehicle*, as this case is not about Ford Explorers generally; it is about the 2002 Ford Explorer involved in the accident at issue in Actions 1 and 3. (See Compl. Action 3, Exhibit "I" ¶¶ 16-34-48.)

60. For the reasons elaborated above and in Ford's original papers, this Court cannot assert specific jurisdiction over Ford under the facts of this case without offending Due Process.

IV. DUE PROCESS DOES NOT PERMIT STATE COURTS TO DECIDE ON PERSONAL JURISDICTION MOTIONS BASED ON THE CONVENIENCE OF PLAINTIFFS OR THIRD PARTIES.

61. "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. at 1122. The Due Process analysis requires a consideration of more than just "the practical problems resulting from litigating in the forum." *Bristol-Myers*, 137 S. Ct. at 1780. See also *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (noting that the Due Process Clause is "more than a guarantee of immunity from inconvenient or distant litigation"). The plaintiffs or third-party plaintiffs' desire to litigate their claims in their home State cannot take precedence

over a defendant's Due Process rights. Indeed, the requirements of the Due Process Clause "must be met as to each defendant." *Bristol-Myers*, 137 S. Ct. at 1783 (quoting *Rush*, 444 U.S. at 332). In this case, Plaintiffs' and US Tires' complaints about the inconvenience of having to litigate against Ford and Goodyear outside of New York is not a basis for the Court to violate Ford's and Goodyear's Due Process rights. Accordingly, the Court cannot consider this argument by Plaintiffs and US Tires in deciding Ford's motion.

CONCLUSION

62. The Second Department has already established that New York courts do not have personal jurisdiction over Ford in this action. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). This Court is bound to follow that decision under the doctrine of *stare decisis*. Even if the Court believed it has discretion to decide whether Ford is subject to specific jurisdiction in this action, it must grant Ford's motion to dismiss because the requirements for specific jurisdiction under both the Due Process and the New York long-arm statute are not met. The Court cannot exercise specific jurisdiction over Ford because Ford does not have any case-related contacts with New York.

63. For all of the foregoing reasons, this Court should grant Ford's motion to dismiss for lack of personal jurisdiction in its entirety.

Dated: New York, New York
March 25, 2019



Walsy K. Sáez Aguirre

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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.

**REPLY AFFIRMATION IN SUPPORT OF
FORD MOTOR COMPANY'S MOTION TO DISMISS**

AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP

Attorneys for Third-Party Defendant
FORD MOTOR COMPANY
Office and Post Address
600 Third Avenue
New York, NY 10016
212-593-6700

To: **ALL PARTIES**



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703632/2017

JOSE AYBAR et al - v. - US TIRES AND WHEELS OF QUEENS, LLC et al

Assigned Judge: Denis Butler

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Doc #	Document Type	Motion #
176	AFFIDAVIT OR AFFIRMATION IN REPLY Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
177	EXHIBIT(S) A Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
178	EXHIBIT(S) B Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
179	EXHIBIT(S) C Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
180	EXHIBIT(S) D Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
181	EXHIBIT(S) E Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
182	EXHIBIT(S) F Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
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184	EXHIBIT(S) H Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
185	EXHIBIT(S) I Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
186	EXHIBIT(S) J Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
187	EXHIBIT(S) K Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002
188	EXHIBIT(S) L Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	002

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**NYSCEF - Queens County Supreme Court
Confirmation Notice**

**703632/2017****JOSE AYBAR et al - v. - US TIRES AND WHEELS OF QUEENS, LLC et al****Assigned Judge: Denis Butler****Filing User**Name: **Walsy K. Saez Aguirre**

Phone #:

E-mail Address: **wksaez@arfd.com**

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**EXHIBIT D TO SAEZ AGUIRRE AFFIRMATION -
DECISION, DATED MAY 25, 2016 [958 - 961]**

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As of: March 23, 2019 9:22 PM Z

Aybar v Aybar

Supreme Court of New York, Queens County

May 25, 2016, Decided; May 31, 2016, Filed

706909/2015

Reporter

2016 N.Y. Misc. LEXIS 2263 *; 2016 NY Slip Op 31139(U) **

[**1] ANNA AYBAR, ORLANDO GONZALEZ,
JESENIA AYBAR, as legal guardian on behalf of K.C.,
an infant over the age of fourteen (14) years; JESENIA
AYBAR, as Administratrix of the ESTATE OF NOELIA
OLIVERAS, JESENIA AYBAR, as Administratrix of the
ESTATE OF T.C., a deceased infant under the age of
fourteen (14) years, and ANNA AYBAR, as
Administratrix of the ESTATE OF CRYSTAL CRUZ-
AYBAR, Plaintiffs, -against- JOSE A. AYBAR, JR.,
FORD MOTOR COMPANY, THE GOODYEAR TIRE &
RUBBER CO., and "JOHN DOES 1 THRU 30"
Defendants. Index Number: 706909/2015

Notice: THIS OPINION IS UNCORRECTED AND WILL
NOT BE PUBLISHED IN THE PRINTED OFFICIAL
REPORTS.

Subsequent History: Motion denied by [Aybar v. Aybar, 2016 N.Y. Misc. LEXIS 2253 \(N.Y. Sup. Ct., May 25, 2016\)](#)

Related proceeding at [Aybar v. Cohen, Placitella & Roth, PC, 2018 N.Y. Misc. LEXIS 692 \(N.Y. Sup. Ct., Feb. 28, 2018\)](#)

Core Terms

general jurisdiction, Tires, foreign corporation,
continuous, registration, systematic, Operations, courts,
foreign subsidiary, affiliations, subsidiaries,
manufacture, activities, appointing, registered, cases

Judges: [*1] Present: HONORABLE THOMAS D.
RAFFAELE, J.S.C.

Opinion by: THOMAS D. RAFFAELE

Opinion

Defendant, Ford's motion to dismiss is denied in its
entirety for the reasons stated herein.

[**2] The essential argument proffered by defendant,
Ford is that Ford is not subject to personal jurisdiction in
New York under the long-arm statute; since Ford neither
committed a tort in New York, because the Explorer was
built and designed outside the state and that defendant
did not cause injury in the state because the subject
accident which caused the death of three of the seven
passengers traveling in the Ford 2002 Explorer occurred
in the state of Virginia. Defendant Ford relies on the
recent seminal case of [Daimler AG v. Bauman, 134 S.Ct. 746, 762, 187 L.Ed. 2d 624 \[2014\]](#) which articulated
a new standard of presence jurisdiction, according to
[CPLR Section 301](#). This new standard is whether the
foreign corporation's affiliations with the state are so
"continuous and systematic" as to render it essentially
"at home" in the forum state.

A review of the complaint shows that plaintiffs' causes of
action against defendant, Ford sound in negligence,
products liability, strict product liability and wrongful
death (see Verified Complaint, dated June 30, 2015).
The complaint specifically alleges that on July 1,
2012, [*2] while co-defendant owner and operator was
driving his used 2002 Ford Explorer in Virginia, the
vehicle became "unstable following the failure of the
rear driver's side subject 'Goodyear Wrangler AP tire'
thereby causing and/or allowing and otherwise resulting
in said subject motor vehicle losing stability and control,
and to overturn and roll over multiple times" (*id* at
paragraph 43). Plaintiffs further allege that the 2002
Explorer had "certain defective, unsafe, and defective
condition(s) in the design, manufacture, fabrication
and/or assembly" (*id* at paragraph 20).

On July 1, 2012, as defendant Jose Aybar operated the
Ford Explorer northbound on Interstate Highway 85 in
the County of Brunswick, Virginia, the vehicle became
unstable because of the failure of the Wrangler tire, and

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the vehicle rolled over several times. Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar and Tiffany Cabral passengers in the vehicle, were injured and/or killed. On or about July 1, 2012 this action for, *inter alia*, negligence, products liability and wrongful death ensued.

As stated above, defendant Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, [*3] relying on [Daimler A.G. v Bauman, 134 S Ct. 746, 187 L. Ed. 2d 624 \[2014\]](#). For the reasons set forth herein, this court finds that Ford's reliance on *Daimler A.G. v Bauman* is misplaced.

It is undisputed that the 2002 Ford Explorer was purchased [*3] in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed with the Department of Motor vehicles in New York State. The vehicle was traveling through Virginia on the route back to New York when the accident occurred. Moreover, Ford maintains a continuous and substantial presence in New York. It owns property in New York (see Exhibit 1 to opposition, \$150 million dollars invested by Ford to upgrade its Hamburg, New York plant). It has hundreds of dealerships selling Ford products under its brand name in New York. Since 1920, Ford has been registered with the New York State Department of State as an active foreign business corporation.

Defendant, Ford moves to dismiss the complaint against it for lack of *in personam* jurisdiction, relying on [Daimler A.G. v Bauman, 134 S Ct. 746, 187 L. Ed. 2d 624 \[2014\]](#). In *Bauman*, Argentinian residents brought an action against Daimler, A.G., a German corporation, under the Alien Tort Statute and the Torture Victims Protection Act, alleging that its wholly-owned Argentinian [*4] subsidiary helped state security forces to kidnap, detain, torture, and kill the plaintiffs or their relatives during Argentina's "Dirty War." The United States Supreme Court held that due process did not permit the exercise of general jurisdiction over the parent corporation, which had a subsidiary operating in California. The Supreme Court drew a distinction between specific jurisdiction and general jurisdiction. Specific jurisdiction concerns adjudicatory authority where the suit arises out of or relates to the defendant's contacts with the forum.

General jurisdiction in substance concerns adjudicatory authority in cases arising anywhere, and "[t]he paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place

of business ***." ([Daimler AG v Bauman, supra, 749](#)) Another forum may assert general jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. ([Daimler AG v. Bauman, supra.](#)) General jurisdiction requires affiliations so continuous and systematic as to make the foreign corporation essentially at home in [*5] the forum state, i.e., similar to a domestic enterprise in that state. [*4] ([Daimler AG v. Bauman, supra.](#))

In determining whether a court of New York has personal jurisdiction over a non-domiciliary, a two-step analysis must be employed. First, the court must inquire whether there is a statute which confers jurisdiction over the non-domiciliary, and, second, the court must inquire whether the exercise of jurisdiction meets due process standards. (See [Darrow v Deutschland, 119 AD3d 1142, 990 N.Y.S.2d 150](#); [Andrew Greenberg, Inc. v Sirtech Canada, Ltd., 79 AD3d 1419, 913 N.Y.S.2d 808.](#))

In the case at bar, [CPLR 302](#), "Personal jurisdiction by acts of non-domiciliaries," New York State's long arm statute, does not provide a basis for the assertion of *in personam* jurisdiction over defendant Ford. [CPLR 302 \(a\)\(3\)](#) provides for the exercise of jurisdiction over a foreign defendant who commits a tortious act outside the state which causes the injury within the state. This statute does not apply to the case at bar.

[CPLR 301](#) reads in relevant part: "Jurisdiction over persons, property or status," is New York's statute for general jurisdiction, and it provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." A foreign corporation is subject to the jurisdiction of New York courts under [CPLR 301](#) "if it has engaged in [*6] such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted." ([Landoil Res. Corp. v Alexander & Alexander Servs., Inc., 77 NY2d 28, 33, 565 N.E.2d 488, 563 N.Y.S.2d 739](#) [internal quotation marks and citations omitted]). In view of defendant Ford's extensive activities in this state since approximately 1920, a finding of "a continuous and systematic course of doing business" in New York can easily be made. "Even if this statutory standard is met, however, the *Due Process Clause of the 14th Amendment* limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it]

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essentially at home in the forum State." (*Hood v. Ascent Med. Corp.*, 2016 U.S. Dist. LEXIS 28142, 2016 WL 1366920 [SDNY] [internal quotation marks and citations omitted]; see, *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 U.S. 915, 131 S.Ct. 2846, 180 L. Ed. 2d 796. [HN 5: "foreign subsidiaries of United States tire manufacturer were not subject to [**5] general jurisdiction in North Carolina courts in action arising from a bus accident in France allegedly caused by a tire that was manufactured and sold abroad, although some of the tires made abroad by the foreign subsidiaries had reached North Carolina through the stream of commerce"].) There are New York State appellate cases decided after *Bauman* which have found a lack of general jurisdiction over the defendants. (See, [⁷] *B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 131 A.D.3d 259, 15 N.Y.S.3d 318; *D & R Glob. Selections, S.L. v Pineiro*, 128 AD3d 486, 9 N.Y.S.3d 234; *Magdalena v Lins*, 123 AD3d 600, 999 N.Y.S.2d 44.)

This court has concluded that neither *Goodyear Dunlop Tires Operations, S.A. v Brown (supra)*, nor *Daimler A.G. v Bauman (supra)*, nor the New York State appellate cases require the dismissal of the case at bar.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, the estates of two minor North Carolina residents who died in a bus accident that occurred in France brought an action in a North Carolina state court against several subsidiaries of a United States tire manufacturer, including subsidiaries organized and operating in Luxembourg, Turkey, and France. The United States Supreme Court held that the North Carolina court lacked both specific and general jurisdiction over the foreign subsidiaries. The foreign subsidiaries were not registered to do business in North Carolina; had no place of business, employees, or bank accounts there; did not design, manufacture, or advertise their products in North Carolina; and did not solicit business in the state or sell or ship tires to North Carolina customers. The plaintiffs tried to argue that the North Carolina court had jurisdiction because "a small percentage of their [the subsidiaries'] tires were distributed in North Carolina by other Goodyear USA affiliates" (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2848), and The North Carolina Court of Appeals decided that the state court had general jurisdiction over [*8] the foreign subsidiaries, whose tires had reached North Carolina through the stream of commerce. The United States Supreme Court reversed with an opinion that stated "[c]onfusing or blending general and specific jurisdictional inquiries," the North Carolina courts had erroneously found jurisdiction

(*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.) In reference to the tenuous relationship between the foreign subsidiaries and North [**6] Carolina, the Supreme Court stated: "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction." (*Goodyear Dunlop Tires Operations, S.A. v Brown, supra*, 2851.)

In sharp contrast, plaintiff Aybar has alleged without contradiction, inter alia, that the 2002 Ford Explorer was purchased in New York and used primarily in New York by co-defendant Jose Aybar. The subject vehicle was also registered and licensed in New York. Ford has an organization of facilities in this state engaged in day-to-day activities. Ford also has many franchises across the state. Defendant Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts. Parenthetically, this court notes that in *Goodyear Dunlop Tires Operations, S.A. v Brown, (supra)*, the parent corporation, which operated [*9] plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.

The New York State appellate cases decided after *Bauman* which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar because of the level of Ford's activities within New York. In *B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., (supra, 264)*, the Appellate Division, First Department, held that "under Daimler, New York does not have general jurisdiction over Mega's worldwide operations," the Mega International Commercial Bank Company being an international banking corporation, organized under the laws of Taiwan, with its principal place of business located there, and having 128 branches worldwide, only one of which was in New York. But the court found that there was jurisdiction (as discussed below, apparently not general jurisdiction) to compel compliance with information subpoenas arising from the bank's registration with the Superintendent of the Department of Financial Services and filing of a written instrument appointing the superintendent as an agent for service of process. "Mega consented to the necessary [*10] regulatory oversight in return for permission to operate in New York, and therefore is subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas [**7] ***." (*B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., supra, 265* [internal quotation marks and citation omitted].) In *D & R Glob. Selections, S.L. v Pineiro*

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(*supra*), the Appellate Division, First Department held that the New York court did not have general jurisdiction pursuant to [CPLR 301](#) or specific jurisdiction pursuant to [CPLR 302](#) over a Spanish winery, but the appellate court mentioned only the winery's visits to this state to promote its products as a contact with New York. In *Magdalena v Lins (supra)*, the Appellate Division, First Department held that the New York court had no jurisdiction over the defendants, mentioning only an apartment in this state which a defendant owned but did not live in (his daughters did) as the only contact with New York.

In view of the foregoing, this court finds that defendant Ford's activities with the State of New York have been so continuous and systematic that the company is essentially at home here. (See, *Daimler A.G. v Bauman, supra*.)

There is another reason for finding general jurisdiction over defendant Ford. In New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under [CPLR 301](#) by [*11] registering as a foreign corporation and designating a local agent for service of process. (See, *Bagdon v Philadelphia & Reading Coal & Iron Co., 217 NY 432, 111 N.E. 1075*.) "[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York." (Alexander, Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:6[c], p21.) After *Bauman*, the courts have split on the question of the constitutional validity of basing general jurisdiction on such registration statutes. (See, Alexander, 2015 Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:8[c].) There is no New York state court appellate authority directly on point. In *B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co. (supra)*, the appellate court relied on [Banking Law §200](#) which provides in substance that, *inter alia*, no foreign banking corporation shall conduct business in this state unless it filed with the [**8] Superintendent of Banking a written instrument appointing him as its agent "upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches [*12], may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state ***." (Emphasis added.) [Banking Law §200](#) concerns a limited jurisdiction, while other state registration statutes

have been interpreted as a conferring general jurisdiction over a foreign corporation. The court notes parenthetically Alexander's observation that "[i]t would have been helpful if the [Mega] court had clarified how the suit at issue - a special proceeding to enforce an information subpoena- arose out of a transaction with the New York branch." (Alexander, Practice Commentaries [2015], McKinney's Cons Laws of NY, Book 7B, p5.)

Other registration and/or appointment statutes, e.g., [Business Corp. Law §§304](#) and [1304](#), have been interpreted as conferring general jurisdiction over foreign corporations. (See, e.g., *Doubet LLC v Trustees of Columbia Univ. in City of New York*, 99 AD3d 433, 952 N.Y.S.2d 16; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 470 N.Y.S.2d 787; *Baile v. Air & Liquid Systems Corp.*, 2013 N.Y. Misc. LEXIS 5097, 2013 WL 1369452 [N.Y.Sup]). *Bauman* does not expressly address general jurisdiction based on such statutes, but the case's implication for such jurisdiction has become a matter of controversy. This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives *Bauman*. "When,*** the basis for jurisdiction is the voluntary compliance [*13] with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions." (*Acorda Therapeutics, Inc. v. Mylan Pharms. Inc.*, 78 F. Supp. 3d 572, 591 [D. Del. 2015], aff'd on other grounds., *817 F.3d 755, 2016 WL 1077048 [2016]*). In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so.

[**9] The instant motion lacks merit. This court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York.

Dated: May 25, 2016

/s/ Thomas D. Raffaele

Thomas D. Raffaele, J.S.C.

End of Document

**EXHIBIT E TO SAEZ AGUIRRE AFFIRMATION -
AMENDED THIRD-PARTY SUMMONS AND AMENDED
THIRD-PARTY COMPLAINT, DATED MARCH 13, 2019
(REPRODUCED HEREIN AT PP. 688-701)**

**EXHIBIT F TO SAEZ AGUIRRE AFFIRMATION -
AFFIDAVIT OF ROBERT PASCARELLA,
SWORN TO JANUARY 28, 2019
(REPRODUCED HEREIN AT PP. 490-492)**

**EXHIBIT G TO SAEZ AGUIRRE AFFIRMATION -
AFFIDAVIT OF ELIZABETH DWYER, SWORN TO AUGUST 11, 2015 [963 - 965]**

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

X

ANNA AYBAR, ORLANDO GONZALEZ,
JESENIA AYBAR, as legal guardian on behalf of
KEYLA CABRAL, an infant over the age of
fourteen (14) years; JESENIA AYBAR, as
Administratrix of the ESTATE OF NOELIA
OLIVERAS, JESENIA AYBAR, as Administratirx
of the ESTATE OF TIFFANY CABRAL, deceased
infant under the age of fourteen (14) years, and
ANNA AYBAR, as Administratrix of the ESTATE
OF CRYSTAL CRUZ- AYBAR

AFFIDAVIT OF
ELIZABETH DWYER
Index No. 706909/2015

Plaintiffs,

- against -

JOSE A AYBAR, JR., FORD MOTOR
COMPANY, THE GOODYEAR TIRE &
RUBBER CO., and "JOHN DOES 1 THRU 30",

Defendants.

X

I, Elizabeth Dwyer, declare as follows:

1. My name is Elizabeth Dwyer. I am over the age of 18, have personal knowledge of the matters set forth in this declaration, unless otherwise stated, and if called as a witness, I would be competent to testify to the matters in this declaration. The facts stated in this declaration are true and correct.

2. I am employed by Ford Motor Company ("Ford") in the Retail Network and Consumer Experience Development department of the Marketing Sales and Service Division. My job title is Retail Network Operations Manager. My responsibilities involve ensuring franchising policies and procedures are adhered to for all Ford and Lincoln franchising actions in

the United States and maintaining contractual records for all active franchised Ford and Lincoln dealers. By virtue of my position, I am familiar with Ford's United States business operations, its relationship with the dealerships that sell Ford cars and trucks, and the location of Ford's manufacturing facilities. I am also familiar with the records that Ford keeps on the vehicles it builds.

3. Ford is in the business of designing and manufacturing new cars and trucks.
4. Ford was incorporated in the state of Delaware and its principal place of business is in Dearborn, Michigan.

5. The vehicle described in Plaintiffs' Complaint is a 2002 Ford Explorer with vehicle identification number 1FMDU74WX2ZB89795. According to Ford's records, that particular vehicle was assembled at Ford's St. Louis Missouri manufacturing plant on February 11, 2002. Those same records reflect that the car was sold on March 11, 2002 to Ford dealer Team Ford Lincoln in Steubenville, Ohio and then subsequently purchased by an individual owner and not the owner alleged in the complaint that forms the basis of this lawsuit.

6. The vehicle described in Plaintiffs' Complaint did not enter the State of New York until 2009 when it was purchased in a used condition by a "Jose Velez" and without Ford's involvement. The Plaintiffs allege in their complaint that the co-defendant, JOSE A. AYBAR, JR. purchased the subject vehicle sometime "on or about late 2011." (Complaint paragraph 34, attached as Exhibit A).

7. Ford does not have any Ford Explorer manufacturing plants in the State of New York.

8. The vehicle described in Plaintiffs' Complaint was not originally sold in the State of New York.

9. The vehicle described in Plaintiffs' Complaint was not designed in New York.
10. Ford does not directly engage in servicing of Ford vehicles in New York. Those activities are conducted exclusively by independent dealers, none of whom is a corporate affiliate of Ford.
11. Upon appointment of each dealership, the owner and operator must agree to the standard provisions of the Ford Sales and Service Agreement. Each Ford Sales and Service Agreement refers to Ford Motor Company as the "Company," and includes the following paragraph—

DEALER NOT AGENT OF THE COMPANY

14. This agreement does not in any way create the relationship of principal and agent between the Company and the Dealer and under no circumstances shall the Dealer be considered to be an agent of the Company. The Dealer shall not act or attempt to act, or represent himself, directly or by implication, as agent of the Company or in any manner assume or create any obligation on behalf of or in the name of the Company.

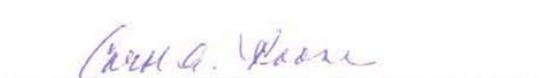
I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Executed this 10th day of August, 2015, at Dearborn, Michigan.
11th Aug



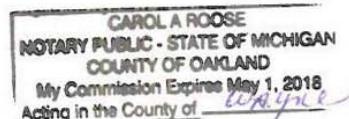
Elizabeth Dwyer

Subscribed and sworn to before me on this 11th day of August, 2015.



Carol A. Roose
Notary Public for the State of Michigan

My Commission Expires: May 1, 2018



CERTIFICATION PURSUANT TO CPLR § 2105

I, Sean Marotta, an attorney of the firm of Hogan Lovells US LLP, attorneys for the Third-Party Defendant-Appellant Ford Motor Company, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Joint Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the Clerk of the County of Queens.

Dated: January 27, 2020



Attorney for Third-Party Defendant-
Appellant Ford Motor Company