

EXHIBIT

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To be Argued by:
ADAM C. CALVERT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

JOSE AYBAR,

Plaintiff-Respondent,

Docket No.:
2016-07396

— against —

THE GOODYEAR TIRE & RUBBER CO.,

Defendant-Appellant,

— and —

GOODYEAR DUNLOP TIRE NORTH AMERICA, LTD.,

Defendant.

U.S. TIRES AND WHEELS OF QUEENS, L.L.C.,

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 Goodyear based on its continuous and systematic contacts in New York?

Yes, because Goodyear is "at home" in New York.

2. Whether the trial court correctly found that there was personal jurisdiction in New York over Goodyear because it is 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 Goodyear.

3. Whether the trial court correctly found that there was no personal jurisdiction over 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 plaintiff is a vehicle owner from New York who was driving back to New York from Disney World with his family when one of the Goodyear tires on his Ford Explorer blew. R.5. The Ford Explorer ran off the road, killing three of the passengers and injuring three other passengers and the driver. R.5.

The plaintiff claims that the accident happened because of a defective design in the Ford Explorer, which was purchased and registered in New York. R.5. He also claims that the accident happened because of a defective Goodyear tire. R.5. 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, from which there were related motions to dismiss and a pending appeal under Docket Nos. 2016-06194 & 2016-07397. R.4. The driver-plaintiff sued Goodyear in Queens County Supreme Court in another action, from which this appeal stems. R.29-37. All plaintiffs sued U.S. Tires in Queens County Supreme

¹ This fact was not part of the record below, but can be made available to the court at oral argument.

Court in a third action. U.S. Tires commenced a third-party action against Ford and Goodyear for contribution and indemnity for their role in causing the accident.²

Goodyear's Motions to Dismiss

Goodyear moved to dismiss the complaint against it for lack of personal jurisdiction. R.11-28. It 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 Goodyear argues are limited to a corporation's state of incorporation and principal place of business. R.11-28. It also argued that there was no specific personal jurisdiction under CPLR 302(a) because it did not commit a tortious act in the State or a tortious act outside the State causing injury within the State. R.11-28.

In support of its motion, Goodyear offered an incomplete and conclusory affidavit that downplays New York's interest in this case. R.38-40. 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.38-40. Goodyear knows nothing about the chain of custody of the tire, not even where it

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.

was shipped to initially after it was manufactured. R.38-40. 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 plaintiff argued that 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.41-49. The plaintiff and U.S. Tires also argued that Goodyear consented to jurisdiction by registering to do business in New York and appointing an agent for service of process. R.44-45, 311-13. Finally, they argued that there was specific jurisdiction under CPLR 302(a). R.41-49.

The Supreme Court's Orders

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied Goodyear's motion. R.4-10. The court found that there was no specific personal jurisdiction under CPLR 302(a)(1) & (3) because the Goodyear tire was manufactured out of state and the injuries were sustained out-of-state. R.6. The court found that there was general personal jurisdiction over 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.8. It also found that there was general personal jurisdiction because

Goodyear consented to jurisdiction as a registered foreign corporation that designated an agent for service of process, thereby consenting to jurisdiction. R.9-10.

Goodyear's Appeal

The Queens County Clerk entered the order on May 31, 2016. R.3. Goodyear timely appealed the Supreme Court's order on June 23, 2016. R. 3.

Argument Summary

The Supreme Court correctly found that it has personal jurisdiction over Goodyear.

First, the court has personal jurisdiction under a general jurisdiction analysis because Goodyear is "at home" in New York. Goodyear sells its products throughout New York, own and operates service centers throughout New York, and operates manufacturing facilities in New York.

Second, there is general personal jurisdiction over Goodyear because it is a registered foreign corporation 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 Goodyear under a specific jurisdiction theory. Goodyear is subject to personal jurisdiction under CPLR 302(a)(1) because it "transacts any business within the state or contract anywhere to

supply goods or services in the state." It is also subject to personal jurisdiction under CPLR 302(a)(3)(i) or (ii) because it 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 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 Goodyear on the current record, if the Court is inclined to agree with Goodyear it should at least order jurisdictional discovery.

Argument

POINT I—THERE IS GENERAL JURISDICTION OVER GOODYEAR, EVEN AFTER THE SUPREME COURT'S DECISION IN *DAIMLER*

The trial court correctly held that Goodyear is 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). Goodyear's activities in New York are so

continuous and systematic to render it "at home" in New York, even though New York is not Goodyear's 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, Goodyear is a U.S. corporation that conducts significant business in New York directly, not only through a subsidiary. 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. Goodyear is a registered foreign corporation 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 one of the largest tire manufacturers in the country.

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, Goodyear is a domestic corporation 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, with that same rationale applying to Goodyear. *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 Goodyear is subject to jurisdiction in New York, even after *Daimler*, because its substantial activities in New York render it "at home" in New York.

POINT II—THERE IS GENERAL JURISDICTION OVER GOODYEAR BASED ON ITS 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 Goodyear is subject to jurisdiction because it is

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 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 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). Goodyear points 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 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 Goodyear is trying to do in our case.

Goodyear relies 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 language stating that corporations consented to general jurisdiction (a point made by Goodyear), but also on the caselaw interpreting that statute (a point ignored by 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 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.

Goodyear argues that it is forced to register because if it does not register it cannot sue in New York and would be enjoined from operations in New York. This is disingenuous. Goodyear complains about the unfairness of being subject to jurisdiction in New York courts when a product it marketed in New York, purchased by a New Yorker, and being used on a vehicle registered by to New Yorker injures a New Yorker. Yet Goodyear does not want to give up its ability to sue in New York.

Goodyear also argues that conferring general jurisdiction via registration will open the doors to out-of-state plaintiffs suing Goodyear in New York in cases that have nothing to do with New York. This is unfounded. There was no doubt before

Daimler that Goodyear was subject to general jurisdiction in New York, so these fears would have manifested already, but they have not.

Goodyear acts as if being sued in New York is a substantial burden. It is a large, national corporation that does significant business in New York. It has the resources to litigate cases in New York, which it frequently does, not only as a defendant, but as a plaintiff. Yet Goodyear has no trouble arguing that New Yorkers who are injured by its products must sue them in Ohio. There is also the very telling admission of 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 Goodyear, not to mention the burden on the plaintiffs and U.S. Tires.

Finally, Goodyear makes the dubious argument that New York has no interest in this case. New Yorkers have been killed and injured, allegedly because of Goodyear's defective product. A product that was advertised and sold in New York and being used on a New York registered vehicle. 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 Goodyear.

POINT III—THERE IS SPECIFIC JURISDICTION OVER GOODYEAR UNDER CPLR 302

There is also specific general jurisdiction over 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. Goodyear is 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 Goodyear transacts business in New York and contracts 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)"). Goodyear sells numerous products throughout New York, including 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

“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, Goodyear will rely on the fact that the Goodyear tire was not manufactured in or initially sold in New York to argue that the accident is not related to its business in New York. It 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 Goodyear tire was part of a nationwide marketing for the product. *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

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, 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 Goodyear tires were manufactured outside New York is irrelevant. Goodyear's sale of this product generally 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. Goodyear is 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, Goodyear committed tortious acts without the state—it manufactured and designed the product 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. 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.

CPLR 302(a)(3) was enacted precisely to prevent the untenable situation Goodyear proposes: allowing a national manufacturer 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 purchase and use of the Goodyear tire on a vehicle owned and registered in New York, 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. Goodyear engages 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.

Goodyear engages in regular business in New York and derives 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 Goodyear "derives substantial revenue from interstate or international commerce."

Goodyear may argue that the other portion of this subsection is not satisfied—that it "expect or should reasonably expect the act to have consequences in the state"—because the Goodyear tire was 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 aa 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 advertisc 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, Goodyear should have reasonably expected that its products could result in injury or consequences in New York based on its marketing and sale of the product 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. at 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 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 Goodyear does not violate due process. It marketed and sold the product in New York and

therefore it should reasonably expect the product's defects to have consequences in New York.

POINT IV—THE RESULT PROPOSED BY GOODYEAR WOULD HAVE DISASTROUS CONSEQUENCES ON THIS CASE AND OTHERS

If this Court agrees with Goodyear and holds that it is 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.”).

Goodyear cries prejudice at the prospect of litigating this case in New York, apparently blind to the fact that its products, which was sold and marketed in New York and being used on a New York registered vehicle, 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. Goodyear is a large, national corporation that

is 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 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 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 Dept 2011).

Here, there are many unanswered questions that warrant jurisdictional discovery. There has been no discovery about the extent of Goodyear's overall operations in New York or its marketing and sale of the products in general. Moreover, there has been no discovery about the manufacture or sale of the specific product involved in this accident.

Conclusion

This Court should find that New York has personal jurisdiction over Goodyear. Goodyear's contacts with New York are substantial enough to render it "at home" in New York under the U.S. Supreme Court's decision in *Daimler*. Goodyear also consented to personal jurisdiction because it is a registered foreign corporation authorized to do business in New York. Finally, there is specific jurisdiction under CPLR 302(a)(1) and 302(a)(3)(i) & (ii). If the court rules that there is no jurisdiction over 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 Goodyear killed and injured New Yorkers. 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.

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