

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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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 AYBAR as Proposed Administratrix
of the Estate of TIFFANY CABRAL

Plaintiffs

- against -

US TIRES AND WHEELS OF QUEENS, LLC.

Defendant.

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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.

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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

Action #1
Index: 9344/14

**PLAINTIFFS'
OPPOSITION TO
MOTION TO DISMISS
CAUSE OF ACTION
AGAINST THIRD-PARTY
DEFENDANT, THE
GOODYEAR TIRE &
RUBBER COMPANY**

represented by separate counsel. I am fully familiar with the facts and circumstances surrounding this action.

2. This affirmation is submitted in opposition to the motion by the Third-Party Defendant, THE GOODYEAR TIRE & RUBBER CO., (hereinafter "GOODYEAR"), seeking to dismiss the third-party action asserted against it, arguing lack of personal jurisdiction over GOODYEAR in New York State Supreme Court, Queens County in the instant matter.

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 GOODYEAR, remain outstanding. Thus, while GOODYEAR no doubt expects the Court to have extensive familiarity with its well known, extensively advertised tire products, it puts the plaintiffs at a disadvantage as the full extent of GOODYEAR's business dealings in New York (including questions regarding the amount of revenue received from its New York business presence) remains undisclosed, and can only be guessed at by the plaintiffs, and this court, in responding to the instant motion. Suffice it to say that GOODYEAR's presence in New York State is significant, pervasive, ongoing and long-standing (i.e. systematic and continuous), and that GOODYEAR no doubt derives significant revenue from its New York presence.

4. Jurisdiction over the third-party defendant, GOODYEAR, is easily established pursuant to CPLR §302(a)(1) and CPLR §302(a)(4), 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.

5. Here, subsections (2) and (3) are not required elements to be satisfied, so long as either subsection (1) or subsection (4) is satisfied, which is why each subsection is separated by the word “or” rather than “and”. For this reason, subsection (2) and (3) are lined out in order to avoid unnecessary distraction and to direct the attention of the court to that portion of the statute that is relevant herein.

6. Assuming that GOODYEAR is a foreign corporation, which is not contested, it qualifies as a “non-domiciliary” for purposes of applicability of CPLR §302. Thus, it is incumbent upon GOODYEAR to assert, and present evidence, that it does not transact any business within New York, or contract anywhere to supply goods or services in New York; and that it does not own, use or possess any real property situated within New York. GOODYEAR fails to make that argument, and ultimately cannot make that argument with a straight face. The GOODYEAR Tire & Rubber Co. clearly and unequivocally transacts business within New York State, and supplies tires in New York, and services motor vehicles in New York at any one of its

numerous GOODYEAR Auto Service Centers located throughout the State. Contrary to GOODYEAR'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 §(1) is separated from §(2) by the word "OR" as opposed to "and").

7. The gist of GOODYEAR'S argument rests in its categorization of the jurisdiction herein to be general, or 'all purpose' jurisdiction, as opposed to 'specific jurisdiction (which requires that matter to arise from contacts within the forum state). Here, although the subject GOODYEAR tire ultimately failed while being temporarily operated on a federal interstate highway outside of New York, specific jurisdiction is nevertheless asserted, as the cause(s) of action arose out of GOODYEAR's specific contacts within the State, as its allegedly defective tire was mounted onto a vehicle that was registered to a New York resident and duly licensed in New York State.

8. GOODYEAR's argument assumes that general jurisdiction is the sole basis of the third-party jurisdiction herein (it is not), and rests its argument almost exclusively on the fairly recent and controversial Supreme Court holding in Daimler A.G. v. Bauman, 134 S. Ct. 746 (2013), which arguably narrows the definition of 'minimum contacts' under the traditional reach of long arm jurisdiction. Relying on the Daimler decision, GOODYEAR argues that it is a foreign corporation, registered in Ohio with its principal place of business and corporate headquarters also in Ohio, and that its affiliations and business operations within New York State are not *so* "continuous and systematic" as to render it essentially at home in New York for purposes of general jurisdiction, and that it does not otherwise "avail itself of jurisdiction in New York." Neither of these assertions are compelling. GOODYEAR maintains both a substantial

and continuous business presence in New York State. And it has voluntarily availed itself of jurisdiction in New York. Thus, even if this court were to ignore the obvious nexus of the defective tire allegation to GOODYEAR's pervasive and ongoing business of marketing, distributing and selling tires in New York State for use on millions of New York registered motor vehicles, it is argued that GOODYEAR would nevertheless be subject to general jurisdiction in New York State.

9. As the instant motion to dismiss has been made pre-discovery, Plaintiff asks the Court to take judicial notice of the following, upon information and belief:

- A) GOODYEAR is a well-recognized brand name, and is primarily in the business of manufacturing, marketing and distributing tires for usage on automobiles;
- B) GOODYEAR tires are marketed and sold throughout New York State, and are distributed and sold by virtually every business which services automobiles or sells automobile tires, including but not limited to Pep Boys Auto Centers, Mavis Discount Tires, Sears Auto Centers, Ford dealerships, GMC dealerships, etc., etc.
- C) In addition to wholesale distribution, GOODYEAR owns, operates and/or controls the franchise for scores of 'Goodyear Tire and Auto Service Centers' actively operating and doing business throughout New York State, including right here in this jurisdiction in Queens, which sell and promote GOODYEAR tire products exclusively under its brand name, and which display the GOODYEAR company logo on its signs both outside and inside the stores, employing thousands of New Yorkers. [Annexed hereto

as **EXHIBIT “1”** is a printout from the GOODYEAR website identifying at least sixty-two separate GOODYEAR Auto Service Centers in New York]. GOODYEAR even brags in its on-line literature on its company website that its Goodyear Auto Service Centers are “wholly owned and operated by the Goodyear Tire & Rubber Company since 1924”! [See **EXHIBIT “2”**].

- D) GOODYEAR tires are found, by the millions, upon vehicles, new and used, that are sold, marketed, registered and operated throughout every county in New York State.

10. In short, GOODYEAR's corporate presence in New York is pervasive. It has engaged in, and continues to engage in, continuous and systematic, ongoing business in New York State, probably deriving millions (if not hundreds of millions) of dollars in revenue from its New York business operations and sales of its products in New York State. Indeed, it is a far stretch for GOODYEAR to assert, with a straight face argument, that it does not maintain affiliations within New York that are continuous and systematic.

11. GOODYEAR essentially argues that its corporate presence in New York, though continuous and systematic, nevertheless does not subject it to general jurisdiction in New York State, relying upon the Daimler decision, *Id.* However, as will be argued herein, that case is easily distinguishable from the facts and circumstances herein. In the Daimler case, a group of Argentina nationals filed suit in a California Federal Court against Daimler AG (a foreign German public stock company) over tortious acts allegedly committed by agents of its subsidiary, Mercedes-Benz of Argentina, in Argentina back in 1976-1983 during what is referred to as Argentina's “dirty war”. The Supreme Court held that, under those facts, the minimum

contacts that Daimler had in California did not support general jurisdiction in California under California's long-arm statute.

12. The Daimler fact pattern is a far cry and easily distinguishable from the case at bar, where Queens, New York residents have sued a Queens, New York company (the defendant/ third-party plaintiff, US TIRES AND WHEELS OF QUEENS, LLC), in connection with a single vehicle, tire failure and subsequent rollover accident, which resulted from the failure of a defective GOODYEAR tire product that was negligently mounted on said vehicle. Here, the lead plaintiff resides in Queens, New York. The first party defendant resides and operates a business in Queens, New York. The subject motor vehicle (which even provided first-party, no-fault benefits under the motor vehicle laws of New York) was registered, licensed and insured in New York. The subject vehicle was purchased in New York, owned by a New York resident, and garaged full time in New York State. Furthermore, the initial tort giving rise to this litigation was committed by the defendant/third-party-plaintiff in New York State. Indeed, New York State is the only reasonable, logical and rational venue for this action to have been brought.

13. Unlike the plaintiffs in Daimler, the plaintiffs herein were not 'forum shopping' for a favorable foreign jurisdiction. They brought suit in Queens, New York where the lead most of the plaintiffs resided, where the vehicle owner resided, where the vehicle was registered and garaged, where the defendant's business was located and where the initial tort was committed. Likewise, the third-party plaintiff was not forum shopping. New York State is the only rational venue for the third-party action at issue herein to have been asserted.

14. The Court should note for the record that there are two other related actions pending in Supreme Court, Queens County, which have been joined (though not yet fully consolidated) for purposes of joint discovery, in which the plaintiffs herein have already brought

direct actions against the movant, GOODYEAR, et. al. Said actions are captioned and identified as follows:

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JOSE AYBAR
Plaintiff, Action #2
Index: 706908/15

-against-

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

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-----X
ANNA AYBAR, ORLANDO GONZALES, JESENIA
AYBAR, as legal guardian on behalf of KEILA CABRAL, Action #3
Index No.: 706909/2015
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"

Defendant(s)

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15. This Court should note that GOODYEAR previously filed a similar motion to dismiss Actions #2 and #3, upon essentially the exact same jurisdictional grounds argued in the instant motion to dismiss the third-party action. Said motion to dismiss was denied by decision of J.S.C. Thomas D. Raffaele on May 25, 2016. [A copy of Judge Raffaele's decision is annexed

hereto as **EXHIBIT “3”**]. Arguably, Judge Raffaele’s decision is controlling in the instant matter, and the doctrine of ‘issue preclusion’ should prevail.

16 In his well reasoned, seven page decision, Justice Raffaele specifically held that GOODYEAR’s motion had “no merit”; that the defendant, GOODYEAR’s contacts were significant, systematic and continuous; and that the new ‘exceptional circumstances’ test as articulated in the Daimler decision was satisfied; and that GOODYEAR voluntarily consented to jurisdiction in New York by virtue of registering its corporation with the NY Department of State , and appointing an in-State agent to accept service of process service of process on its behalf here in New York. *[Said decision is presently on Appeal].

17. Nevertheless, in what amounts to a second bite at the apple, GOODYEAR now moves to have the third-party action against it dismissed, arguing that New York State does not have jurisdiction over GOODYEAR as a third-party defendant. It is respectfully asserted that the doctrine of “issue preclusion” applies, as jurisdiction over Goodyear in this court has already been determined. To the extent that the issue may be outside the rubric of issue preclusion, Judge Raffaele’s decision, and his findings, should nevertheless be instructive to this bench.

18. GOODYEAR attempts to argue that the Third-Party claim against it herein sounds in products liability, where the initial action sounds only in negligence, and is thus improperly brought. Yet the very basis of the negligence claim is the underlying failure of the main defendant, US TIRES AND WHEELS OF QUEENS, LLC., to properly inspect, recognize and communicate the subject tire’s lack of road worthiness to the plaintiffs, due to its defective design, manufacturing and assembly flaws attributed to GOODYEAR. In other words, the main action and the third-party action are inextricably intertwined, particularly in light of the

companion actions which assert direct causes of action against GOODYEAR sounding in products liability].

GOODYEAR'S AFFILIATIONS WITH THE STATE OF NEW YORK ARE SO CONTINUOUS AND SYSTEMATIC AS TO RENDER IT ESSENTIALLY AT HOME IN NEW YORK STATE, AND IN ANY EVENT, SATISFIES 'EXCEPTIONAL CIRCUMSTANCES'

I. SYSTEMATIC AND CONTINUOUS

19. While the Daimler decision appears to have narrowed the 'minimum contacts' test for general jurisdiction, by requiring a corporate defendant to have "affiliations with the State that are so continuous and systematic as to render it essentially at home in the forum State," it obviously did not altogether abolish general jurisdiction. Here, the issue is not about fishing for evidence of minimum contacts with the state, since GOODYEAR's contacts with New York State are publicly known and far beyond minimum. Indeed, GOODYEAR's affiliations are so extensive, long-standing and pervasive, so "systematic and continuous," that GOODYEAR is "essentially at home" in New York State. This somewhat new (yet at the same time traditional) standard is specifically articulated throughout the Daimler decision. "Accordingly, the inquiry under Goodyear is not whether a foreign corporation's in-forum contact 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." Daimler at 761 (*citing Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915).

20. Thus, in applying Daimler, the pertinent question before this Court is whether GOODYEAR's business affiliations within New York State are so pervasive, and "continuous and systematic" as to render it essentially "at home" in New York State, whereby it effectively "avails itself of jurisdiction in New York," for purpose of general jurisdiction under CPLR §302.

21. Upon information and belief (recall, this motion is premature, having been filed pre-discovery) GOODYEAR has been systemically and continuously doing business in New York since at least 1924. It reportedly owns, manages and/or essentially controls scores of business outlets through tightly controlled company owned stores and/or franchises bearing the GOODYEAR corporate name, corporate logo and corporate color scheme, and which advertise, promote and sell exclusively the corporate products of GOODYEAR. GOODYEAR has conducted such business and derived substantial revenue from such business for several uninterrupted decades. It advertises extensively in New York. Millions upon millions of their tire products are sold and utilized on automobiles throughout New York State. It is no wonder, then, that Goodyear has registered with the New York State Department of State, Division of Corporations, in order to be fully authorized to conduct business within the State of New York and avail itself of the laws of the State of New York. Discovery would likely reveal that sale of their respective products within New York State have amounted to hundreds of millions, if not billions, of dollars in revenue.

22. Furthermore, in the case at bar, the subject motor vehicle bearing the subject GOODYEAR tire at issue herein (which was originally installed upon the vehicle when it was new), was purchased (albeit used) by the plaintiff, JOSE AYBAR, in New York State. JOSE AYBAR is a New York State resident. The vehicle was lawfully registered with the DMV in New York State and bore New York State license plates. It was garaged full time in New York State, and it was driven, 99% of the time, within New York State. It was allegedly negligently serviced by the defendant, US TIRES AND WHEELS OF QUEENS LLC, at a Queens, New York auto shop. It was merely happenstance that the subject single car rollover accident

occurred outside of New York State, as the vehicle was being operated upon a Federal Interstate Highway at the time, returning from a short vacation road trip to Florida and back.

23. It is upon this singular basis alone, the location of the occurrence (a federal interstate highway in Virginia, where the vehicle was merely passing through on its way back to New York on the time and date of occurrence) that allows the moving defendant even a straight face argument against jurisdiction in New York. (Had the tire failure-rollover occurred on the same Federal Highway within New York's borders, the defendants would have even less basis at all to challenge jurisdiction). However, as stressed earlier in this brief, it is not necessary, for purposes of obtaining general or specific jurisdiction under either CPLR §302(a)(1) or CPLR §302(a)(4) for the actual tort to have occurred within the borders of New York State, so long as there is sufficient corporate presence in New York, as here.

24. 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 occurred on the highway in Virginia). On that basis, GOODYEAR essentially asks 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 forty years ago in Argentina! The Supreme Court correctly held that Daimler was not amenable to suit in California for injuries allegedly caused by the conduct of Daimler subsidiary MB Argentina that took place 40 years ago entirely outside the United State, where none of the parties were 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 this lawsuit.

II. EXCEPTIONAL CIRCUMSTANCES

25. The Daimler court did not specifically define precise elements of “exceptional circumstances” which would subject an out-of-state corporation to general jurisdiction in the forum state, but it stressed that elements of due process, and traditional notions of fairness were intertwined into this new standard. Here, unlike the parties in Daimler and its select progeny, the plaintiffs (and third-party-plaintiff), did not forum select New York State out of thin air. Indeed, as demonstrated hereinabove, it was virtually the only choice for proper venue, as the originally named defendant was a New York resident company, and the plaintiff(s) were New York residents, and the subject motor vehicle (which bore the subject GOODYEAR tires) was a New York registered motor vehicle. Nor was Federal Court an option, as there was no diversity. Likewise, Virginia (the location of the ultimate rollover) is not, and could not, be a proper venue, as neither the plaintiffs nor the defendant (nor the third-party defendants) were residents of Virginia.

26. GOODYEAR asserts that, under the facts and circumstances herein, the only possible jurisdiction over it in this case would be in the state of Ohio, as they are incorporated in Ohio and their principal corporate headquarters is in Ohio. Yet they fail to recognize that Ohio is a completely wrong jurisdiction for all of the remaining litigants on both sides. Bringing suit (or third-party action) against GOODYEAR in Ohio would effectively require a separate action altogether, rather than a third-party action. Taking GOODYEAR’s position further, virtually dozens of inter-state jurisdictions could be ultimately invoked, followed by dozens of motions to

consolidate into one ultimate jurisdiction. Such civil practice could take years just to establish a venue for litigation.

27. This could not have been the intent of the Supreme Court in deciding Daimler. And indeed, the Daimler holding specifically carved out an exceptional circumstances test. It is argued herein that a third-party action such as this, involving multiple defendants who contributed to manufacturing and marketing a single product, each with a different and distinct home jurisdiction, rises to the level of exceptional circumstance, allowing for a single venue, so long as the initial action was properly brought, as here, in the proper venue against the original defendants. But the Daimler holding does not automatically limit jurisdiction to a foreign corporation's domicile. Rather, it clearly recognizes that general jurisdiction can still be obtained under "exceptional circumstances" or sufficient "corporate presence."

III. REGISTRATION AS A FOREIGN CORPORATION DOING BUSINESS IN NEW YORK STATE

28. Moreover, as argued in the third-party-plaintiff's opposition papers already submitted in opposition to the instant motion, GOODYEAR has voluntarily availed itself of the laws of New York, by voluntarily registering its corporate presence in New York State with the Department of State, and thus has voluntarily consented to accept service of process within New York State by appointing an in-state agent to accept service of process on its behalf. [Annexed hereto as **EXHIBIT "4"** is a true and accurate printout taken from the NYS Department of State website, documenting GOODYEAR's filing as a foreign business corporation actively doing business in New York, dating back to 1956].

29. This has been held to amount to a knowing consent to general jurisdiction in the courts of New York. *See Steuben Foods, Inc. v. Oystar Group*, 2013 WL 2105894 (W.D.N.Y.

2013); Rockefeller University v. Ligand Pharmaceuticals, Inc., 581 F. Supp.2d 461, 466-67 (S.D.N.Y) 2008); Augsbury Corp. v. Petrokey Corp., 470 NYS2d 787, (3rd Dept., 1983). This is deemed “part of the bargain by which [a foreign corporation] enjoys the business freedom of the State of New York.” Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, at 175. As argued by the defendant/third-party-plaintiff, the moving defendant availed itself of New York laws, and thereby consented to personal jurisdiction in New York, by duly registering its corporation with the NYS Department of State.

IV. CONCLUSION

30. Here, 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 city and elsewhere throughout New York State, and it employs hundreds, probably 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. 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 fairly recent Daimler decision cited by GOODYEAR throughout its moving papers. The proper analysis to undertake is not whether GOODYEAR is *actually* at home in New York State, but if it is ‘essentially at home’ for the purpose of obtaining jurisdiction in a New York under the facts and circumstances herein.

31. Whether this court applies the ‘Corporate Presence’ test or the ‘Exceptional Circumstances’ test, the result is the same. GOODYEAR's actual corporate presence and

pervasive business dealings and affiliations in New York are so substantial, systematic and continuous that it has availed itself of New York law, and is effectively "at home" in New York State for purposes of both specific and general jurisdiction.

32. Even post-*Bauman*, New York courts have continued to assure New York plaintiffs that CPLR 302 remains viable. In *D & R Global Selections, S.L. v. Pineiro*, 128 A.D.3d 486 (1st Dep't 2015), the Appellate Division reiterated that a "defendant's visits to New York to promote its wine business constitutes transaction of business here" under CPLR §302.

V. ADDITIONAL TIME FOR LIMITED JURISDICTIONAL DISCOVERY

33. Should the court not readily find that jurisdiction over GOODYEAR is established, Plaintiff's request they be afforded a period of limited jurisdictional discovery to fully assess the full extent of defendant GOODYEAR's contacts with this state. Uniquely absent from Goodyear's papers is any allegation that they are not "essentially at home" in New York. Limited jurisdictional discovery will reveal that not only is Goodyear authorized to do business in this State and derives substantial income from that business, but that it is a virtual domestic corporation, operating at all levels, retail and wholesale, here. The failure to both make and support, with evidence in admissible form, an allegation that is was is 'essentially at home' in this State is fatal to defendant's application. *Peters v. Peters*, 127 A.D.3d 656, 657 (1st Dep't 2015) [(T)he Daimler decision supports plaintiff's position that Daimler did not establish a new rule, but "clarified" the general jurisdiction standard previously "set forth" in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, [2011]; (See also *In re Roman Catholic Diocese of Albany, N.Y. Inc.*, 745 F.3d 30, 37 [2d Cir.2014]). Under the standard first articulated in *Goodyear*, UBS did not contest in its motion papers that it is not "essentially at

home” in New York Id. at 2851); therefore, it waived its objection based on personal jurisdiction”]. The failure to make that essential allegation waives any objection based on lack of personal jurisdiction.

34. Finally, GOODYEAR cannot claim violation of its due process rights here. The United States Supreme Court's due process precedents provide that: “So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not ‘present’ in that State.” Fischbarg v. Doucet, 9 N.Y.3d 375, 384-85 (2007). Compare to within, where GOODYEAR’s “presence” is apparent and undisputed.

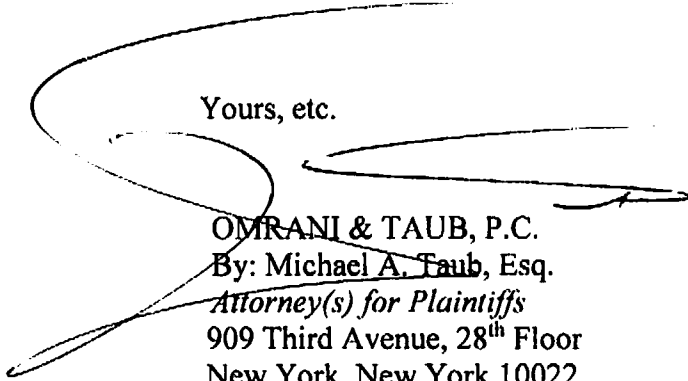
35. There should be no issue that the Supreme Court of the State of New York, Queens County, is the most proper and appropriate venue for this action. With regard to the third-party action at issue herein, it has been readily established that GOODYEAR conducts substantial business in New York, and does engage in pervasive, ongoing, continuous business, and owns or controls property within New York State. For the reasons stated herein, said contacts are sufficient under both the ‘Corporate Presence’ test and the more narrow ‘Exceptional Circumstances’ test (if that is indeed the new standard). It should be clear that jurisdiction over GOODYEAR (and FORD, as well, for that matter) satisfies any and all due process concerns raised by the Daimler decision. GOODYEAR may indeed *prefer* to haul all of the parties into its home state of Ohio (as FORD would undoubtedly prefer to litigate its defense in its home state of Michigan), but that option is entirely impractical and improper, and would only serve to raise additional and even more compelling jurisdictional issues for the other parties. Simply put, there is no one single jurisdiction that will satisfy all of the parties herein, but surely this case belongs in Queens County, New York where jurisdiction and venue is just and proper.

GOODYEAR cannot seriously expect this court to sever it from the case or dismiss the claims (and now cross-claims) against it for lack of personal jurisdiction, given its pervasive, continuous, systematic and ongoing business presence in New York.

36. For the reasons addressed herein, the instant motion to dismiss the third-party claims against the movant, THE GOODYEAR TIRE AND RUBBER COMPANY, as third-party defendant, for lack of personal jurisdiction over it, should be denied in its entirety.

Dated: New York, New York
July 20, 2018

Yours, etc.



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