

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.,

NOTICE OF APPEAL

Plaintiffs,

Index No. 703632/2017

- 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 the above-named defendant, THE GOODYEAR TIRE & RUBBER COMPANY, by its attorneys DLA PIPER LLP (US), hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Department, from that portion of the annexed order of the Supreme Court, Queens County (Hon. Denis J. Butler, J.S.C.) dated September 25, 2019 and entered in the office of the clerk of the court on or about September 27,

2019, which denied THE GOODYEAR TIRE & RUBBER COMPANY's motion to dismiss, and from each and every part of said order adverse to the interests of the appealing defendant.

Dated: New York, New York
October 18, 2019

DLA PIPER LLP (US)

By: /s/ Jayne A. Risk
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The Goodyear Tire & Rubber Company*

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Supreme Court of the State of New York

Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

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.,

- against -

US TIRES AND WHEELS OF QUEENS, LLC. —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.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- Civil Action
- CPLR article 75 Arbitration

- CPLR article 78 Proceeding
- Special Proceeding Other
- Habeas Corpus Proceeding

Filing Type

- Appeal
- Original Proceedings
- CPLR Article 78
- Eminent Domain
- Labor Law 220 or 220-b
- Public Officers Law § 36
- Real Property Tax Law § 1278

- Transferred Proceeding
- CPLR Article 78
- Executive Law § 298
- CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

| | | | |
|--|---|--|---|
| <input type="checkbox"/> Administrative Review | <input type="checkbox"/> Business Relationships | <input type="checkbox"/> Commercial | <input type="checkbox"/> Contracts |
| <input type="checkbox"/> Declaratory Judgment | <input type="checkbox"/> Domestic Relations | <input type="checkbox"/> Election Law | <input type="checkbox"/> Estate Matters |
| <input type="checkbox"/> Family Court | <input type="checkbox"/> Mortgage Foreclosure | <input type="checkbox"/> Miscellaneous | <input type="checkbox"/> Prisoner Discipline & Parole |
| <input type="checkbox"/> Real Property (other than foreclosure) | <input type="checkbox"/> Statutory | <input type="checkbox"/> Taxation | <input checked="" type="checkbox"/> Torts |

Appeal

| | | | |
|--------------------------------------|--|--|--|
| PaperAppealed From (Check one only): | | If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper. | |
|--------------------------------------|--|--|--|

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|--|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

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|---|--|
| Court: Supreme Court | County: Queens |
| Dated: 09/25/2019 | Entered: 09/27/2019 |
| Judge (name in full): Denis J. Butler, J.C.S. | Index No.: 703632/2017 |
| Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final | Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury |

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? Yes No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Anna Aybar, Orlando Gonzales, Jesenia Aybar, as legal guardian on behalf of K.C an infant over the age of fourteen (14) years, Jesena 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 v. Jose A Aybar, Jr., Ford Motor Company, The Goodyear Tire & Rubber Company, and "John Does 1 thru 30." Queens County Supreme Court Index No. 706909/2015, Status: Stayed

Jose Aybar v. The Goodyear Tire & Rubber Company and Goodyear Dunlop Tires North America, Ltd., Queens County Supreme Court Index No. 706908/2015, Status: Disposed

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

| | |
|-----------------------|-------------------------|
| Court: Choose Court | County: Choose County |
| Judge (name in full): | Order of Transfer Date: |

CPLR 5704 Review of Ex Parte Order:

| | |
|-----------------------|-----------------------|
| Court: Choose Court | County: Choose County |
| Judge (name in full): | Dated: |

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal from an order of the Supreme Court, Queens County (Butler, J.) in which that court, amongst other rulings, denied a motion by Third-Party Defendant The Goodyear Tire & Rubber Company which sought to dismiss the third-party complaint against it on general and specific jurisdictional grounds.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

It will be submitted on appeal that the court below erred in denying The Goodyear Tire & Rubber Company's motion to dismiss, that it significantly misunderstood the law and established precedent in its rulings regarding both specific and general jurisdiction with regard to The Goodyear Tire & Rubber Company, and that it erred in such other ways as may be apparent from a review of the full record on appeal.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

| No. | Party Name | Original Status | Appellate Division Status |
|-----|------------------------------------|-------------------------------|---------------------------|
| 1 | Jose Aybar | Plaintiff | Respondent |
| 2 | Orlando Gonzales | Plaintiff | Respondent |
| 3 | Jesenia Aybar | Plaintiff | Respondent |
| 4 | Anna Aybar | Plaintiff | Respondent |
| 5 | US Tires and Wheels of Queens, LLC | Defendant 3rd-Party Plaintiff | Respondent |
| 6 | The Goodyear Tire & Rubber Company | 3rd-Party Defendant | Appellant |
| 7 | Ford Motor Company | 3rd-Party Defendant | |
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Address: 488 Madison Avenue, 20th Floor

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E-mail Address: mtaub@omraniandtaub.com

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Party or Parties Represented (set forth party number(s) from table above):

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Address:

| | | | |
|--------------|---------------|-------------|----------------------|
| City: | State: | Zip: | Telephone No: |
|--------------|---------------|-------------|----------------------|

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

ORIGINALLY FILED

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

-----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.,

Index No.:
703632/2017

Plaintiff(s),

Motion Date:
May 7, 2019

Motion Seq. Nos.:
017 & 019

-against-

US TIRES AND WHEELS OF QUEENS, LLC.,

Defendant.

-----x
US TIRES AND WHEELS OF QUEENS, LLC.,

Third-Party Plaintiff,

| |
|-------------------------------|
| FILED |
| SEP 27 2019 |
| COUNTY CLERK QUEENS COUNTY |

-agaisnt-

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

Third-Party Defendants.

-----x
The following numbered papers were read on the separate motions by third-party defendant The Goodyear Tire & Rubber Company for an order, pursuant to CPLR 3211 (a) (7) and (8), dismissing the third-party complaint for failure to state a cause of action and lack of general or specific personal jurisdiction, and by third-party defendant Ford Motor Company, pursuant to CPLR 3211 (a) (8), for an order dismissing the third-party complaint for lack of general or specific personal jurisdiction; and on the cross-motion by

third-party plaintiff US Tires and Wheels of Queens, LLC, for an order amending its complaint and staying the action pending a decision on the appeals in the companion cases before the Court of Appeals regarding personal jurisdiction.

| | Papers <u>Numbered</u> |
|--|------------------------------------|
| Notice of Motion - Affidavits - Exhibits..... | E55-60;154-163 |
| Notice of Cross Motion - Affidavits - Exhibits.... | E164-171 |
| Answering Affidavits - Exhibits..... | E94-103;122-127 172-175;189-196 |
| Reply Affidavits..... | E129;176-188 |

Upon the foregoing papers, the motions and cross-motion are determined as follows:

This action arises out of an automobile accident allegedly caused by a defective tire designed and manufactured by third-party defendant The Goodyear Tire & Rubber Company (Goodyear), and a defectively designed and manufactured Ford Explorer, designed and manufactured by third-party defendant Ford Motor Company (Ford). Plaintiff alleges that he brought the tires to defendant/third-party plaintiff US Tires and Wheels of Queens, LLC (US Tires), asked that they be inspected, tested, and, if found to be safe, installed upon plaintiff Aybar's vehicle. Plaintiff Jose Aybar purchased his Ford Explorer in New York State. The vehicle was registered and predominantly used in the State of New York. The tire(s) was purchased and installed in New York. The driver and all the occupants were residents of New York. While traveling through Virginia, the aforesaid tire exploded, the Ford Explorer flipped over, and, tragically, of the six occupants in the vehicle, three perished and three were seriously injured.

In the companion cases, *Aybar v Goodyear and Ford* and *Aybar v Aybar*, Goodyear and Ford brought separate motions in Supreme Court, Queens County, seeking to dismiss the complaint against each of them, respectively, on the grounds of lack of general jurisdiction. The Honorable Thomas D. Raffaele, pursuant to the orders dated May 25, 2016, found the defendants subject to general jurisdiction, however, those decisions were subsequently reversed on appeal by the Appellate Division, Second Department, on January 23, 2019. In a footnote to the decision, the Appellate Division, Second Department, stated it was not making a determination regarding specific jurisdiction as the plaintiffs neither presented that issue for argument nor was third-party plaintiff US Tires a party to those motions and had no significant opportunity to defend.

Ever since the sweeping decision by the Supreme Court of the United States in *Daimler AG v Bauman* (571 US 117 [2014]), the constitutional limitation upon state general jurisdiction requires that for a nonresident or foreign corporation to be subject to jurisdiction for all purposes it must have such continuous and systematic business contacts within the forum state as to be considered "at home." Less clear than the stated threshold is the manner in which a court weighs the various factors involved in ascertaining whether the foreign corporation has been shown to have met this standard. In the aforementioned companion cases, the Appellate Division has determined that defendants Ford and Goodyear are not subject to the general jurisdiction of the State of New York as the extent of their contacts here do not rise to the level of being "at home" (see *Aybar v Aybar*, 169 AD3d 137 [2d Dept 2019]). Here, third-party plaintiff has not sufficiently raised any additional issues of fact or factors to be considered requiring jurisdictional discovery. As to the ruling on general jurisdiction, this court is currently constrained to adhere to the determination by the Appellate Division, Second Department, subject to the appeal pending before the Court of Appeals of the State of New York.

Turning to specific jurisdiction, it must be ascertained whether third-party defendants fall within the reach of New York's long-arm jurisdiction statute, CPLR 302. After review, it appears that the pertinent portion of the statute is within CPLR 302 (a) (1), thereby requiring a determination as to whether third-party defendants (1) transacted business in New York, and, if so, (2) whether there is an arguable nexus or substantial relationship between the business transacted and the claim asserted (see *Al Rushaid v Pictet & Cie*, 28 NY3d 316 [2016]; *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327 [2012]; *Fischbarg v Doucet*, 9 NY3d 375 [2007]). Causation is not a requirement but merely a relatedness such that the legal claim is not completely unmoored from the former, regardless of the ultimate merits of the claim (see *Al Rushaid*, 28 NY3d 316; *Licci*, 20 NY3d 327). It is only required that the claim, in some arguable way, be connected to the transaction (*id.*).

It is undisputed that both Ford and Goodyear have considerable financial and business contacts and dealings in the State of New York and have had these contacts for a lengthy period of time. Although quite extensive, the Appellate Division, Second Department, ruled these contacts did not rise to the level of rendering both Ford and Goodyear "at home" in the State of New York. However, it is without question that these contacts satisfied the first prong of the long-arm statute, in that both third-party defendants transact business within the State of New York (see *McGowan v Smith*, 52 NY2d 268 [1981]).

With regard to the second prong, although the products at issue herein were manufactured out of state by third-party defendants, the nature of their businesses within New York State include, but are not limited to, marketing, promoting, advertising, sales, and servicing (either through corporate owned entities or independent contractors or dealers under contract) of their products. These business activities are directly targeted at the New York market, consisting of millions of resident drivers. Ford and Goodyear manufacture these vehicles and tires outside the state, but sell these vehicles and tires throughout New York State, nationally, and internationally. More specifically, both third-party defendants locate themselves throughout New York State, around the country, and the world for these purposes. Here, in the State of New York, as aforesaid, they each have numerous wholly owned or contractual relationships with independent dealers who sell their products, both new and used, to residents of New York. Both spend considerable capital on sophisticated marketing, advertising and promotional programs to sell their products and enhance their brand names in New York State. It is certainly foreseeable and anticipated by these parties that their goods and products are a large part of the used car and tire markets in the State of New York. In addition to the vast business and financial dealings by third-party defendants here in New York, both parties are registered and authorized to do business in New York.

In *McGowan* (52 NY2d 268), a fondue pot purchased in Buffalo, New York, manufactured by a Japanese company, exploded in Canada. A third-party action was brought against the Japanese manufacturer in New York. The court determined that several visits to New York State by a representative of the Japanese Company was insufficient to be characterized as purposeful activities within the state, so that specific jurisdiction under CPLR 302 (a) (1) was denied. Here, the purposeful business activities of both third-party defendants greatly exceed that required by the court in *McGowan*. Whether a specific vehicle or part was sold by the respective defendants, it is well settled that a manufacturer of defective products who places them into the stream of commerce may be held strictly liable for injuries caused by its products, regardless of privity, foreseeability, or due care (see *Codling v Paglia*, 32 NY2d 330 [1973]). Notwithstanding whether Ford or Goodyear sold the particular product directly to plaintiffs, of greater significance is whether the products manufactured elsewhere were placed into the stream of commerce as a result of the purposeful business activities of the parties in this state (see *McGowan*, 52 NY2d 268), targeted at New York residents, wound up in New York, and harmed plaintiffs, residents of New York (*id.*). As in *McGowan*, the pure happenstance in this matter is the fateful trip by plaintiffs to Virginia.

It is noted that, with similar facts, the US Supreme Court found a lack of jurisdiction when the place of occurrence, alone, did not satisfy the minimal contacts requirement of the constitution (see *World-Wide Volkswagen Corp., v Woodson*, 444 US 286 [1980]). Therein, the court stated, "[f]low of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction" (*World-Wide Volkswagen Corp.*, 444 US at 297). Both third-party defendants assure the flow of their products to New York through their myriad assortment of purposeful activities in which they partake. It is noted that a case cited by Ford, *Magill v Ford Motor Co.* (2016 CO 57, 379 P3d 1033 [2016]), while denying general personal jurisdiction over Ford in Colorado, the Supreme Court of Colorado remanded the matter to the lower court to consider whether specific jurisdiction was applicable. Further noted, in *Pitts v Ford Motor Co.* (127 F Supp 3d 676 [2015]), it was ruled that Mississippi's long-arm statute subjected Ford to specific personal jurisdiction in that state.

These purposeful activities far exceed the minimal contacts with the State of New York necessary to pass constitutional muster (see *Paterno v Laser Spine Inst.*, 24 NY3d 370 [2014]). Furthermore, the nature of the business activities of the parties satisfies the requirement for an arguable nexus and substantial relationship between that business and the causes of action revolving around the alleged defective products purchased and installed on the vehicle in New York (see *Al Rushaid*, 28 NY3d 316; see also *Thomas v Ford Motor Company*, 289 F Supp3d 941 [ED Wis 2017]; *Ford Motor Co. v Montana Eighth Judicial District Court*, 395 Mont 478 [2019]). Therefore, the provisions of CPLR 302 (a) (1) are satisfied, rendering third-party defendants subject to specific personal jurisdiction in the State of New York.

As to that branch of Goodyear's motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), a key element of common law indemnification is not a duty running from the indemnitor to the injured party but rather is a separate duty owed the indemnitee by the indemnitor (see *Raquet v Braun*, 90 NY2d 177 [1997]). The predicate of common law indemnification is vicarious liability, such that there is no actual fault on the part of the proposed indemnitee (see *Board of Managers of Olive Park Condominium v Maspeth Prop., LLC.*, 170 AD3d 645 [2d Dept 2019]; *Dreyfus v MPCC Corp*, 124 AD3d 830 [2d Dept 2015]). If the cause of action against third-party plaintiff is based on allegations of its own negligence, it cannot receive the benefit of the doctrine (*id.*). Since the basis of plaintiff's complaint against US Tires is that US Tires was negligent in failing to inspect or test the tires, and ascertain as to their safety prior to installation,

third party-plaintiff's cause of action for common law indemnification is dismissed.

However, a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a substantive legal rule or a procedural bar (see *Raquet*, 90 NY2d 177; *Bivona v Danna & Assoc., P.C.*, 123 AD3d 956 [2d Dept 2014]). The critical requirement for apportionment by contribution under CPLR 1401 et seq. is that the breach of duty owed a duty to the plaintiff and such breach had a part in causing or augmenting the injury for which contribution is sought (*id.*).

Accordingly, the motions by Ford and Goodyear seeking to dismiss the third-party complaint for lack of specific personal jurisdiction are denied, the branch of Goodyear's motion to dismiss the cause of action based on common law indemnification is granted. The cross-motion by third-party plaintiff to amend its answer is granted, and the amended complaint in the form proposed must be served and filed within twenty (20) days of service of a notice of entry of this order upon the respective attorneys for the parties. In all other respects, the motions and cross-motion are denied.

This constitutes the Decision and Order of the Court.

Dated: September 25, 2019



Denis J. Butler, J.S.C.



AFFIDAVIT OF SERVICE

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

Rachel Hamilton, being duly sworn, deposes and says: I am over the age of 18 years old and not a party to this action. On the 18th day of October, 2019, I caused true and correct copies of the Notice of Appeal with Information Statement and Order to be served by the United States Postal Service First Class mail on the below listed persons:

OMRANI & TAUB, P.C.
Attorneys for Plaintiffs
ORLANDO GONZALES, 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.
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Garden City, NY 11530

AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
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600 Third Avenue
New York, NY 10016


Rachel Hamilton

Sworn to before me this
18th day of October 2019

