

COURT OF APPEALS
STATE OF NEW YORK

----- X

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

NOTICE OF MOTION

Docket Nos. 2016-06194
2016-07397

Plaintiffs-Appellants,

- against -

[2nd Department]

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

Defendants,

- and -

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

Defendants-Respondents,

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

Non-Party Respondent.

----- X

PLEASE TAKE NOTICE, that upon the annexed memorandum, dated July 16, 2019; the Record on Appeal in the Supreme Court, Appellate Division, Second Judicial Department; the decisions and order of the Appellate Division, Second Judicial Department, entered May 31, 2016, with notices of entry thereof dated June 9, 2016; the decision and order of the Appellate Division, Second Judicial Department, entered on March 26, 2018, with notice of entry thereof dated January 23, 2019; the decision and order of the Appellate Division, Second Judicial Department, entered on June 11, 2019, with notice of entry thereof dated July 13, 2019, and served by mail on July 13, 2019; and all other papers and proceedings had to be had herein, plaintiffs-appellants will move this Court at a term thereof, to be held at Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 5th day of August, 2019, or as soon thereafter as counsel can be heard, for an order granting leave to appeal, pursuant to CPLR 5513 and 5602(a); and for such other and further and different relief as is just and proper within the premises.

*Dated: Port Washington, New York
July 16, 2019*

Yours, etc.,

PARKER WAICHMAN LLP

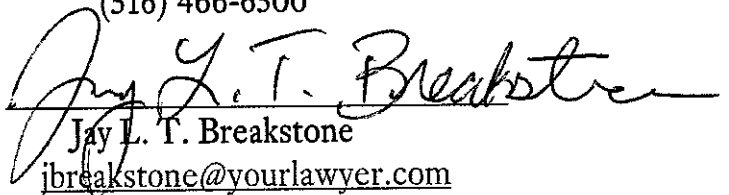
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Non-Party Respondent.

MOTION FOR LEAVE TO APPEAL

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**MEMORANDUM IN SUPPORT
OF MOTION FOR LEAVE TO APPEAL**

QUESTION PRESENTED

1. Did the court below improperly ignore or presumptuously overrule this Court's ruling in *Bagdon v. Phil. and Reading C. & I. Co.*, 217 NY 432 [1916] and the United States Supreme Court's ruling in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 US 165 [1939], by finding that a foreign corporation's voluntary registration to do business in New York and its designation of New York's Secretary of State as its agent for the service of process was insufficient as a consent to general jurisdiction in New York?

2. The court below answered this question in the negative.

**PROCEDURAL HISTORY
PURSUANT TO 22 NYCRR § 500.22**

3. The orders of Supreme Court which formed the basis of the appeal to the Appellate Division were both dated May 25, 2016 [R 7, 20]¹, and both entered on May

¹Numbers in brackets, preceded by the letter "R", refer to the Record on Appeal in the Appellate Division.

31, 2016. *Id.* Notices of entry as to both orders² were dated June 9, 2016. [R 5, 18]

4. Notices of appeal from the orders were served and filed within thirty (30) days from the date of service of a copy of the respective orders with notice of entry. [R 3 (*Ford*); R 16 (*Goodyear*)]

5. The decision and order of the Appellate Division, Second Department, reversing the order of Supreme Court, was dated March 26, 2018, with notice of entry dated January 23, 2019. A copy is annexed as Exhibit “A” and it is reported at 169 AD3d 137.

6. A motion, dated February 21, 2019, was made to the Appellate Division, Second Department, to reargue or, in the alternative, for leave to appeal to this Court.

7. The Appellate Division, Second Department, denied both reargument and leave to appeal by decision and order entered on June 11, 2019. A copy is annexed as Exhibit “B”. The decision and order, together with notice of entry, was served by mail on July 13, 2019. *Id.* This motion is timely made.³ CPLR 5513.

²Both orders are substantially the same, with one applying to defendant Ford Motor Company [*“Ford”*] and the other to defendant The Goodyear Tire & Rubber Company [*“Goodyear”*]. The Appellate Division assigned two different docket numbers to the appeals, but decided them in the single order whose review is sought in this application. *Aybar*, 169 AD3d at 141-2.

³A motion for leave made directly to the Court by non-party respondent U.S.
(continued...)

8. The decision and order appealed from affirmed the grant of summary judgment dismissing the complaint and is a final order within the meaning of CPLR 5602(a)(1)(I).

PRELIMINARY STATEMENT

This case addresses the one jurisdictional area left untouched by the United States Supreme Court in the *Goodyear Dunlop Tires*, *Daimler*, and *BNSF* cases⁴, that of jurisdiction by consent. That reservation was not unintentional, for unlike all of the distinctions addressed in these jurisdictional decisions, whether “general or all-purposed jurisdiction” or “specific or conduct-linked jurisdiction” (*Daimler*, 571 US at 122), jurisdiction by consent is not dependent on the harmful action alleged. Instead, jurisdiction by consent is contractual and is based on the agreement between the defendant and the sovereign; it is “part of the bargain” by which a foreign corporation enjoys the benefits of a host state. *Neirbo*, 308 US at 175.

³(...continued)

Tires and Wheels of Queens, LLC, was denied upon the ground that non-party respondent was not an aggrieved party under CPLR 5511. 2019 NY Slip Op 72350, 2019 WL 2438843 (Ct App, 2019).

⁴*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 [2011]; *Daimler AG v. Bauman*, 517 US 117 [2014]; and *BNSF Ry. Co. v. Tyrell*, 137 SCt 1549 [2017].

Until the Second Department's decision below — from 1916 and consistently thereafter — the rule in New York has been that a foreign corporation which registers to do business in this state and designates the Secretary of State as its agent for the service of process in this state, consents to the jurisdiction of this state. No decision by the United States Supreme Court has ever suggested that this rule is constitutionally faulty in any manner, nor has any decision of this Court. The Appellate Division, over-stepping its mandate, has now wrongfully discarded over 100 years of jurisprudence which, by every standard examined, was wholly consistent with the state's obligations under the 14th Amendment.

A R G U M E N T

Facts Necessary to Decide this Motion

The Crash; The Plaintiffs; The Defendants

In 1920, Ford registered in New York as a foreign corporation seeking to transact business in the state; Goodyear did so in 1956. [R 12, 21] Neither defendant has ever sought to revoke those registrations.

In 2011, Jose Aybar, a New York resident, purchased a used 2002 Ford Explorer, equipped with a Goodyear tire, from another New York resident. [R 21] The

vehicle was registered to Jose Aybar in New York. [R 8-9, 12]

While Jose Aybar was driving on I-85 in Virginia, the Goodyear tire failed, the Ford Explorer became unstable and crashed, rolling over several times. [R 8, 21, 51] Plaintiffs Anna Aybar, Noelia Oliveras, Crystal N. Cruz Aybar and Tiffany Cabral [“*plaintiffs*”], all passengers in the vehicle, were either killed or seriously injured. [R 8, 21]

In 2015, plaintiffs brought this action, sounding in negligence and strict products liability, alleging that the crash and its result were caused by defendants. [R 8, 21, 49]

The record demonstrated that Goodyear had been actively involved in the lives of New York State residents in almost every imaginable area. It had owned and operated a chemical plant in Niagara, New York since the 1940's; it had been the exclusive supplier of tires and the like to the New York City Transit Authority since 1987; it had maintained at least 180 authorized Goodyear dealers selling its products in the state⁵; it had operated countless stores in New York and New Yorkers by the thousands had been its employees.[R 21, 24] Goodyear, however, maintained that it

⁵U.S. Tires and Wheels of Queens, LLC — where the Goodyear tire and the Ford Explorer were serviced — admitted in its own briefing in the Appellate Division that itself was a registered Goodyear service facility. *Brief for Non-Party Respondent* at (2).

was merely an Ohio corporation with its principal place of business located in Akron.

[R 21]⁶

In similar fashion, Ford explained that it was incorporated in Delaware and its principal place of business was in Dearborn, Michigan. [R 73] Like Goodyear, Ford had taken advantage of the extensive business advantages New York has to offer, owning property in New York and having invested no less than \$150,000,000 to upgrade its plant in Hamburg, New York. [R 132] Hundreds of dealerships had been created in New York to sell Ford's products under the Ford brand as part-and-parcel of Ford's day-to-day activities in New York. [R 9, 12]

The Supreme Court's Decision

Supreme Court, in the first paragraph of its decision, cut through to defendants' positing of what they believed to be a constitutional question. If neither Ford (Delaware/Michigan) nor Goodyear (Ohio/Ohio) committed a tort in New York and the injury to plaintiffs (New York) occurred outside of New York, could New York's long-arm statute, CPLR 301, reach either of the two corporate defendants? Defendants argued that it couldn't, as *Daimler* "articulated a new standard of

⁶Goodyear's Chief Tire Analysis Engineer acknowledged that Goodyear actually manufactured tires (though not the subject tire) in its Tonawanda, New York, plant at both the time of the crash and at the time the action was commenced. [R 121 at ¶ 8]

presence jurisdiction . . . whether the foreign corporation's affiliations with the state are so 'continuous and systematic' as to render it essentially 'at home' in the forum state." [R 8]

Under the long history of both Ford and Goodyear's business relationships with the citizens of New York, the court found that the activities of Ford [R 13] and Goodyear [R 24] were "so continuous and systematic that the compan[ies were] essentially at home here" under *Daimler*.

The court then addressed whether the fact that both corporations had long ago registered to do business in New York and designated the Secretary of State as their agent for the service of process acted as a consent to New York jurisdiction. [R 13, 25] After all, since the Court's decision in *Bagdon*, the rule was that such a registration and designation amounted to "consent to general jurisdiction in this state under CPLR 301" and "'the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York.'" *Id.*, citing Alexander, *Practice Commentaries*, McKinney's Con. Law of NY, Book 7B, C301:1.6[c], p. 21.

While other courts of coordinate jurisdiction may have split on the consent issue, Supreme Court correctly noted that after *Bagdon*, no New York appellate court, nor the United States Supreme Court itself, had upset the Court's decision in *Bagdon*

on constitutional grounds, including *Daimler* itself. [R 24, 13 (referring to *Daimler* as “*Bauman*”)] After reviewing analogous statutory constructs, *e.g.* Banking Law § 200 and Business Corporation Law §§ 304 and 1304, the court concluded that there was no reason that *Bagdon* did not retain its authority under the federal Constitution. “This court agrees with those courts that hold that general jurisdiction based on consent through registration and appointment survives *Bauman*.” [R 25, 14] Ford and Goodyear knew full well that registration and designation meant consent to New York’s general jurisdiction when they opted to do so. “‘When, * * * the basis for jurisdiction is the voluntary compliance with a state’s registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state’s courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions.’” [R 25, 14, citing *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F Supp 3d 572, 591 [D Del 2015], *aff’d* on other grounds, 817 F3d 755 [Fed Cir 2016], cert denied 137 S Ct 625 [2017].

The court denied defendants’ motions to dismiss as frivolous. “In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so.”

[R 26, 14]

The Appellate Division

The Appellate Division reversed, holding that under *Daimler*, a foreign corporation may not be deemed to have consented to New York jurisdiction by virtue of having registered and designated a local agent as before, thus expressly overruling the Court's decision in *Bagdon. Aybar* at 139. Indeed, the court recognized that "[t]he parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction *would be consistent with New York law*. The disagreement lies in whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*." *Id.* at 143 (emphasis added).

Quoting both *Daimler* and *BNSF*, the Appellate Division viewed all general jurisdictional questions as dependent on activity occurring in the forum state. Since neither Ford nor Goodyear were incorporated in New York, nor had its principal place of business in New York, and each lacked "affiliations with New York . . . so continuous and systematic as to render it essentially 'at home' here," general jurisdiction could not lie. *Id.* at 144.

This left remaining only one basis for general jurisdiction, jurisdiction by

consent. *Aybar* at 146. In order to reject jurisdiction by consent on registration grounds, however, the court would have to dispose of *Bagdon*, which held the exact opposite. New York's registration statute is voluntary and does not require foreign corporations to register in the state as a requirement of doing business in New York. While there is no statute giving general jurisdiction to the state upon corporate registration, the Appellate Division conceded that "[t]here has been a longstanding judicial construction, however, by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." *Id.* at 147, citing *Bagdon* and others. It would now end.

We hold that in view of the evolution of *in personam* jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.

Id. (footnote omitted).

In discarding *Bagdon*, the Appellate Division equated New York's jurisdiction

by consent registration as nothing more, for constitutional purposes, than a foreign corporation maintaining a “local office” in New York, an insufficient basis under *Daimler* for conferring general jurisdiction. *Aybar* at 151-152. It also observed that every state has a registration statute that requires foreign corporations to register to do business in that state and appoint an agent for process. *Id.* at 152. Plainly, under *Daimler*, a corporation could not be “at home” in every state in the union. “‘A corporation that operates in many places can scarcely be deemed at home in all of them.’” *Id.*, citing *Daimler*, 571 US at 139 n 20, and *BNSF*, 137 S Ct at 1559.

But New York’s registration and designation statutes are *not* mandatory and the choice made by a foreign corporation to utilize them is voluntary. The Appellate Division’s intention to eliminate consent to general jurisdiction by registration in New York would be frustrated if Judge Cardozo’s explanation in *Bagdon* prevailed. “The [*Bagdon*] Court reasoned that by obtaining a certification from New York to do business here, the defendant had entered into a binding contract with New York. In exchange for the right to do business in New York, the defendant had filed a stipulation in the office of the secretary of state designating a person upon whom process may be served within the state The Court found that this person was a ‘true agent’ of the defendant and the stipulation was a ‘true contract’ with New

York.” *Aybar* at 149. *Bagdon* was confirmed when, as the Appellate Division explained, 23 years later the United States Supreme Court found *Bagdon* and New York’s consent by registration constitutional in *Neirbo*, finding that New York’s statutory framework was based on “a voluntary act” by the foreign corporation. 308 US at 174-175.

Undaunted by such precedent, the Appellate Division concluded that such consent by registration cases were based on the concept of “presence” in New York; that by registering and appointing an agent for the service of process in New York, the foreign corporation agreed to be “found” in New York and, as “*Daimler* made clear, . . . that general jurisdiction cannot be exercised solely on such presence (*see Daimler* . . . 571 US at 137-138).” *Aybar* at 151. The court cautioned that “without the express consent of the foreign corporation to general jurisdiction,” the long precedent of *Bagdon* would have to be viewed as “unacceptably grasping” under *Daimler*. *Id.* at 152. Ignoring its own review of at least five modern cases following the *Bagdon* principle, the Appellate Division closed its decision by chiding the Court that it had not itself “cited to *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided” and that this revelation was “a strong indicator that

its rationale is confined to that era, which was dominated by *Pennoyer's*⁷ territorial thinking, and that it no longer holds in the post-*Daimler* landscape.” *Id.* The court would never claim that *Bagdon* had not been followed faithfully by New York courts and practitioners for over 100 years.

A motion for reargument or leave to appeal to this Court was denied by the Appellate Division. Order at Exhibit “B”. This application now follows.

POINT I

DAIMLER DID NOT ADDRESS JURISDICTION BY CONSENT, WHICH IS CONTRACTUAL IN NATURE

The Appellate Division’s suggestion that *Bagdon* “must be understood within the historical context in which it was decided” begs the question of the contractual basis of consent jurisdiction. *Aybar* at 148. If New York’s consent by registration is contractual in nature, then it is that agreement of the parties which controls, not the constitutional context in which it was born. The record is devoid of any claim by Goodyear or Ford that they were coerced to register as foreign corporations in New York or that they did not fully understand that such registra-

⁷*Pennoyer v. Neff*, 95 US 714 [1878].

tion brought with it a consent to general jurisdiction within the state. Moreover, defendants operated within that understanding for decades, renewing the ground rules upon which that agreement was based and freely reaping its benefits in return. *Daimler* was never intended to function as a *deus ex machina* to extricate corporations from the bogey man of New York's contractual, jurisdiction by consent, framework.

In *Daimler*, the United States Supreme Court took great pains to make it clear that it had never stepped back from its historical position that jurisdiction by consent was contractual in nature and therefore outside the purview of general jurisdiction imposed upon a corporation by other means. While *International Shoe Co. v. Washington*, 326 US 310 [1945] was the "canonical opinion" in the area of personal jurisdiction over an out-of-state defendant (*Daimler* at 126, quoting *Goodyear* at 923), since then, little has been said about general, as opposed to specific, jurisdiction. The Court conceded in *Goodyear* that "general jurisdiction [has played] a reduced role" in modern jurisdictional theory since *International Shoe*. *Daimler* at 128, quoting *Goodyear* at 925, citing in turn, Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 628 [1988]. "Our post-*International Shoe* opinions on general jurisdiction, by comparison" said Justice Ginsburg, "are

few.” *Daimler* at 129.

Only two cases on general jurisdiction were discussed by the *Daimler* court, *Perkins v. Benguet Consol. Mining Co.*, 347 US 437 [1952], and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408 [1984]. Justice Ginsburg, writing for the Court, took careful pains to quote her own decision in *Goodyear* to limit *Perkins* and *Helicopteros*. “[The Court’s] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum.*” *Daimler* at 129 (emphasis added), quoting *Goodyear* at 928.

The Supreme Court continues to view general and specific jurisdiction differently. *Daimler* at 132. However, neither of the two jurisdictional folders contain any constitutional moment for jurisdiction by consent. In *BNSF*, Justice Ginsburg again excised consent jurisdiction from constitutional review, carefully stating that “*absent consent*, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.” *BNSF*, 581 US ___, 137 S Ct at 1556 (emphasis added).⁸

⁸Because the Montana Supreme Court did not address the argument that *BNSF* had consented to personal jurisdiction, the Supreme Court explained, “we do not reach it.” 137 S Ct at 1559.

The Appellate Division's reversal of *Bagdon* in view of the United States Supreme Court's clear statements to the contrary is in direct conflict with the Court's own direction that no precedent should be overruled in the absence of an explicit statement by the Court to that effect. *Eberhart v. United States*, 546 US 12, 14-15, 19-20 [2005] Moreover, it is a state's own courts that federal courts should look to first in determining whether or not a corporation's compliance with that state's statutes grants general jurisdiction. *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 US 213, 215-16 [1921] (when foreign corporation appoints agent for service of process, court will construe that appointment as extending to suits respecting business transacted by that foreign corporation elsewhere if the "state law either expressly *or by local construction* give to the appointment a larger scope" [emphasis added]).

The decision of the Appellate Division offers no constitutional reason for relieving Ford or Goodyear from their agreements consenting to New York jurisdiction and defendants offer no factual reason for doing so either. *Bagdon* is the law in this state, except perhaps in the Second Department. It is the law in the Third Department under *Augsbury Corporation v. Petrokey Corporation*, 97 AD2d 173 [3d Dept 1983] ("The privilege of doing business in New York is accompanied

by an automatic basis for personal jurisdiction [citation omitted]”) and is the law in the First Department under *Doubet LLC v. Trustees of Columbia University in the City of New York*, 99 AD3d 433, 434 [1st Dept 2012] (as foreign corporation authorized to do business in New York, corporation has given consent to personal jurisdiction in New York). The split in the departments created by the decision below was improvident and unsupported by a decision of this Court or the Supreme Court. While either court might change the law, until that happens, a lower court should not, “on its own authority ... take[] the step of renouncing [Supreme Court precedent].” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 US 477, 484 [1989]. The reason is readily apparent. “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.” *Id.* If neither *Daimler* nor *Bagdon* provide authority for the decision below, then there is none; if they do, then it is for the Supreme Court or this Court to say so, not an intermediate appellate panel.

POINT II

FORD AND GOODYEAR ARE “AT HOME” AND HAVE A “PRESENCE” IN NEW YORK SUFFICIENT FOR A FINDING OF JURISDICTION

Whether under the rubric of *Daimler*'s “at home” or *Aybar*'s requirement of “presence” in New York to justify consent jurisdiction, the actions of Ford and Goodyear more than satisfy the definitions. Goodyear has “lived” in New York for nearly a century, employing thousands of New Yorkers here since 1924 and housing its business enterprises in New York, maintaining a family of dealers here and becoming part of New York's daily life, even to the level of supplying all the tires for New York City's busses. *See, e.g., Aybar* at 146. Ford has also “lived” in New York and, since 1920, has employed thousands of New Yorkers, housed its businesses here, maintained a family of dealers here to sell its products and “has frequently been a litigant” in its courts. *Id.* at 145. Yet, none of this activity is sufficient to demonstrate to the court below that either Ford or Goodyear is “at home” in New York and, presumably, neither is it adequate to support a finding of “presence” sufficient to qualify them for jurisdiction by consent in New York.⁹

⁹It was to Supreme Court, however. [R 13, 23-24]

The problem is that, for an individual, “the paradigm forum for the exercise of general jurisdiction is the individual’s domicile,” while for a corporation, “it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Daimler* at 137. The Court then continued to find that the corporate general jurisdiction paradigm is “the place of incorporation and principal place of business.” *Id.*, citing *Goodyear*, 564 US at 924. Those practical limitations in *Daimler*, providing two or perhaps only a single state in which to bring suit against a corporation on general jurisdiction grounds, “reaffirms the restrictive ‘at home’ test set out in *Daimler* — a test that, as I explained, has no home in our precedents and creates serious inequities. See [*Daimler*] 571 US at 142-160 (Sotomayor, J., concurring in judgment).” *BNSF*, 137 S Ct at 1560 (Sotomayor, J., concurring in part and dissenting in part).

If either the “at home” or “presence” test supplants the jurisdiction by registration provided for in *Bagdon*, then the problem highlighted by Justice Sotomayor comes full circle. Despite having taken advantage of New York’s market, work force, business position, court system and a myriad of other advantages over the years, Ford and Goodyear would not be subject to the general jurisdiction of the state which provided them these benefits and to which they

voluntarily and knowingly agreed to be bound. The New York plaintiffs here will then be required to bring suit in two foreign jurisdictions (either Ohio and Michigan/Delaware) to hold defendants liable for their alleged acts. To suggest that this is fair or equitable is nonsense, for it is not. While Ford and Goodyear operate on a daily basis in every state in the union and numerous foreign countries, maintain offices, employees, resources and enjoy familiarity with numerous court systems, these individual plaintiffs do not. Corporations may be multi-national; people are usually not.

In continuing her disagreement with the direction set in *Daimler*, Justice Sotomayor speaks directly in her concurring/dissenting opinion in *BNSF* to this Court and the opportunity the case at bar presents with its hybrid consent/general jurisdiction factual context. “The majority’s approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation. Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic

contacts within the United States.” 137 S Ct at 1560 (Sotomayor, J., concurring in part and dissenting in part) (citation omitted). Though at one time, under *International Shoe*, a case such as this one could preserve justice through flexibility, this is no longer true. “What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation’s principal place of business or place of incorporation.” *Id.* (footnote omitted). Without an additional basis for general jurisdiction to weigh in the balance, individual plaintiffs are irreparably damaged. “The result? It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority’s approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.” *Id.*

If *Bagdon* prevails, so do New York plaintiffs who are scarcely in the same position as multi-national defendants such as Ford and Goodyear who do business in every jurisdiction imaginable on a daily basis. Ford and Goodyear knew when they registered in New York and designated a local agent for the service of process that they were subject to the general jurisdiction of the state under *Bagdon*. The same cannot be said for plaintiffs who rode in a Ford automobile on Goodyear tires in Virginia.

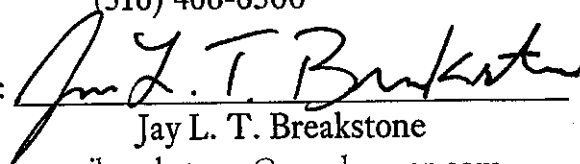
CONCLUSION

The Court should grant leave in order to reset and realign the departments under *Bagdon*. In doing so, it should speak to the continued vitality of *Bagdon* with particular emphasis on the contractual basis of consent jurisdiction under *Daimler*. The motion for leave should be granted in all respects.

Respectfully submitted,

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Of Counsel.

July 16, 2019

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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

Plaintiffs,

- against -

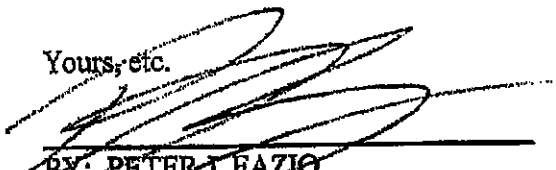
JOSE A. AYBAR, JR., FORD MOTOR COMPANY,
THE GOODYEAR TIRE & RUBBER CO., and
"JOHN DOES 1 THRU 30"

Defendants.

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

Dated: New York, New York
January 23, 2019

Yours, etc.



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

DS7109

C/htr

AD3d

Argued - March 26, 2018

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

2016-06194

2016-07397

OPINION & ORDER

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

(Index No. 706909/15)

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

statute² (see CPLR 302).

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

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

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

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

as to render it essentially "at home" here.

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

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

A.

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

a litigant in New York courts.

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

B.

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

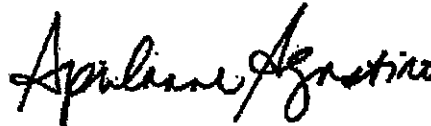
Accordingly, the Supreme Court should have granted the separate motions of Ford and Goodyear to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction.

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

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

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

ENTER:



Aprilanne Agostino
Clerk of the Court

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

Index No: 706909/2015

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

Plaintiffs,

- against -

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

Defendants.

ORDER WITH NOTICE OF ENTRY

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To: **ALL PARTIES**

EXHIBIT B

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

JOHN M. LEVENTHAL, J.P.
HECTOR D. LASALLE
FRANCESCA E. CONNOLLY
VALERIE BRAITHWAITE NELSON, JJ.

2016-06194; 2016-07397

Anna Aybar, et al, plaintiff-respondents,
v. Jose A. Aybar, Jr., et al., defendants,
Fort Motor Company, et al., appellants,
U.S. Tires and Wheels of Queens, LLC, non-party respondent,

**ORDER WITH
NOTICE OF ENTRY**

Index No. 23625/07

(Index No: 706909/2015)

COUNSELORS:

PLEASE TAKE NOTICE, that the within is a true copy of an Order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department entered in the office of the clerk of the within named court on June 11, 2019.

Dated: New York, New York
June 12, 2019

Yours, etc.


By: ELLIOTT J. ZUCKER
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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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E/mm

JOHN M. LEVENTHAL, J.P.
HECTOR D. LASALLE
FRANCESCA E. CONNOLLY
VALERIE BRATHWAITE NELSON, JJ.

2016-06194, 2016-07397

DECISION & ORDER ON MOTION

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

(Index No. 706909/15)

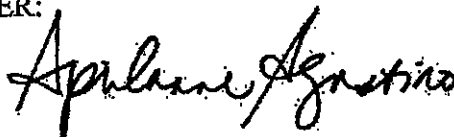
Motion by the plaintiffs-respondents for leave to reargue appeals from two orders of the Supreme Court, Queens County, both entered May 31, 2016, which were determined by opinion and order of this Court dated January 23, 2019, or, in the alternative, for leave to appeal to the Court of Appeals from the opinion and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with \$100 costs.

LEVENTHAL, J.P., LASALLE, CONNOLLY and BRATHWAITE NELSON, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

June 11, 2019

AYBAR v AYBAR

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

Index No: 706909/2015

ANNA AYBAR, et al.,

Plaintiffs-Respondents,

v

JOSE A. AYBAR, JR., et al.,

Defendants,

ORDER WITH NOTICE OF ENTRY

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