

705

Court of Appeals

STATE OF NEW YORK



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

Plaintiffs-Appellants,

against

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

Defendants,

(Caption Continued on the Reverse)

**JOINT BRIEF IN OPPOSITION TO MOTION
FOR LEAVE TO APPEAL TO
THE NEW YORK STATE COURT OF APPEALS**

JAYNE ANDERSON RISK
NEAL KRONLEY
HALEY TORREY
DLA PIPER LLP (US)
1251 Avenue of the Americas
27th Floor
New York, New York 10020
212-335-4500
jayne.risk@dlapiper.com

*Attorneys for Defendant-Respondent
The Goodyear Tire &
Rubber Company*

SEAN MAROTTA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, New York 10017
212-918-3000
sean.marotta@hoganlovells.com

and

ELLIOT J. ZUCKER
AARONSON RAPPAPORT FEINSTEIN
& DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
212-593-6700
ejzucker@arfdlaw.com

*Attorneys for Defendant-Respondent
Ford Motor Company*

Date Completed: August 2, 2019

and

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

_____ *Defendants-Respondents.*

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

Non-Party Respondent.

CORPORATE DISCLOSURE STATEMENTS

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

Limited; Ford Motor Company, S.A. de C.V.; Ford Motor Credit Company LLC; and Ford Motor Service Company.

The Goodyear Tire & Rubber Company states that it has no parent company.

The corporate affiliates of The Goodyear Tire & Rubber Company are: Airship Participacoes Ltda; C.A. Goodyear de Venezuela; Celeron Corporation; Compania Goodyear del Peru, S.A.; Divested Atomic Corporation; Divested Companies Holding Company; Divested Litchfield Park Properties, Inc.; DNA (Housemarks) Limited; Dunlaide Limited; Dunlop Grund und Service Verwaltungs GmbH; Dunlop Tyres Limited; Fonds de Pensions Goodyear ASBL; GD Handelssysteme GmbH; GD Versicherungsservice GmbH; G.I.E. Goodyear Mireval; Goodyear Australia Pty Limited; Goodyear Canada Inc.; Goodyear Dalian Tire Company Ltd.; Goodyear de Chile S.A.I.C.; Goodyear de Colombia S.A.; Goodyear do Brasil Produtos de Borracha Ltda; Goodyear & Dunlop Tyres (Australia) Pty Ltd; Goodyear & Dunlop Tyres (NZ); Goodyear Dunlop Sava Tires d.o.o.; Goodyear Dunlop Tires Amiens Sud SAS; Goodyear Dunlop Tires Austria GmbH; Goodyear Dunlop Tires Baltic OU; Goodyear Dunlop Tires Belgium N.V.; Goodyear Dunlop Tires Czech s.r.o.; Goodyear Dunlop Tires Danmark A/S; Goodyear Dunlop Tires Espana S.A.; Goodyear Dunlop Tires Europe B.V.; Goodyear Dunlop Tires Finland OY; Goodyear Dunlop Tires France; Goodyear Dunlop Tires Germany GmbH; Goodyear Dunlop Tires Hellas S.A.I.C.; Goodyear Dunlop Tires Hungary

Ltd.; Goodyear Dunlop Tires Ireland Ltd; Goodyear Dunlop Tires Ireland (Pension Trustees) Limited; Goodyear Dunlop Tires Italia SpA; Goodyear Dunlop Tires Manufacturing GmbH & Co. KG; Goodyear Dunlop Tires Norge A/S; Goodyear Dunlop Tires Operations S.A.; Goodyear Tires Operations Romania S.r.L.; Goodyear Dunlop Tires Polska Sp. z.o.o.; Goodyear Dunlop Tires Portugal Unipessoal, Ltda; Goodyear Dunlop Tires Romania S.r.L.; Goodyear Dunlop Tires Slovakia s.r.o.; Goodyear Dunlop Tires Suisse S.A.; Goodyear Dunlop Tires Sverige A.B.; Goodyear Dunlop Tires Ukraine; Goodyear Dunlop Tyres UK Ltd; Goodyear Dunlop Tyres UK (Pension Trustees) Limited; Goodyear Earthmover Pty Ltd; Goodyear EEMEA Financial Services Center Sp. z.o.o.; Goodyear Export Inc.; Goodyear Farms, Inc.; Goodyear Holdings Sarl; Goodyear India Ltd; Goodyear Industrial Rubber Products Ltd; Goodyear International Corporation; Goodyear Italiana S.p.A.; Goodyear Jamaica Limited; Goodyear Korea Company; Goodyear Lastikleri TAS; Goodyear Malaysia Berhad; Goodyear Marketing & Sales Sdn. Bhd.; Goodyear Maroc S.A.; Goodyear Middle East FZE; Goodyear Nederland B.V.; Goodyear Orient Company Private Limited; Goodyear Philippines, Inc.; Goodyear Regional Business Services Inc.; Goodyear Russia LLC; Goodyear S.A.; Goodyear Servicios y Asistencia Tecnica S. de R.L. de C.V.; Goodyear (Shanghai) Trading Company Limited; Goodyear-SLP, S. de R.L. de C.V.; Goodyear South Africa (Pty) Ltd; Goodyear South Asia Tyres Private

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

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED.....	2
COUNTERSTATEMENT.....	3
ARGUMENT	7
I. THE APPELLATE DIVISION CORRECTLY HELD THAT CONSENT BY REGISTRATION IS UNCONSTITUTIONAL.....	7
II. THE APPELLATE DIVISION CORRECTLY HELD THAT FORD AND GOODYEAR ARE NOT “AT HOME” IN NEW YORK AND NO COURT DISAGREES.....	16
CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Augsbury Corp. v. Petrokey Corp.</i> , 97 A.D.2d 173 (3d Dep’t 1983).....	10
<i>Aybar v. Aybar</i> , 33 N.Y.3d 1044 (2019).....	6
<i>Bagdon v. Philadelphia & Reading Coal & Iron Co.</i> , 217 N.Y. 432 (1916).....	<i>passim</i>
<i>Barrow S.S. Co. v. Kane</i> , 170 U.S. 100 (1898).....	13
<i>Bendix Autolite Corp. v. Midwesco Enters., Inc.</i> , 486 U.S. 888 (1988).....	16
<i>Birchfield v. North Dakota</i> , 136 S. Ct. 2160 (2016).....	15
<i>BNSF Ry. Co. v. Tyrrell</i> , 137 S. Ct. 1549 (2017).....	8, 13
<i>Bristol-Myers Squibb Co. v. Superior Court</i> , 137 S. Ct. 1773 (2017).....	18, 19
<i>Brown v. Lockheed Martin Corp.</i> , 814 F.3d 619 (2d Cir. 2016)	9
<i>Burnham v. Superior Court</i> , 495 U.S. 604 (1990).....	12
<i>Clark v. Lockheed Martin Corp.</i> , No. 15-CV-995-SMY-PMF, 2016 WL 67265 (S.D. Ill. Jan. 6, 2016).....	18
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014).....	<i>passim</i>
<i>DeLeon v. BNSF Ry. Co.</i> , 426 P.3d 1 (Mont. 2018).....	9

TABLE OF AUTHORITIES—Continued

	<u>Page</u>
<i>Doubet LLC v. Trustees of Columbia Univ. in the City of New York</i> , 99 A.D.3d 433 (1st Dept. 2012)	10
<i>Ehrlich-Bober & Co. v. University of Houston</i> , 49 N.Y.2d 574 (1980)	15
<i>Fletcher v. Kidder, Peabody & Co.</i> , 81 N.Y.2d 623 (1993)	7
<i>Ford Motor Co. v. Cejas</i> , No. 09-16-00280-CV, 2018 WL 1003791 (Tex. Ct. App. Feb. 22, 2018).....	18
<i>Genuine Parts Co. v. Cepec</i> , 137 A.3d 123 (Del. 2016)	9
<i>Goodyear Dunlop Tires Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011).....	12
<i>In re East Ramapo Cent. Sch. Dist. v. King</i> , 29 N.Y.3d 938 (2017)	15
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	5, 6, 12, 13
<i>LaMarca v. Pak-Mor Mfg. Co.</i> , 95 N.Y.2d 210 (2000)	10
<i>Louisville, Cincinnati, & Charleston R.R. Co. v. Letson</i> , 43 U.S. (2 How.) 497 (1844)	11
<i>Magdalena v. Lins</i> , 123 A.D.3d 600 (1st Dep’t 2014)	17
<i>Magill v. Ford Motor Co.</i> , 379 P.3d 1033 (Colo. 2016).....	17
<i>Mitchell v. Wisconsin</i> , 139 S. Ct. 2525 (2019).....	14

TABLE OF AUTHORITIES—Continued

	<u>Page</u>
<i>Pennoyer v. Neff</i> , 95 U.S. 714 (1877).....	11, 12, 13
<i>Qudsi v. Larios</i> , 173 A.D.3d 920 (2d Dep’t 2019).....	17
<i>Rush v. Savchuk</i> , 444 U.S. 320 (1980).....	19
<i>Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.</i> , 898 N.W.2d 70 (Wis. 2017).....	9
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977).....	11, 12
<i>Sonera Holding B.V. v. Çukurova Holding A.Ş.</i> , 750 F.3d 221 (2d Cir. 2014)	10
<i>Viko v. World Vision, Inc.</i> , No. 2:08-CV-221, 2009 WL 2230919 (D. Vt. July 24, 2009)	13
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	18
STATUTES:	
BCL § 1301(a)	8
BCL § 1305	8
RULES:	
CPLR 301.....	10
CPLR 5602(a)	6
OTHER AUTHORITIES:	
Tanya J. Monestier, <i>Registration Statutes, General Jurisdiction, and the Fallacy of Consent</i> , 36 Cardozo L. Rev. 1343 (2015).....	8

TABLE OF AUTHORITIES—Continued

	<u>Page</u>
4 Charles Alan Wright et al., <i>Federal Practice & Procedure</i> § 1066 (4th ed. 2019 update).....	11

PRELIMINARY STATEMENT

In a comprehensive and scholarly opinion, the Appellate Division below unanimously held that Ford Motor Company and The Goodyear Tire & Rubber Company cannot be subject to general jurisdiction in New York even though they registered to do business in the State with the Secretary of the State and have some business operations here. Plaintiffs now seek leave to appeal, contending that the Appellate Division's thorough opinion brazenly disregarded this Court's and the U.S. Supreme Court's precedent.

Nothing could be further from the truth. The Appellate Division explained—in detail—why this Court's century-old opinion in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916) that approved “consent by registration” had been abrogated by the U.S. Supreme Court's later cases, including *Daimler AG v. Bauman*, 571 U.S. 117 (2014). In reaching that conclusion, the Appellate Division joined the overwhelming majority of appellate courts that have addressed the issue after *Daimler*. Plaintiffs' invective is no match for the Appellate Division's well-reasoned opinion.

Plaintiffs also make a half-hearted argument that Ford and Goodyear are “at home” in New York and therefore subject to general jurisdiction in the State on that basis. But Ford and Goodyear are not incorporated or headquartered in New York, and their contacts with New York are not the kind of exceptional case that

would warrant finding them “at home” in any places other than their States of incorporation or corporate headquarters. And Plaintiffs cannot identify a single opinion that endorses their broad view of general jurisdiction. Instead, they use their “at-home” argument for a barely disguised policy pitch claiming that finding no general jurisdiction over Ford and Goodyear is unfair to them. But personal jurisdiction is about the due-process rights of *defendants*, not the convenience of *plaintiffs*. Plaintiffs’ policy arguments are therefore beside the point.

The motion for leave to appeal should be denied.

QUESTIONS PRESENTED

1. Whether the Appellate Division correctly held that a foreign corporation cannot be subject to general jurisdiction in New York merely because it registered to do business in the State and appointed the Secretary of State as its agent for service of process, both of which are statutory requirements for a foreign corporation to conduct business in New York.

Suggested answer: Yes.

2. Whether the Appellate Division correctly held that Ford and Goodyear—neither of which is incorporated or headquartered in New York, and both of which have substantial business operations elsewhere—are not “at home” in the State.

Suggested answer: Yes.

COUNTERSTATEMENT

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

Ford and Goodyear moved to dismiss Plaintiffs' claims for lack of personal jurisdiction, explaining that they were neither "at home" in New York nor subject to specific jurisdiction on Plaintiffs' causes of action. R. 27-28, 75-76. Plaintiffs opposed, arguing that Ford and Goodyear were "at home" and thus subject to general jurisdiction in New York. R. 122-131, 152-166. U.S. Tires—which is not a party to this suit—opposed, arguing that Ford and Goodyear were subject to personal jurisdiction in New York because the companies had registered to do business here and appointed the Secretary of State as agent for service of process as required by the Business Corporation Law. R. 205-206.

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

The Supreme Court (Thomas D. Raffaele, J.S.C.) denied the motions to dismiss. R. 7-15, 20-26. The Supreme Court held that Ford and Goodyear were “at home” in New York and subject to general jurisdiction here because of their extensive contacts with the State. R. 13, 24. The Supreme Court also held that Ford and Goodyear had “consent[ed] to general jurisdiction” in New York by registering as foreign corporations and appointing the Secretary of State as their agent for service of process. R. 13, 25.²

The Appellate Division’s Opinion. Ford and Goodyear appealed, and the Appellate Division reversed. App. Div. Op. 14 (attached as Exhibit A to the motion for leave to appeal). The Appellate Division held that Ford and Goodyear were not “at home” in New York and thus were not subject to general jurisdiction here. *Id.* at 5-8. The court explained that even though Ford and Goodyear had commercial activities in New York, those activities were not so great—when compared with the companies’ respective world-wide activities—that New York could be said to be Ford’s or Goodyear’s corporate home. *Id.* at 8.

The Appellate Division then held that neither Ford nor Goodyear consented to the exercise of general jurisdiction in New York by registering to do business in

² Plaintiffs contend that the Supreme Court denied Ford and Goodyear’s motions to dismiss “as frivolous.” Mot. 9. Hardly. The Supreme Court recognized that “the courts have split on the question of the constitutional validity of basing general jurisdiction on . . . registration statutes.” R. 13, 25.

New York and appointing the Secretary of State as agent for service of process. *Id.* at 8-14. The court observed that the Business Corporation Law does not expressly require consent to general jurisdiction as a condition of doing business in New York, but noted what it called “longstanding judicial construction” to the effect that it does. *Id.* at 9. The court then went on to hold that, even in the face of that construction, “in view of the evolution of in personam jurisdiction jurisprudence . . . it cannot be said that a corporation’s compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts, to be sued upon causes of action that have no relation to New York.” *Id.*

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

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

local agent for service of process, a foreign corporation has consented to be found in New York.” *Id.* at 13. But that reasoning was flawed; the U.S. Supreme Court’s modern decisions, including *Daimler*, “made clear . . . that general jurisdiction cannot be exercised solely on such presence.” *Id.*

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

Post-Opinion Proceedings. Plaintiffs and U.S. Tires took different paths following the Appellate Division’s opinion. U.S. Tires sought leave to appeal directly from this Court. *See* CPLR 5602(a). The Court dismissed the motion because, as a non-party to the Supreme Court proceedings, U.S. Tires was “not a party aggrieved” by the Appellate Division’s order. *See Aybar v. Aybar*, 33 N.Y.3d 1044 (2019). Plaintiffs, meanwhile, moved in the Appellate Division for

reargument or leave to appeal. *See* Mot. Ex. B. The Appellate Division unanimously denied both. *Id.*

Plaintiffs' motion followed.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY HELD THAT CONSENT BY REGISTRATION IS UNCONSTITUTIONAL.

Plaintiffs spend the bulk of their motion arguing that the Appellate Division flouted this Court's and the U.S. Supreme Court's precedent in holding that New York could not constitutionally require a company to consent to general jurisdiction in the State as a condition of doing business here. Mot. 4-5, 14-18.

But the Appellate Division was entirely correct that *Bagdon* has been abrogated by the U.S. Supreme Court's modern personal-jurisdiction case law. App. Div. Op. 12-14.

It is that U.S. Supreme Court precedent, not the musty decisions that it overturned, that the Appellate Division—and this Court—must follow. As this Court has said, “[w]hile adherence to State precedent may be justified in the absence of clear guidance from the Supreme Court, we are bound to follow both the holding and the rationale of the Nation’s highest Court on this and other questions of Federal law, when, as here, there is no ambiguity in the Court’s position.” *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 631-632 (1993) (internal citation omitted). And that principle resolves this appeal, were leave to be

granted. But leave should not be granted here because, as discussed below, the Appellate Division's opinion reflects the settled state of the law today, and Plaintiffs' attempt to fabricate a Departmental split should be rejected.

1. Under the U.S. Supreme Court's case law, a company may be subject to "general" jurisdiction—that is, jurisdiction on causes of action unrelated to the defendant's contacts with the forum—only where the company's forum contacts "are so continuous and systematic as to render [it] essentially at home in the forum State." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler*, 571 U.S. at 127) (internal quotation marks omitted). Crucially, a company is *not* at home every place it does business; "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 571 U.S. at 139 n.20. "[A]t home" is therefore not "synonymous with 'doing business.'" *Id.*

As the Appellate Division recognized (at 13-14), consent by registration turns this principle on its head. Every State, including New York, requires a foreign company to register as a condition of doing business. See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 *Cardozo L. Rev.* 1343, 1345 (2015); see also BCL § 1301(a) (foreign corporation may not do business in New York unless authorized to do so); *id.* § 1305 (foreign corporation obtains authorization to do business in New York by filing an application with the Secretary of State). If New York could impose

general jurisdiction by deeming foreign companies to consent to it as part of a condition of doing business, “*Daimler*’s ruling would be robbed of meaning by a back-door thief.” *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016). Doing business in a State—plus the statutorily required step of registering with the Secretary of State—would be sufficient to impose general jurisdiction once more.

Plaintiffs contend that the Appellate Division “over-stepp[ed] its mandate” by agreeing with this straightforward reasoning. Mot. 5. But the Appellate Division joined a “majority of federal courts” that have held that consent-by-registration is not constitutional following *Daimler*. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 (Del. 2016); *see also* Ford and Goodyear App. Div. Opening Br. 26-29 (collecting cases finding consent by registration unconstitutional); Ford and Goodyear App. Div. Reply Br. 17-18 (same). That list only grows. The Montana Supreme Court has emphasized that consent by registration “would swallow the Supreme Court’s due process limitations on the exercise of general personal jurisdiction.” *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 9 (Mont. 2018). And the Wisconsin Supreme Court has observed that “the Supreme Court has made clear that the Due Process Clause proscribes the exercise of general jurisdiction over foreign corporations” based on registration alone. *Segregated Account of*

Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 898 N.W.2d 70, 83 (Wis. 2017). It is Plaintiffs who are asking New York to be an outlier.

2. Plaintiffs also assert that the Appellate Division's decision breaks with the First and Third Departments. Mot. 17-18 (discussing *Doubet LLC v. Trustees of Columbia Univ. in the City of New York*, 99 A.D.3d 433 (1st Dept. 2012) and *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173 (3d Dep't 1983)). But *Doubet* and *Augsbury* appear to have addressed whether registration constituted consent to general jurisdiction under CPLR 301. See *Doubet*, 99 A.D.3d at 434-435; *Augsbury*, 97 A.D.2d at 175-176. Even if registration to do business in New York constitutes consent to jurisdiction under the long-arm statute, it does not follow that registration constitutes consent under the Due Process Clause. A plaintiff must prove that there is jurisdiction over the defendant under both the long-arm statute and the Due Process Clause. See *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000).

That distinction is particularly relevant because courts have doubted that a finding of general jurisdiction under CPLR 301 satisfies the federal due-process analysis after *Daimler*. See *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 224 n.2 (2d Cir. 2014) (per curiam) (noting that there is "some tension" between CPLR 301's and *Daimler*'s tests for general jurisdiction). And not even the Supreme Court agreed with Plaintiffs' argument that finding consent by

registration unconstitutional would contravene Appellate Division precedent. It concluded that “[t]here is no New York state court appellate authority directly on point.” R. 13, 25.

3. Despite *Daimler*—and despite the wealth of case law concluding that consent by registration is unconstitutional—Plaintiffs maintain that *Bagdon* remains good law. See Mot. 16-18. But as the Appellate Division recognized, “*Bagdon* must be understood within the historical context in which it was decided.” App. Div. Op. 10. When this Court decided *Bagdon*, personal-jurisdiction inquiries were governed by *Pennoyer v. Neff*, 95 U.S. 714 (1877), which held that “a tribunal’s jurisdiction over persons reaches no farther than the geographic bounds of the forum.” *Daimler*, 571 U.S. at 125; see also *Pennoyer*, 95 U.S. at 722 (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”). That meant that corporations could be sued only in their state of incorporation, regardless of a suit’s connection to the forum. See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 557-559 (1844). Courts therefore created “fictions” like those in *Bagdon*, under which a corporation’s appointment of an agent for service of process was deemed consent to suit in the State. See 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1066 (4th ed. 2019 update); see also *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

The U.S. Supreme Court has since repudiated these fictions. Three times. First, in *International Shoe*, the Supreme Court “cast th[e] fiction[]” that appointment of an agent constituted consent to service “aside.” *Burnham v. Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion). In that “canonical opinion,” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011), the Court shed *Pennoyer*’s “strict territorial approach” in favor of “a less rigid understanding, spurred by changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,” *Daimler*, 571 U.S. at 126 (internal quotation marks and citation omitted). And in doing so, the Court disclaimed cases like *Bagdon* that based jurisdiction on the “legal fiction that [a nonresident corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents.” *International Shoe*, 326 U.S. at 318.

Second, in *Shaffer v. Heitner*, the Supreme Court reaffirmed that *Pennoyer* “approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State” and that *International Shoe* marked a “departure from *Pennoyer*’s conceptual apparatus.” 433 U.S. at 201, 204. The Court held that “*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.” *Id.* at 212 (emphasis added). And the Court then removed all doubt as

to *Pennoyer*'s status by holding that "[t]o the extent that prior decisions are inconsistent with [*International Shoe*], they are overruled." *Id.* at 212 & n.39.

Finally, the Supreme Court repudiated the old consent-by-registration cases in *Daimler* and *BNSF Railway*. In *Daimler*, the plaintiffs rested their theory of general jurisdiction on two cases "decided in the era dominated by *Pennoyer*'s territorial thinking." 571 U.S. at 138 n.18. The Court dismissed those old cases out-of-hand, cautioning that *Pennoyer*-era decisions "should not attract heavy reliance today." *Id.* One of the cases the Court rejected found personal jurisdiction over a nonresident corporation on the very theory advanced by Plaintiffs here: consent by registration. *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 108, 112 (1898). And in *BNSF Railway*, the Supreme Court again rejected reliance on cases "decided before this Court's transformative decision on personal jurisdiction in *International Shoe*." 137 S. Ct. at 1557-58. These decades of consistent Supreme Court precedent demonstrate that the *Pennoyer* era, including *Bagdon*, is a dead letter. See *Viko v. World Vision, Inc.*, No. 2:08-CV-221, 2009 WL 2230919, at *10 (D. Vt. July 24, 2009) (observing that "to the extent that early cases such as *Bagdon* . . . hold that compliance with a registration requirement alone establishes personal jurisdiction—whether based on 'consent,' 'presence,' or some other theory—the viability of such holdings is cast in doubt by . . . *International Shoe*.").

4. Plaintiffs finally argue that all of these cases are different because they involved defendants who had not consented to jurisdiction in the forum while Ford and Goodyear consented to jurisdiction in New York through their registrations to do business, akin to a contract. *See* Mot. 14-16. Not so.

For starters, a Supreme Court plurality recently explained that statutory-consent regimes should not be analyzed as “consent” at all. It observed that in analyzing implied-consent laws intended to battle drunk driving, “our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize.”

Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532-33 (2019) (plurality op.). “Instead, [the Court] ha[s] based [its] decisions on the precedent *regarding the specific constitutional claims in each case . . .*” *Id.* at 2533 (emphasis added). The same should be true here. The Court should not view the registration statutes as creating actual consent to general jurisdiction. Instead, the Court should base its decision on the precedents regarding the due-process claims at issue. And, as the Appellate Division explained, general jurisdiction as a consequence of registering to do business in a State is inconsistent with all of the Supreme Court’s general-jurisdiction case law. *See* App. Div. Op. 9-14.

Moreover, as the Appellate Division recognized, to the extent that New York’s registration statute imposes consent to general jurisdiction as a condition of

doing business at all,³ it does so implicitly. *Id.* at 9 (“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.”) And implicit consent extracted by statute is not consent at all. If it were, States could impose all kinds of unconstitutional requirements on foreign corporations and then claim that the corporation has consented to those requirements by registering to do business. But “[t]here must be a limit to the consequences . . . which” can be imposed through the fiction of implied consent. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

Consent by registration gives foreign companies the choice of either doing business in New York and “consenting” to general jurisdiction or avoiding general jurisdiction but not doing business in New York. Given New York’s status as “the preeminent commercial and financial nerve center of the Nation and the world,” *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 581 (1980), that is no choice at all. “Requiring a foreign corporation . . . to defend itself with

³ Ford and Goodyear argued below that the Business Corporation Law does not, as a statutory matter, require foreign corporations to consent to general jurisdiction in New York as a condition of doing business here. Ford and Goodyear App. Div. Opening Br. 18-25, 37-38; Ford and Goodyear App. Div. Reply Br. 11-14. If the Court grants the motion, Ford and Goodyear will defend their judgment on this separate, statutory ground. See *In re East Ramapo Cent. Sch. Dist. v. King*, 29 N.Y.3d 938 (2017).

reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.”

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988). And it is a burden that New York may not constitutionally impose.

II. THE APPELLATE DIVISION CORRECTLY HELD THAT FORD AND GOODYEAR ARE NOT “AT HOME” IN NEW YORK AND NO COURT DISAGREES.

Plaintiffs also argue weakly that the Appellate Division erred in finding that Ford and Goodyear were not “at home” in New York. Mot. 19-22. They contend that Ford and Goodyear have longstanding and quantitatively significant business operations in New York and those operations should be sufficient. *Id.* at 19-20.

But as even Plaintiffs are forced to concede (at 20), the U.S. Supreme Court holds that “the place of incorporation and principal place of business are” the “paradig[m] . . . bases for general jurisdiction.” *Daimler*, 571 U.S. at 137 (citation omitted and bracket and ellipses in *Daimler*). Neither Ford nor Goodyear is headquartered or incorporated in New York. R. 73, 120. And a corporation is not “at home” outside of where it is headquartered or incorporated except in an “exceptional case.” *Daimler*, 571 U.S. at 139 n.19.

Nothing about Ford and Goodyear’s New York operations are exceptional. To be sure, Ford and Goodyear may have some operations in New York. But Ford and Goodyear have substantial operations elsewhere, too. For instance, although

Ford has a plant in New York and franchise agreements with independent dealers in the State (R. 9), Ford has 62 plants and 11,980 franchise agreements with independent dealerships worldwide. R. 144-145. Similarly, although Goodyear has an unrelated plant in New York and leases service centers in the State (R. 24, 121), it has 15 plants in the United States alone and 50 plants and 1,200 retail tire outlets worldwide. R. 235-237. And under *Daimler*, a court must “apprais[e] . . . a corporation’s activities in their entirety, nationwide and worldwide.” 571 U.S. at 139 n.20. Substantial business contacts, by themselves, in a State are not enough.

It is perhaps telling, then, that Plaintiffs do not cite a single case that would support their hypothesis that Ford and Goodyear are at home in New York. We have not located a single New York state appellate case finding a corporation at home outside of the two paradigm fora after *Daimler*. See, e.g., *Qudsi v. Larios*, 173 A.D.3d 920, 922 (2d Dep’t 2019) (rejecting general jurisdiction over a foreign corporation “which was not incorporated in New York and did not have its principal place of business in New York”); *Magdalena v. Lins*, 123 A.D.3d 600, 601 (1st Dep’t 2014) (concluding that “there is no basis for general jurisdiction . . . since [the corporation] is not incorporated in New York and does not have its principal place of business in New York”). And other courts have found Ford and Goodyear not subject to general jurisdiction in their States on materially identical allegations. See, e.g., *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Colo. 2016) (Ford

not subject to general jurisdiction in Colorado); *Ford Motor Co. v. Cejas*, No. 09-16-00280-CV, 2018 WL 1003791 (Tex. Ct. App. Feb. 22, 2018) (Ford not subject to general jurisdiction in Texas); *Clark v. Lockheed Martin Corp.*, No. 15-CV-995-SMY-PMF, 2016 WL 67265, at *2 (S.D. Ill. Jan. 6, 2016) (Goodyear not subject to general jurisdiction in Illinois). Again, Plaintiffs do not cite a single contrary case.

Ultimately, Plaintiff's at-home argument is not so much a contention that the Appellate Division's analysis was wrong as it is a policy argument that it would be unfair to recognize *Bagdon's* abrogation. Mot. 20-22. Unless there is some way to subject Ford to general jurisdiction in New York, the argument seems to go, it would be unfair to Plaintiffs, who might have to sue the companies in different, non-New York forums. *Id.*

But that is not how personal jurisdiction works. "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). And the interests protected by the Due Process Clause "encompass[] the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). As a result, "[e]ven if the defendant would suffer minimal or no in convenience from being forced to litigate before the tribunals of another State . . . the Due Process Clause,

acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” *Id.* at 1780-81 (citation omitted). The fairness of jurisdiction in New York to *Plaintiffs* simply does not enter into the calculus.

The same is true of the possibility that Plaintiffs may have to split their claims against Ford and Goodyear. Plaintiffs must prove personal jurisdiction is proper “as to each defendant over whom a state court exercises jurisdiction.” *Id.* at 1783 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)). Plaintiffs cannot make personal jurisdiction proper over Ford and Goodyear simply by suing both together in a single action. The Appellate Division therefore correctly held that Ford and Goodyear were not subject to general jurisdiction New York.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

Layne Risk

JAYNE ANDERSON RISK
NEAL KRONLEY
HALEY TORREY
DLA PIPER LLP (US)
1251 Avenue of the Americas
27th Floor
New York, New York 10020
(212) 335-4500

*Counsel for The Goodyear Tire &
Rubber Company*

Respectfully submitted,

Sean Marotta

SEAN MAROTTA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, New York 10017
(212) 918-3000

ELLIOT J. ZUCKER
AARONSON RAPPAPORT FEINSTEIN &
DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
(212) 593-6700

Counsel for Ford Motor Company

August 2, 2019