To be Argued by:
JAY L. T. BREAKSTONE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

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-Respondents,

– against –

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

Defendants,

– and –

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

Defendants-Appellants.

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

Non-Party Respondent.

Docket Nos.:
2016-06194
2016-07397

BRIEF FOR PLAINTIFFS-RESPONDENTS

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COUNTERSTATMENT OF THE QUESTIONS PRESENTED

A. Whether Defendants-Appellants, The Goodyear Tire & Rubber Company ("Goodyear") and Ford Motor Company ("Ford"), knowingly and voluntarily consented to general jurisdiction in New York by registering to conduct business here and appointing the Secretary of State as their agent for service of process.

Supreme Court held that Goodyear and Ford had consented to general jurisdiction in New York because foreign corporations have been on notice since 1916 that registration to conduct business in New York amounts to consent to general jurisdiction here.

B. Whether Goodyear's activities within the State of New York have been so continuous and systematic that the company is essentially "at home" here.

Supreme Court held that Goodyear is essentially at home in New York State due to the degree of its systematic and continuous activity here, and therefore, New York courts had general jurisdiction over Goodyear.

C. Whether Ford's activities within the State of New York have been so continuous and systematic that the company is essentially "at home" here.

Supreme Court held that Ford is essentially at home in New York State due to the degree of its systematic and continuous activity here, and therefore, New York courts had general jurisdiction over Ford.

COUNTERSTATEMENT OF THE FACTS AND NATURE OF THE CASE

In light of the specific facts presented, longstanding laws, and well-settled precedents of New York State, Supreme Court correctly held that there were two independent bases by which The Goodyear Tire & Rubber Company ("*Goodyear*") and Ford Motor Company ("*Ford*") each are subject to general personal jurisdiction here, and its determinations as to both bases should be affirmed. Not only did the court below hold that Goodyear and Ford each had consented to general jurisdiction in New York, because "[i]n 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," (Record on Appeal ("*R.*") 14, 26), but also that Goodyear's and Ford's "activities with the State of New York have been so continuous and systematic that the company[ies] [are] essentially at home here." (R. 13, 24; *see also* R. 15 ["This court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York."]; R. 26 ["This court has jurisdiction over defendant Goodyear because of the degree of its systematic and continuous activity in New York and because of its registration to do business in New York."])

In 2011, Defendant Jose Aybar (*"Mr. Aybar"*), a resident of New York State, purchased a used 2002 Ford Explorer (*"Ford Explorer"*) equipped with a Goodyear

Wrangler AP Tire (the "*Wrangler Tire*") from Jose Velez, who is also a New York State resident. (R. 21)

It is conceded by Ford, a foreign corporation registered with the New York State Department of State and authorized to do business in the state (R. 15), that it is in the business of designing and manufacturing cars and trucks (Affidavit of Elizabeth Dwyer, Retail Network Operations Manager, at R. 73, ¶ 3), that Ford designed the Ford Explorer (R. 41, at ¶ 31), and that the Ford Explorer was assembled in Ford's own manufacturing plant. (*Id.*, at R. 73, ¶ 5). It is undisputed that the Ford Explorer was purchased by Mr. Aybar in New York, used primarily in New York by Mr. Aybar, and registered and licensed with the Department of Motor Vehicles in New York State. (R. 8-9, 12) It is also undisputed that Goodyear, a foreign corporation registered with the New York State Department of State and authorized to do business in the state, manufactured the Wrangler Tire. (R. 21)

In July, as Mr. Aybar drove the Ford Explorer northbound on Interstate Highway 85 in Virginia, the vehicle became unstable as a result of the failure of the Wrangler Tire, which caused the Ford Explorer to lose stability and control, rolling over several times. (R. 8, 21, 51) Plaintiffs-Respondents Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar, and Tiffany Cabral ("*Plaintiffs*"), passengers in the vehicle, were killed or injured. (R. 8, 21) Plaintiffs have alleged that the Ford Explorer had "certain defective, unsafe, and

defective condition(s) in the design, manufacture, fabrication and/or assembly[.]" (R. 8, 49) This action, sounding in, among other causes, negligence and strict products liability was brought in July 2015. (R. 21)

In the court below, Plaintiffs demonstrated that (1) Goodyear had owned and operated a chemical plant in Niagara, New York since the 1940's; (2) Goodyear had been the exclusive supplier of tires and related products for the New York City Transit Authority bus fleet since 1987; (3) Goodyear maintained at least 180 authorized Goodyear dealers for its products within New York State;[1] and that (4) Goodyear owned and operated numerous service centers in New York State which employed many residents of the state.[2] (R. 21) Plaintiff also showed that, since 1924, Goodyear had operated numerous stores in New York State, employing thousands of New York workers. (R. 24) Goodyear's organization of facilities in New York State, engaged in day-to-day activities, and Goodyear's activities within New York

[1] Although not a part of the record below, a search of Goodyear's public website conducted in June 2017 using Goodyear's website "Stores Near You" search function shows: (1) 36 registered Goodyear service facilities in Queens County alone; (2) 34 registered Goodyear service facilities within a 5 mile radius of U.S. Tires and Wheels of Queens, LLC ("U.S. Tires"), the registered Goodyear service facility where the Wrangler Tire and Mr. Aybar's Ford Explorer were serviced (Brief for Non-Party Respondent, U.S. Tires, at 2); and (3) 84 registered Goodyear service facilities within a 10 mile radius of U.S. Tires.

[2] Goodyear advertises to the public that it has one or more registered Goodyear Tire Stores in at least 325 different cities within New York State. [R. 189-202] *See also* https://goodyear.com/en-US/tire-stores/NY.

State, had been so continuous and systematic as to render Goodyear subject to the general jurisdiction of New York's state courts. (*Id.*) Goodyear denied none of these factual allegations in the court below. (R. 21, 24)

Instead, Goodyear professed that it was merely an Ohio corporation, with its principal place of business located in Akron and that the Wrangler Tire was manufactured in its facilities in Union City, Tennessee. (R. 21) At some point after the Wrangler Tire was manufactured and first sold by Goodyear, Plaintiff acquired the tire and brought it to New York. (R. 21) There, a party unrelated to Goodyear inspected the tire and installed it on Plaintiff's vehicle, approximately two weeks before the accident. (*Id.*) At the time the Wrangler Tire was installed on Plaintiff's vehicle, Goodyear conceded that it still was actively doing business in New York, its Chief Tire Analysis Engineer, part of its Global Tire Analysis Department, acknowledged that at all relevant times, Goodyear owned and operated a tire manufacturing plant located in Tonawanda, New York. (R. 121, at ¶ 8) ["Until September 30, 2015, Goodyear was a member of a limited liability company known as Goodyear Dunlop Tires North America, Ltd. ("GDTNA") which owned and operated a tire manufacturing plant in Tonawanda, NY."] Though the Tonawanda plant did not manufacture the specific Wrangler Tire at issue in this case (*id.*), it did manufacture tires for commercial trucks, all terrain vehicles, competition go-carts, and motorcycles there.

Based on these facts, the court below found that Plaintiff had demonstrated "Goodyear's extensive activities in this state since approximately 1924," (R. 23), and held that "Goodyear's activities with the State of New York have been so continuous and systematic that the company is essentially at home here." (R. 24)

Like co-defendant Goodyear, Ford also professed that it was merely a Delaware corporation, with its principal place of business located in Dearborn, Michigan, and that the Ford Explorer was manufactured in its facilities in St. Louis, Missouri. (R. 73) As to Ford, the court below found that "Ford maintains a continuous and substantial presence in New York[,]" noting that Ford owns property in New York (including having invested $150 million dollars to upgrade its Hamburg, New York plant [R. 132]), and has hundreds of dealerships selling Ford products under its brand name throughout New York State. (R. 9, 12) The court below summarized that "Ford has an organization of facilities in this state engaged in day-to-day activities." (R. 12) Significantly, Supreme Court also noted that "Since 1920, Ford has been registered with the New York State Department of State as an active foreign business corporation." (*Id.*) Based on these facts, Supreme Court found that "Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts. (R. 12) Consequently, Supreme Court found Ford's motion to dismiss without merit,

and concluded that "[t]his court has jurisdiction over defendant Ford because of the degree of its systematic and continuous activity in New York ... [.]" (R. 15)

As a separate and independent matter, Supreme Court found that both Goodyear and Ford had been on notice prior to the time they first registered as a foreign corporation in New York State and designated the Secretary of State as their agent for service of process that "[i]n New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process." (R. 13, 25) Furthermore, Supreme Court noted that "'[W]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York.'" (R. 13 [quoting Alexander, Practice Commentaries, McKinnney's Con. Law of NY, Book 7B, C301:6[c], p. 21])

ARGUMENT

I. Goodyear and Ford Knowingly and Voluntarily Consented to the Jurisdiction of New York State Courts.

The court below correctly applied the holdings of the Court of Appeals, the weight of a myriad of courts which followed, and the recognition of this settled law by the Supreme Court of the United States in finding that under New York law, Goodyear and Ford had knowingly and voluntarily consented to general personal

jurisdiction in this state. Specifically, the court correctly interpreted Goodyear's and Ford's registration and authorization to do business in New York, together with each corporation's appointment of the New York Secretary of State as its local agent for service of process under CPLR 301 and Business Corporation Law §§ 304 and 1304, as conferring general jurisdiction over that foreign corporation. (R. 13-15, 25-26)

A. Foreign Corporations Have Been on Notice Since 1916 that Registration and Designation of an Agent for Service of Process Under New York's Business Corporation Law is Interpreted by New York State Courts as Consent to General Personal Jurisdiction

"In New York," the court explained, "it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for service of process." (R. 9) [citing *Bagdon v. Phil. and Reading C. & I. Co.*, 217 N.Y. 432, 436 (1916)]. In *Bagdon*, the Court of Appeals definitively spoke on the issue through Judge Cardozo. Indeed, the Supreme Court recognized this, stating that "the scope and meaning of such a designation as part of the bargain by which [a foreign corporation] enjoys the business freedom of the State of New York" has been "authoritatively determined[.]" *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939).

> 'The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. ... The contract deals with jurisdiction of the person. It does not enlarge or

> diminish jurisdiction of the subject-matter. It means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.'

Neirbo, 308 U.S. at 175 [citing and quoting with approval, *Bagdon*, 217 N.Y. at 436-37]; *see also Roger v. A. H. Bull & Co.*, 170 F.2d 664, 665 (2d Cir. 1948) ["Here, as in the *Neirbo* case, the corporation by filing the certificate consented to make itself amenable to process in the state courts through service upon its designated agent."].

In *Bagdon*, Judge Cardozo recited, and then rejected, the same faulty reasoning argued by that defendant foreign corporation resurrected by the unsuccessful defendant corporations here: "The defendant concedes that it is engaged in business in New York.[3] It concedes that its appointment of an agent has never been revoked.[4] It insists, however, that his agency must be limited to actions

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[3] Here, Goodyear also has conceded that it is engaged in business in New York, with a vast organization of facilities engaged in day-to-day activities impacting, involving, and employing New Yorkers on a daily basis (R. 5, 8), even to the extent of "[a]t all relevant times," recognizing its subsidiary has "owned and operated a tire manufacturing plant located in Tonawanda, New York." (R. 39, at ¶ 5). Likewise, Ford has conceded that it is engaged in business in New York on a day-to-day basis, including owning a plant in Hamburg, New York in which it recently invested an additional $150 million in upgrades [R. 132], has hundreds of dealerships selling Ford products under its brand name throughout New York State. (R. 9, 12; Joint Brief for Defendants-Appellants ("*Appellants' Br.*"), at 11).

[4] *Compare* R. 224, ¶ 16 [conceding in the course of its argument that Goodyear "is registered to do business [in New York] and has designated an agent for service of process within the state."]; R. 228, ¶ 26 [same]; Appellants' Br., at 18 [conceding in the course of its argument that Ford and Goodyear "compli[ed] with Business Corporation Law § 304, which requires companies to register with the Secretary of State and appoint the Secretary as their agent for service of process"]; *id.*, at 22, 34

which arise out of the business transacted in New York.[5] It says that any other construction would do violence to its rights under the federal Constitution.[6]" 217 N.Y. at 433-34. Indeed, Judge Cardozo contradicted this argument directly:

> when a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted. ... We think there is nothing to the contrary either in the decision of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution.

Bagdon, 217 N.Y. 438-39. The Court of Appeals further underscored the *voluntary* nature of this registration and designation by considering the consequences to a foreign corporation who does not register and designate an agent for service of process.

[same]; R. 212-13, at ¶ 12 [Ford conceding that it had appointed the Secretary of State as its agent under Section 304].

[5] *Compare* Appellants' Br., at 5 ["Neither Ford nor Goodyear had any contacts in New York with Plaintiffs, the Explorer, or the Goodyear tire installed on it."]; Attorney Affirmation in Support of Ford Motor Company's Pre-Answer Motion to Dismiss, R. 31, at ¶¶ 5, 15, 30, 32; *see also* Reply Attorney Affirmation in Support of Ford Motor Company's Pre-Answer Motion to Dismiss, R. 137, at ¶ 3. Notably, even Goodyear and Ford appear to have abandoned this argument in their joint brief in this Court, arguing to the contrary here that "[b]y definition, general jurisdiction is agnostic as to a case's facts or their connection to the forum; a claims factual connection to a state matters only for *specific* jurisdiction." (Appellants' Br., at 16) [citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926, 131 S.Ct. 2846 (2011)]

[6] *Compare* Appellants' Br., at 4 ("a statute that attempts to impose general jurisdiction as a condition of registration to do business in a particular state would be plainly unconstitutional").

> "*[T]he corporation may withhold its stipulation and carry on business legally*; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege, it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract."

Bagdon, 217 N.Y. at 438 [emphasis added].

The Supreme Court agreed with this characterization. "A statute calling for such a designation [of a local agent for service of process] is constitutional, and the designation of the agent 'a voluntary act.'" *Neirbo*, 308 U.S. at 175 [citing and quoting *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917)]; *id.* ["finding an actual consent by [the foreign corporation] to be sued in the courts of New York" because even where the Business Corporation Laws do not explicitly state that registration confers general jurisdiction, judicial interpretation of the statutes is what matters].[7] This voluntary, actual consent by registration and

[7] So voluntary is the consent to New York's registration and designation statute that an unregistered/unauthorized foreign corporation who wishes to assert its interests in the courts of this state may actually bring an action *before registering to comply with the statute*, as New York courts have held that in such a circumstance, it is proper for the court to grant a stay or conditional dismissal until the foreign corporation is able to comply with the registration and designation statute. *See SD Protection, Inc. v. Del Rio*, 498 F. Supp. 2d 576, 581 (E.D.N.Y. 2007) [holding that New York state "case law [] indicate[s] a strong opposition of New York courts to dismissing a Complaint on the ground that the plaintiff lacks a certificate, and a preference for giving the plaintiff a chance to remedy this defect"] [citing *Uribe v. Merchants Bank of New York*, 266 A.D.2d 21, 697 N.Y.S.2d 279, 280 (1st Dep't 1999) ["the failure of plaintiff to obtain a certificate pursuant to BCL 1312 may be cured prior to the resolution of the action"] and *Tri-Terminal Corp. v. CITC*

designation was recognized by the Court of Appeals as "a true consent" rather than an imputed or implied one; the difference "between a fact and a fiction[.]" *Bagdon*, 217 N.Y. at 437; *Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 280 (1944) ["a designation of a public officer upon whom service may be made has the same effect as a voluntary consent"] [citing *Bagdon* and *Neirbo*]; *id.* ["A foreign corporation filing such designation or consent cannot complain that the courts of the State have given a broader construction to such consent than the corporation intended, if its language 'rationally might be held to go to that length.'"] [citing *Pennsylvania Fire Ins. Co.*, 243 U.S. at 95, 37 S. Ct. at 345]; *see also Moss v. Atlantic Coast Line R. Co.*, 149 F.2d 701, 701 (2d Cir. 1945) [citing *Bagdon*, noting that the registration required by the General Corporation Law of New York State was "a consent which subjects it to service upon all claims wherever arising"]; *id.* at 702 [noting that "a state like New York[]... exacts a submission to personal service in suits upon every kind of claim."]; *id.* [citing *Neirbo*, stating that it "seems to us to leave no doubt that only an actual consent of the foreign corporation makes it a 'resident' of the district," and discussing "the designation under state law which is the basis of consent" as a foreign corporation "deliberately domesticat[ing] itself."]. Ford and Goodyear are simply incorrect when they argue that "Ford and Goodyear's supposed 'consent' to

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Industries, Inc., 78 A.D.2d 609, 432 N.Y.S.2d 184, 185 (1st Dep't 1980)]; *Nasso v. Seagal*, 263 F. Supp. 2d 596, 606 (E.D.N.Y. 2003) [same, collecting cases].

general jurisdiction is a fiction." (Appellant's Br. at 33). In New York, it has never been as such.

The Restatement (Second) of Conflict of Laws summary of this consent doctrine is illustrative, as it also recognizes the validity of consent to general personal jurisdiction by registration and designation.

> A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends.

Restatement (Second) of Conflict of Laws § 44 (1971). The comments to Section 44 further bolster the solidity of these concepts. *Id.*, § 44 cmt. a ["By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. *This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.*"] [emphasis added]; *id.* § 44 cmt. b ["It is commonly provided by statute that a foreign corporation shall not do business in a state until it has procured a license to do so from some public official. As a condition precedent to obtaining such a license, it is commonly provided that the corporation shall authorize an agent or public official to accept service of process for it in actions brought against it in the state. Once such authorization has been given and service of process made

upon the designated agent or official, the state may exercise judicial jurisdiction over the corporation as to all causes of action which fall within the terms of the authorization. *This is true even though such authorization was a condition precedent to the corporation being permitted to do business in the state.*"] [emphasis added]; *id.* § 44 cmt. c ["If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. ... *By qualifying under one of these statutes, the corporation renders itself subject to whatever suits may be brought against it within the terms of the statutory consent as interpreted by the local courts* provided that this interpretation is one that may fairly be drawn from the language of the enactment."] [emphasis added].

Appellants' own argument coupled with Ford's and Goodyear's past conduct demonstrates the calculated and knowing bargain that they made in consenting to personal jurisdiction in New York, not for the purpose of doing business in New York, but in order to obtain the privilege of *suing* on their own behalf in New York courts to enforce their contracts and support their own causes. Appellants argue that "if Ford and Goodyear did business in New York without registering, they could no longer sue in the New York courts, even if New York was the only forum in which they could obtain personal jurisdiction over a defendant." (Appellant's Br. at 35) As

an initial, and practical matter, this is untrue and belied by standing New York jurisprudence.[8]

But further, this is the essence of the bargain that Goodyear and Ford made with the State of New York: In order to exercise the privilege of suing in its state courts (which Goodyear and Ford have exercised countless times to enforce their contracts), Goodyear and Ford must themselves consent to being brought into those same courts. This is precisely the "corresponding benefit to offset this substantial burden" of consenting to personal jurisdiction in suits brought in New York trial courts. Appellants' Br., at 36. In sum, it is not only entirely consistent with over a century of New York jurisprudence, but also equitable, that in exchange for the privilege of asserting its rights in New York, Ford and Goodyear themselves should remain subject to the possibility that others might assert their own rights against them in those same forums.

Moreover, this is the same covenant that domestic corporations make with the state and its citizens. Goodyear registered as a foreign corporation in New York State in 1956 and, accordingly, was on notice for forty years *after* the Court of Appeals decided *Bagdon* that registration and designation of the Secretary of State as its agent for service of process is interpreted by New York's courts as constituting consent to

[8] *See SD Protection*, 498 F. Supp. 2d at 581; *Uribe*, 266 A.D.2d 21, 697 N.Y.S.2d at 280; *Tri-Terminal*, 78 A.D.2d 609, 432 N.Y.S.2d at 185; *Nasso*, 263 F. Supp. 2d at 606.

general personal jurisdiction. Conversely, Ford first registered with the New York State Department of State as an active foreign business corporation in 1920, a mere four years after Judge Cardozo issued the landmark *Bagdon* opinion. (R. 12) Since registering nearly a century ago, Ford has never revoked that consent or sought to withdraw its authorization; so too has Goodyear never revoked its consent or sought to withdraw its authorization since first registering over sixty years ago. *See, e.g.*, *Rockefeller Univ. v. Ligand Pharms. Inc.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008 ["In maintaining an active authorization to do business and not taking steps to surrender it as it has a right to do, defendant was on constructive notice that New York deems an authorization to do business as consent to jurisdiction."]

In sum, Goodyear and Ford consented to submitting to general personal jurisdiction knowingly, and voluntarily, with full notice through *Bagdon* and the consistent jurisprudence of New York courts interpreting the state's registration and designation statutes in the sixty to one hundred years since; they made this bargain with New York State in order to secure the benefit of being able to sue to enforce their business contracts and further their business interests here. There was no error below when the court read Ford's and Goodyear's voluntary acts of registration precisely as such an act had been read in *Bagdon*, as a voluntary consent to general personal jurisdiction in New York. Its decision should be affirmed.

B. The United States Supreme Court Did Not Intend for *Daimler* and *BNSF* to Abrogate Jurisdiction by Consent Under New York Law

There have been only three personal jurisdiction decisions by the United States Supreme Court that bear upon general personal jurisdiction by consent: *Neirbo*, *Pennsylvania Fire Ins. Co.*, and *BNSF Ry. Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017). The two decisions that dealt squarely with the consent issue, *Neirbo* and *Pennsylvania Fire Ins. Co.*, came down firmly in support of *Bagdon*. As explained in greater detail below, the third decision, *BNSF*, not only implied that consent was still a valid basis for general personal jurisdiction, but expressly did not reach this issue as it had not been raised in the court below.

Thus, although its recent decisions in *Daimler, A.G. v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014) and *BNSF Ry. Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017) have reshaped much of general jurisdiction jurisprudence, resulting in no little consternation, confusion, and controversy, the Supreme Court has chosen not to disturb the principle of general personal jurisdiction by consent on constitutionality, or any other, grounds, in these decisions. To the contrary, the Court has either implied that the concept of consent to jurisdiction remains valid, or has explicitly stated that it was issuing no ruling on the question of general jurisdiction by consent.

In *Daimler*, the Court quoted its opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, (2011), stating that its

"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*, 134 S. Ct. at 755-56 [quoting *Goodyear*, 564 U.S. at 928, 131 S. Ct. at 2856] [emphasis added]. In this one instance in which the Court mentioned consent to jurisdiction, it carefully and purposefully *distinguished* it from the circumstances presented in *Daimler*. Not only does *Daimler* not say *anything* about overruling or abrogating *Bagdon*, but what the Court does says suggests the contrary conclusion: That *Bagdon* and consent to general personal jurisdiction under New York State law survives to this day, untouched by *Daimler* or *Goodyear*.

In the *BNSF* opinion issued just last month, the Court's "hands off" approach to general jurisdiction by consent was both implicit and express. First, continuing to write for the Court in this area, Justice Ginsburg carefully noted that "*absent consent*, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." *BNSF*, 581 U.S. ___, 137 S. Ct. at 1556 [emphasis added]. Following this implicit recognition that consent remains a valid basis for the exercise of personal jurisdiction, Justice Ginsburg expressly stated that because the Montana Supreme Court did *not* address the argument that BNSF has consented to personal jurisdiction in Montana, "we do not reach it." *Id.*, at 1559.

In consideration of *Daimler*, *BNSF*, and New York's own jurisprudence, the court below "agree[d] with those courts that hold that general jurisdiction based on consent through registration and appointment survives [*Daimler*]. (R. 9) [citing *Doubet LLC v. Trustees of Columbia Univ. in City of New York*, 99 A.D.3d 433 (1st Dep't 2012); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173 (3d Dep't 1983); *Bailen v. Air & Liquid Systems Corp.*, No. 190318/2012, 2013 WL 1369452 (Sup. Ct., N.Y. Co. April 1, 2013)]; *Bailen v. Air & Liquid Systems Corp.,* 2014 WL 3885949, at *4 (Sup. Ct., N.Y. Co. August 5, 2014) ["a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent."] [citing *Neirbo*, 308 U.S. at 170, 175 and *Rockefeller Univ.*, 581 F. Supp. 2d at 466 ["the majority of federal district courts and New York courts … hold that a filing for authorization to do business in New York is sufficient to subject a foreign corporation to general personal jurisdiction in New York."] [additional citations omitted].[9] The court held that Goodyear's consent to general

[9] *But see Famular v. Whirlpool Corp.*, 2017 WL 2470844, at **4-5 (S.D.N.Y. June 7, 2017) [holding, in backwards fashion, that it could not exercise general personal jurisdiction due to consent by registration and designation "because of the unclear constitutional status of the consent-by-registration theory in light of *Daimler*," thus ignoring the mandate of the large body of cases from the past century establishing the validity of general personal jurisdiction by consent, though inexplicably recognizing that "the Second Circuit has explicitly avoided the issue" in *Brown v. Lockheed Martin Corp.*, 814 F.3d at 637, and expressly disregarding the post-*Daimler* decision in *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014), holding that "a corporation may consent to jurisdiction in New York … by registering as a foreign corporation and designating

personal jurisdiction in New York State was knowing and voluntary: "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. 9) [citing *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp.3d 572, 591 (D. Del. 2015], *aff'd on other grounds*, 817 F.3d 755 (D.C.Cir. 2016) [emphasis added].

Moreover, Goodyear and Ford are wrong, both in their interpretation of *Daimler* and *BNSF* and in their characterization of the text of the New York state statutes: Silence is not the same thing as contradiction.[10] First, this argument by

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a local agent."]; *Minholz v. Lockheed Martin Corp.*, --- F. Supp. 3d ---, 2016 WL 7496129, at *9 (N.D.N.Y. December 30, 2016) [acknowledging that "Plaintiff correctly points out that many New York courts have held that registration under N.Y. Business Corporation Law § 1304 subjects foreign companies to personal jurisdiction in New York, *see STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) (collecting cases), these cases predate *Daimler*[,]" but refusing to apply the guiding New York state court precedents on the grounds of the "likely" constraints articulated in *Daimler*]. Plaintiff respectfully asserts that the decisions in *Famular* and *Minholz* were not only errors of analysis, but also contrary to the admonishment of *Eberhart v. United States*, 546 U.S. 12, 14–15, 19–20 (2005) that, rather than issuing a ruling contrary to prior Supreme Court precedent that had not been expressly overruled, the "prudent course" for a court was to *continue to apply that Supreme Court precedent*, 546 U.S. at 14–15, 19–20, as well as that of the highest courts of the state whose law is being applied.

[10] Goodyear and Ford argue that "nothing in Business Corporation Law § 304 – or any other provision of the Business Corporation Law, for that matter – even mentions consent to general jurisdiction. The Supreme Court's consent by

Appellants also flies in the face of the Supreme Court's caution that no precedent should be overruled in the absence of an explicit statement by the Court to that effect. *See Eberhart*, 546 U.S. 12, 14–15, 19–20 (noting that it was a "prudent course" for a lower court to apply prior Supreme Court precedent that had not been expressly overruled). And second, this argument as to the "silence" of the New York registration and designation statutes ignores the further instruction of the Supreme Court that federal courts should first look to how *state* courts have *interpreted their own state registration statutes* in order to determine whether a corporation's compliance with the statute grants the court personal jurisdiction over that corporation. *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 215-16 (1921) [the Court clarified its holding in *Pennsylvania Fire* and explained that when a foreign corporation appoints an agent for service of process, a court will properly 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* gives to the appointment a larger scope"] [emphasis added]. [11]

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registration theory is therefore at odds with the plain text of the statute that it purports to interpret." (Appellants' Br., at 3-4)

[11] *Compare Justiniano v. First Student Management LLC*, 2017 WL 1592564, at *6 (E.D.N.Y. Apr. 26, 2017) (slip op.) [citing *Minholz*, 2016 WL 7496129, at *9 for the proposition that because NY BCL § 1301 does not contain explicit text regarding consent, the court cannot exercise general jurisdiction over the defendants]. In *Justiniano*, however, the District Court made the same error of analysis urged by

In addition to these principles of construction, the court below properly adhered to the longstanding interpretation of New York's registration and designation statutes by local courts, both trial and appellate; controlling and persuasive. In New York, for over a century, from *Bagdon* to *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir 2016) (concluding that New York's registration statute has been construed to confer general jurisdiction), courts tasked with interpreting New York's registration and designation statutes[12] overwhelmingly have held that they confer general personal jurisdiction over foreign corporations who enter into the contract with the state to allow themselves to be hailed into New York state courts in exchange for the privilege of doing the same. *See, e.g.*, *STX*

Ford and Goodyear here: that on the issue of consent, only the text of the registration and designation statutes is of consequence. This erroneous conclusion ignores the effect of over a century of local New York jurisprudence that has interpreted compliance with the registration and designation statutes of the BCL as true consent to general personal jurisdiction. This century of jurisprudence is not of mere precedential value in the courts; this longstanding local interpretation of New York law is what puts any foreign corporation seeking to benefit from doing business in New York *on notice* of the bargain it is making in exchange for that benefit. This longstanding notice is what transforms New York's BCL from a "run of the mill registration and appointment statute" into true, knowing consent.

[12] A key distinguishing feature of *Brown v. Lockheed Martin Corp.* is that the *Connecticut* statute being considered by the Court had *neither* any explicit mention of consent to general personal jurisdiction *nor was there local Connecticut precedent interpreting the Connecticut statute* to confer such jurisdiction by consent. 814 F.3d at 629 ("[W]e find it prudent—*in the absence of a controlling interpretation by the Connecticut Supreme Court*, or a clearer legislative mandate than Connecticut law now provides—to decline to construe the state's registration and agent-appointment statutes as embodying actual consent....") [emphasis added].

Panocean, 560 F.3d at 131 [collecting many cases in which New York courts have held that registration under N.Y. Business Corporation Law § 1304 subjects foreign companies to personal jurisdiction in New York]; *Muollo v. Crestwood Vill., Inc.*, 155 A.D. 2d 420, 421, 547 N.Y.S.2d 87, 88 (2d Dep't 1989) ["It is true that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304" [citations omitted] ... the statute imposes no limitation upon this appointment; the Secretary of State may receive process for any purpose."]; *Augsbury*, 470 N.Y.S.2d at 789 ["The privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction."]; *Bailen,* 2014 WL 3885949, at *4-5; *Trounstine v Bauer, Pogue & Co.*, 44 F.Supp. 767, 770 (S.D.N.Y. 1942), *aff'd* 144 F.2d 379 (2d Cir. 1944), *cert. den.* 323 U.S. 777; *see also Spiegel v. Schulman*, 604 F.3d 72, 77 n. 1 (2d Cir. 2010) [discussing consent by registration in dicta]; Alexander, Practice Commentaries, McKinnney's Con. Law of NY, Book 7B, 1989 Pocket Part, CPLR c301:5, at 7.

Because the doctrine of jurisdiction by consent remains valid and in force in New York after *Daimler* and *BNSF*, the court below properly followed the "prudent course" of applying prior Supreme Court and Court of Appeals precedent that had not been expressly overruled. The denials of Goodyear's and Ford's motions to

dismiss below were the result of a correct and faithful application of New York law, and should be affirmed.

C. Consent by Registration and Designation is an Independent and Sufficient Basis for General Personal Jurisdiction, and Does Not Require Any "At Home" Analysis under *Daimler* and *BNSF*

After finding general jurisdiction over Goodyear and Ford based on consent by registration and designation, the court below further noted that "where a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York." (R. 13, 25) [citing Alexander, Practice Commentaries, McKinnney's Con. Law of NY, Book 7B, C301:6[c], p. 21]. This holding is directly in line with the controlling precedent of this Court and the Court of Appeals. Accordingly, once the court below found that Goodyear and Ford each had consented to general personal jurisdiction, no further analysis was needed to investigate whether Goodyear or Ford should have been considered "at home" in New York under *Daimler* and *Goodyear*. This decision may properly be affirmed without proceeding to evaluate whether Goodyear's or Ford's affiliations with New York State are so 'continuous and systematic' as to render them essentially "at home" in this forum;

consent by registration is all that is needed in New York,[13] unless and until the Court is directed otherwise by the Court of Appeals or the United States Supreme Court, both of which have declined to do so.

However, should the Court exceed those parameters and advance to consider this separate and independent basis for finding general jurisdiction over Goodyear and Ford, the court below also was correct in holding that Goodyear's and Ford's longstanding affiliations with New York render both "essentially at home" here.

II. Even if Goodyear and Ford Had Not Consented to General Jurisdiction in New York, Goodyear and Ford are "At Home" in New York

While *Goodyear*, *Daimler*, and *BNSF* all left general personal jurisdiction by consent under New York State law untouched, they did shift the parameters under which general jurisdiction over foreign corporations may be found *absent consent.*

All three cases stand for the proposition that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 131 S. Ct. at 2851; *id.* at 2853-54; *Daimler*, 134 S. Ct. at 754; *BNSF*, 137 S. Ct. at 1558. "The "paradigm" forums in which a corporate defendant is 'at home,' … are

[13] *See Bailen*, 2014 WL 3885949, at *5 ["In other words, a New York court may exercise general personal jurisdiction over a corporation, regardless of whether it is 'at home' in New York, so long as it is registered to do business here as a foreign corporation and designates a local agent for service of process."].

the corporation's place of incorporation and its principal place of business." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. at 1558 [citing *Daimler*, 134 S.Ct. at 760; *Goodyear*, 564 U.S., at 924, 131 S.Ct. 2846]. As the court below recognized, "[g]eneral jurisdiction requires affiliations so continuous and systematic as to make the foreign corporation essentially at home in the forum state, i.e., similar to a domestic enterprise in that state." (R. 6) [citing *Daimler*, *supra*]. Thus, "[t]he exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.'" *BNSF,* 137 S. Ct. at 1558 [quoting *Daimler*, 134 S. Ct. at at 761, n. 19]. The ultimate determination as to where a corporation is "at home" "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, at 762 n.20.

As to Goodyear, the court below examined the record of "Goodyear's extensive activities in this state since approximately 1924," and determined that "a finding of 'a continuous and systematic course of doing business' in New York can easily be made." (R. 7) After meeting this statutory standard, the court below continued its analysis, in light of the fact that "the Due Process Clause of the 14th Amendment limits the exercise of general jurisdiction to those cases in which a corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State[.]" (*Id.*) [citations omitted]. Once again,

in view of the same set of "Goodyear's extensive activities," the court below "concluded that neither *Goodyear Dunlop Tires Operations, S.A. v. Brown (supra)*, nor *Daimler A.G. v. Bauman (supra)*, nor the New York State appellate cases require the dismissal of the case at bar." (*Id.*) "[B]ecause of the level of Goodyear's activities within New York[,]" the court found "that [t]he New York State appellate cases decided after [*Daimler*] which found a lack of general jurisdiction over the defendants are distinguishable from the case at bar," and that "defendant Goodyear's activities with the State of New York have been so continuous and systematic that the company is essentially at home here." (R. 8) [citation omitted]

Indeed, as the court below correctly recognized, Goodyear's presence in New York is special: It has made itself "at home" in New York State for nearly a century. Goodyear has been "so heavily engaged in activity" here that it has been "render[ed] essentially at home" in New York State [*BNSF*, 137 S. Ct. at 1559] by, among other things which may not have been discovered in the case below, owning real estate and operating a chemical plant here since the 1940s;[14] bringing suit as a plaintiff in

[14] (R. 39, at ¶ 5) ["During "all relevant times, [Goodyear Dunlop Tires North America, Ltd. ("GDTNA")] owned and operated a tire manufacturing plant located in Tonawanda, New York."]

both New York State courts[15] and local federal district courts[16]; leasing and subleasing real estate;[17] manufacturing and supplying commercial tires and related products for the New York City Transit Authority bus fleet since 1987; maintaining a network of Goodyear dealers for its products; owning and operating service centers within New York State, including registered Goodyear tire and service centers spanning at least 365 different New York cities; maintaining its active foreign corporation/authorized to do business status with the New York State Department of State; and employing thousands of New York State residents since 1924. This is no *BNSF* train passing in the night. Goodyear presents the truly "exceptional case" where a foreign corporation has spent nearly a century engrained in the day-to-day activities of a state and its citizens, availing itself of the privilege of bringing suit on its own behalf and in its own interest in our courts, and supplying a major state municipality with commercial tires (which it may have also manufactured in its New York State factory) for nearly three decades. For all of these reasons, it does no

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[15] *See, e.g.*, *Goodyear Tire & Rubber Co. v. Vulcanized Prod. Co.*, 228 N.Y. 118, 121–22 (1920); *Goodyear Tire & Rubber Co. v. Hershenstein*, 224 N.Y.S. 501 (App. Div. 1927); *Goodyear Tire & Rubber Co. v. Azzaretto*, 962 N.Y.S.2d 220 (2d Dep't 2013).

[16] *See, e.g.*, *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicecenter of Haverstraw, Inc.*, No. 02 CIV. 0504 (RCC), 2003 WL 22110281 (S.D.N.Y. Sept. 10, 2003); *Goodyear Tire & Rubber Co. v. N. Assur. Co.*, 92 F.2d 70 (2d Cir. 1937).

[17] *See, e.g.*, *Azzaretto*, 962 N.Y.S.2d 220; *Kirk's Tire & Auto Servicecenter of Haverstraw*, 2003 WL 22110281.

violence to the general jurisdiction standards set forth by the United States Supreme Court in *Daimler* and *BNSF* for this Court to affirm Supreme Court's determination that Goodyear should be considered essentially "at home" in New York State.

The court below also found that, like Goodyear, Ford had become woven into the fabric of New York state domestic activity, "[i]n view of [its] extensive activities in this state since approximately 1920," [R. 9]. Factors that the court below recited as evidence of Ford's "continuous and systematic course of doing business" include Ford having maintained its active foreign corporation/authorized to do business status in New York since 1920 through regular registration with the New York State Department of State [R. 9]; operating "an organization of facilities in this state engaged in day-to-day activities," [R. 12]; "maintain[ing] a continuous and substantial presence in New York[,]" [R. 9], as Ford itself concedes [Appellants' Br., at 17]; owning property in New York it spends at least $150 million to maintain [R. 9, 132] and employs significant numbers of New York citizens; and franchising its brand, contracting with hundreds of dealerships to sell its products under the Ford brand name, throughout New York State. (R. 9, 12) Having made itself "at home" in New York State for nearly a century, Supreme Court found that "Defendant Ford's activities within New York have been so continuous and systematic as to render it subject to the general jurisdiction of this state's courts." [R. 12] The court below also used the specific terminology that has become central to the general jurisdiction

inquiry mandated by the United States Supreme Court in the absence of consent [*BNSF*, 137 S. Ct. at 1559]: Ford has been "so heavily engaged in activity" here that it has been "render[ed] essentially at home" in New York State. [R. 13]. Further, not recited by the court below but a key example of Ford availing itself of the privileges it earned by subjecting itself to general personal jurisdiction, on countless occasions Ford has been a litigant in New York trial courts, including bringing suit as a plaintiff in contract, tort, and intellectual property in both New York State courts[18] and local federal district courts.[19]

Considering the significant stature enjoyed by both Goodyear and Ford as historic "big business" American brands, it is not surprising that both have engaged

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[18] *See, e.g.*, *Ford Motor Co. v. C.N. Cady Co.*, 124 Misc. 678, 208 N.Y.S. 574 (Sup. Ct. Onondaga County 1925) [Ford brought trademark action]; *Ford Motor Co. v. O.W. Burke Co.*, 59 Misc. 2d 543, 299 N.Y.S.2d 946 (Sup. Ct. New York County 1969) [Ford brought an action for breach of contract, breach of warranty, negligence and fraudulent misrepresentation arising out of the construction of a number of Ford's buildings]; *Alba v. Ford Motor Co.*, 111 A.D.2d 68 (1st Dep't 1985) [Ford proceeded as third-party plaintiff in an action arising out of a death of an operator of a Ford Tractor].

[19] *See, e.g.*, *Ford Motor Co. v. Helms*, 25 F.Supp. 698 (E.D.N.Y. 1938) [Ford brought action for injunction regarding defendants' neon sign over the street in front of Ford's building]; *Ford Motor Co. v. West Seneca Ford,* 1994 WL 263822 (W.D.N.Y. 1994) [Ford brought action alleging breach of contract]; *Ford Motor Co. v. The Russian Federation*, 2010 WL 2010867 (S.D.N.Y. 2010) [Ford brought suit against the foreign sovereign for breach of contract and indemnification arising out of a vehicle lease agreement between itself and the Russian Federation, under which it had entered into a $4.65 million settlement with a passenger injured while riding in the vehicle the Russian Mission had leased from Ford].

so heavily and systematically in activity in the Empire State so as to satisfy the "exceptional" case for which *Daimler* and *BNSF* made allowance.

III. If There is Insufficient Evidence as to Goodyear's or Ford's Contacts with New York State to Find Them "At Home" in New York on the Present Record, This Case Should Be Remanded for Fact Intensive Discovery on This Topic

In *BNSF*, Justice Sotomayor, in her concurrence and dissent, cautioned that by adopting the "at home" test of *Daimler*, the Court was "grant[ing] a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions." 137 S.Ct. at 1560. The "at home" standard means that such corporations, like Goodyear and Ford here, will only be subject to general jurisdiction where they are incorporated or set their principal places of business. *Id.*

Practically speaking, however, and of concern should the Court change the direction of the law in this state notwithstanding the pronouncements of the Supreme Court and the Court of Appeals which remain unwavering, it ought not be done in the case at bar on this limited record. A period of jurisdictional discovery must be set to allow the parties to focus on the "at home" issues that such a decision by the Court would require. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 628, fn. 8 (2d Cir. 2016)[20] [court did not decide "at home" question under *Daimler* under

[20] In *Brown*, the Second Circuit had explicitly declined to decide the efficacy of consent-by-registration in light of *Daimler*'s avoidance of the issue. *Famular v. Whirlpool Corporation*, 16 CV 944 (VB), 2017 WL 2470844, *4 (S.D.N.Y. June 6, 2017), citing *Brown*, 814 F.3d at 624.

Connecticut law until undisputed facts developed during period of jurisdictional discovery]; *BNSF*, 137 S. Ct. at 1562 (Sotomayor, J., concurring in part and dissenting in part) [asserting that the Court should have "remanded to the Montana Supreme Court to reevaluate the due process question under the correct legal standard," under which "that court could have examined whether this is such an 'exceptional case'"]. Although Plaintiff contends that the facts taken into consideration by the court below were sufficient for it to conclude that Goodyear and Ford are essentially at home in New York, Plaintiff did not have the opportunity to conduct full discovery regarding Goodyear's and Ford's jurisdictional contacts here, much less the full discovery that might be necessary to engage in the sort of "comparative contacts" analysis discussed in *Daimler* and *BNSF* regarding Goodyear's and Ford's activities here compared with other states and worldwide. *See Daimler*, 134 S. Ct. at 762 n. 20. Consequently, and only in the alternative, should the Court reverse, Plaintiff would ask that the matter be remanded with the direction that a period of jurisdictional discovery be directed by the court below.

CONCLUSION

The order below should be affirmed in all respects, together with such other, further and different relief as is just and proper within the premises.

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Respectfully submitted,

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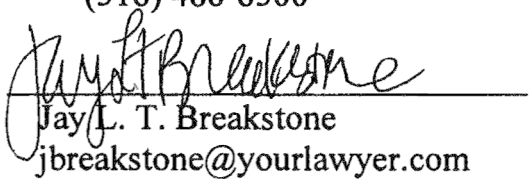
By: 
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