To be Argued by:
ANTON METLITSKY
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Court of Appeals
of the
State of New York

RAYMOND FINERTY and MARY FINERTY,

Plaintiffs-Respondents,

– against –

ABEX CORPORATION, *et al.*,

Defendants.

FORD MOTOR COMPANY,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JONATHAN D. HACKER
BRITTNEY LANE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel.: (202) 383-5300
Fax: (202) 383-5414

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
Tel.: (212) 326-2000
Fax: (212) 326-2061

ELLIOTT J. ZUCKER
AARONSON RAPPAPORT FEINSTEIN
& DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
Tel.: (212) 593-6700
Fax: (212) 593-6970

Attorneys for Defendant-Appellant

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Plaintiffs' answering brief serves only to confirm that Ford US cannot be held liable as a matter of law in this products-liability action, contrary to the Appellate Division's ruling. As Ford US's opening brief demonstrated, New York law does not extend products liability beyond the entities that manufacture, distribute, or sell the allegedly defective product. Plaintiffs do not seriously dispute that Ford US did none of those things—the auto parts that allegedly injured Mr. Finerty were indisputably manufactured and distributed by Ford UK, a corporate subsidiary that all now agree is fully separate from its shareholder, Ford US. Plaintiffs instead principally argue that Ford US can be held liable *even though* it neither manufactured, nor distributed, nor sold any product alleged to be defective here. That contention is precluded by decades of this Court's and other New York courts' precedents.

Those precedents certainly do not support the Appellate Division's novel conclusion that a corporate parent can be held liable on a products-liability theory merely because it was—like *any* corporate parent—in the "best position to exert pressure" on a separate corporate subsidiary that actually manufactured the product. In every case plaintiffs cite on this point, the party that could "exert pressure" was itself the manufacturer, distributor, or seller of the product at issue. New York courts have routinely rejected the proposition that merely being a

corporate parent is enough to make the parent directly liable for defective products manufactured or distributed by its subsidiaries. Indeed, adopting the Appellate Division's rule would eviscerate the fundamental principle of corporate separateness in the products-liability context, because every corporate parent is in a position to exert tremendous pressure on their manufacturing or selling subsidiaries to alter product design or warnings, and thus every parent corporation would be subject to products liability for defective products manufactured and distributed by its separate corporate subsidiaries.

For these reasons, the decision below was incorrect, which suffices to answer the certified question—the decision below was *not* "properly made." But the Court should not stop there. Plaintiffs' principal basis for denial of summary judgment is evidence that they say shows Ford US's "control" of Ford UK. But such evidence would be relevant only if plaintiffs sought to hold Ford US *vicariously* liable for Ford UK's acts, and plaintiffs insist they are not seeking to establish vicarious liability. The question here instead is whether Ford US *itself* can be held *directly* liable for injuries allegedly caused by auto parts it neither manufactured nor distributed. Ford US's supposed "control" over Ford UK is irrelevant to that inquiry. As hard as plaintiffs try to conjure a genuine issue of material fact, the only fact that matters is not subject to reasonable dispute: Ford US did not manufacture, distribute, or sell the allegedly defective auto parts at

issue here. Ford US accordingly cannot be held liable, as a matter of law, for those alleged defects. This Court should direct the entry of summary judgment for Ford US.

I. AS A MATTER OF LAW, PRODUCTS LIABILITY IS LIMITED TO MANUFACTURERS, DISTRIBUTORS, AND SELLERS OF A DEFECTIVE PRODUCT

Plaintiffs' contention that there are genuine issues of material fact concerning Ford US's liability for injuries caused by the allegedly defective auto parts at issue here turns on a fundamental misunderstanding of this State's products-liability law. While plaintiffs acknowledge that a defendant cannot be held liable on a theory of products liability absent some "role in the chain of distribution," Pls. Br. 44, their entire argument for Ford US's liability here is based on the assertion that "New York law does not limit strict liability merely to a manufacturer, retailer, or seller or even to a party/distributor lower in the chain of commerce." Pls. Br. 34.[1] Plaintiffs cite no case for that proposition, because there is none. This Court's precedents, and New York law more generally, instead

[1] In the introduction of their brief, and again in a later footnote (Pls. Br. 54 n.34), plaintiffs say that they raise not only strict products-liability claims, but also a "separate" claim that Ford US "acted negligently by failing to warn Raymond Finerty of the hazards of its products." Pls. Br. 3. Under New York law, however, there is no difference between these claims: "Where liability is predicated on a failure to warn, New York views negligence and strict liability claims as equivalent." *Martin v. Hacker*, 83 N.Y.2d 1, 8 n.1 (1993).

strictly limit products liability to entities within the distribution chain, i.e., manufacturers, distributors, and sellers of a defective product. Ford US Br. 17–30.

A. Only Manufacturers, Distributors, Or Sellers Of A Defective Product Can Be Held Liable Under A Theory Of Products Liability

This Court has recognized that while "[m]anufacturers of defective products may be held strictly liable for injury caused by their products, regardless of privity, foreseeability or due care," that is a particularly "onerous" form of liability, the imposition of which "rests largely on considerations of public policy." *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 94–95 (1986). Those policy considerations limit products liability to entities within the distribution chain—i.e., manufacturers, distributors, and sellers of a defective product.

The Court has explained that the "basic justification for strict products liability … is to place responsibility for a defective product on the *manufacturer* who placed that product into commerce." *Semenetz v. Sherling & Walden, Inc.*, 7 N.Y.3d 194, 201 (2006) (emphasis added; quotation omitted). The Court has expanded the scope of liability beyond manufacturers only slightly, to reach certain sellers and distributors, based on the specific policy reason that "the burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained." *Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473

(2003); *see Joseph v. Yenkin Majestic Paint Corp.*, 261 A.D.2d 512, 512 (2d Dep't 1999) (it is "well settled that distributors of defective products, as well as retailers and manufacturers are subject to potential strict products liability" (quotation and alteration omitted)); *see also Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 585 (1987); *Sukljian*, 69 N.Y.2d at 95; Ford US Br. 17–19.

That policy reason obviously has no application *beyond* the entities that manufacture, distribute, and sell products. For precisely that reason, this Court has expressly *rejected* any rule that did not "place[] responsibility for a defective product on a party that did not put the product into the stream of commerce"—such a rule, the Court observed, would be contrary to the "basic justification" for strict products liability. *Semenetz*, 7 N.Y.3d at 201. New York appellate courts likewise have uniformly held that strict liability "may *not* be imposed … upon a party that is outside the manufacturing, selling or distributive chain." *Kane v. A.J. Cohen Distribs. of Gen. Merch., Inc.*, 172 A.D.2d 720, 720 (2d Dep't 1991) (emphasis added); *see Laurin Mar. AB v. Imperial Chem. Indus. PLC*, 301 A.D.2d 367, 367–68 (1st Dep't 2003); *Passaretti v. Aurora Pump Co.*, 201 A.D.2d 475, 475 (2d Dep't 1994); *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205, 211 (4th Dep't 1993); *Zwirn v. Bic Corp.*, 181 A.D.2d 574, 575 (1st Dep't 1992); *Watford v. Jack LaLanne Long Island, Inc.*, 151 A.D.2d 742, 744 (2d Dep't 1989); *Smith v. City of New York*, 133 A.D.2d 818, 819 (2d Dep't 1987); Ford U.S. Br. 19–20.

Indeed, with the exception of a single trial court decision, every New York case plaintiffs cite recognizes that an entity cannot be held liable on a products-liability theory if it neither manufactured, nor distributed, nor sold the defective product. *See Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 118 (1981) (manufacturer); *Anaya v. Town Sports Int'l, Inc.*, 44 A.D.3d 485, 485 (1st Dep't 2007) (seller and manufacturer); *Lowe v. Dollar Tree Stores, Inc.*, 40 A.D.3d 264, 264 (1st Dep't 2007) (indemnity action by toy seller against toy distributor); *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 59–60 (2d Dep't 2003) (indemnity action between distributors); *Perillo v. Pleasant View Assocs.*, 292 A.D.2d 773, 774 (4th Dep't 2002) (seller); *Bielicki v. T. J. Bentey, Inc.*, 248 A.D.2d 657, 659–60 (2d Dep't 1998) (manufacturers and sellers); *Nutting v. Ford Motor Co.*, 180 A.D.2d 122, 128–29 (3d Dep't 1992) (manufacturer and seller); *Brumbaugh v. CEJJ, Inc.*, 152 A.D.2d 69, 72 (3d Dep't 1989) (suit against a seller and "the sole conduit by which [the products] enter the marketplace," i.e., the distributor). And plaintiffs' lone trial court decision held a contractor—not a manufacturer, distributor, or seller—strictly liable because the court "reject[ed] [the] position that [the defendant] cannot be held strictly liable for plaintiffs' injuries because its activities were outside the stream of commerce," *Houston v. A.O. Smith Water Prods. Co.*, 2014 N.Y. Misc. LEXIS 4279 (Sup. Ct. Sept. 17,

2014)—a holding this Court has already concluded to be contrary to the "basic justification" for strict products liability. *Semenetz*, 7 N.Y.3d at 201.[2]

B. A Parent Corporation Cannot Be Held Liable For Defective Products Manufactured, Distributed, Or Sold By Its Separate Subsidiary

The rule that products liability is limited to manufacturers, distributors, and sellers of a defective product means that a parent corporation cannot be held liable on a products-liability theory when (as here, *see infra* Part III.A) a product was manufactured, distributed, or sold not by the parent itself, but by a separate corporate subsidiary. Ford US Br. 24–30.

That rule follows from the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable

[2] Plaintiffs also cite an Appellate Division decision rejecting a claim of products liability, but stating in dicta that a party that is "not formally involved as a manufacturer, designer or seller may be subject to liability for injuries caused by a defective product where, for example, it has had significant involvement in distribution or is capable of exercising control over quality." *Harrison v. ITT Corp.*, 198 A.D.2d 50, 50 (1st Dep't 1993). But that assertion directly relies only on precedent from *other* jurisdictions, unlike New York, that *do* allow products liability to extend beyond the chain of distribution. *See id.* (citing *Burkert v. Petrol Plus of Naugatuck, Inc.*, 216 Conn. 65, 77–82 (1990); *Torres v. Goodyear Tire & Rubber Co.*, 163 Ariz. 88, 93–94 (1990); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 409–12 (1979)). The *Harrison* court also added a "cf." cite to the Fourth Department's decision in *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205 (4th Dep't 1993), but it is hard to see how *Porter* supports the cited proposition, since the Fourth Department in that case expressly held that "[p]roducts liability cannot be imposed on a party that is outside the manufacturing, selling or distribution chain." *Id.* at 211.

for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)); *see* Ford US Br. 21–24. Plaintiffs do not dispute this general principle. And while a parent corporation can, of course, be held *vicariously* liable for the conduct of its subsidiary if there is a basis for piercing the corporate veil, plaintiffs admit there is no basis for veil-piercing here. Pls. Br. 23–27. Indeed, plaintiffs repeatedly insist that they only seek to hold Ford US *directly* liable for its *own* conduct. Pls. Br. 25–30. But direct liability of a corporate parent means liability "for its own actions," *Bestfoods*, 524 U.S. at 65, and in this context, the only "actions" that can create liability for a defective product are the manufacture, distribution, or sale of the product. Ford US Br. 23–24.

That principle also follows from the policy justifications for strict liability in the first place. Strict liability as against manufacturers, distributors, and sellers of a defective product is justified because "the burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained." *Sprung*, 99 N.Y.2d at 473. Yet the principle of corporate separateness means that owners of a corporation—including the ultimate parent of a subsidiary—"are normally not liable for the debts of the corporation, and … it is perfectly legal to

incorporate [a subsidiary] for the express purpose of limiting the liability of the [parent]." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993). Otherwise said, one of the principal reasons for forming corporate subsidiaries is to *avoid* treating the liabilities accrued by the subsidiary "as a cost of doing business" for which insurance must be purchased. Ford US Br. 24–27. Plaintiffs do not even attempt a response to this fundamental point.

It is no surprise, then, that New York courts have *unanimously* refused to hold corporate parents directly liable when the defective product was manufactured by their subsidiaries. *See Bova v. Caterpillar, Inc.*, 305 A.D.2d 624, 626 (2d Dep't 2003); *King v. Eastman Kodak Co.*, 219 A.D.2d 550, 551–52 (1st Dep't 1995); *Porter v. LSB Industries, Inc.*, 192 A.D.2d 205, 211 (4th Dep't 1993). Plaintiffs point out that the cases involve different facts, as all cases do, Pls. Br. 40–42, but what matters is that each rests on the fundamental *legal* principle that a parent cannot be held liable for product distributed by a wholly owned subsidiary because "[p]roducts liability cannot be imposed on a party that is outside the manufacturing, selling or distribution chain," and a parent corporation is not in the distribution chain of a product manufactured, distributed, or sold by its subsidiary. *Porter*, 192 A.D.2d at 211; *see Bova*, 305 A.D.2d at 626; *King*, 219 A.D.2d at 551–52. Tellingly, plaintiffs cannot cite a single New York case—not one—in

which a corporate parent was held liable when a defective product was manufactured, distributed, or sold by its separate corporate subsidiary.

The only relevant question here is whether plaintiffs adduced evidence showing that Ford US manufactured, distributed, or sold the products that allegedly injured Mr. Finerty. Because the Appellate Division decided that Ford US could be held liable as corporate parent even absent that showing, this Court should answer the certified question—whether the decision below was "properly made," R.1137—in the negative. *See infra* Part II. But plaintiffs further argue that there is a genuine dispute of material fact as to whether Ford US itself was within the distribution chain of the allegedly defective products. This Court should address and reject that argument, which is incorrect as a matter of law. Ford is entitled to judgment as a matter of law, and the Court should order that summary judgment be granted. *See infra* Part III.

II. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE BECAUSE THE APPELLATE DIVISION'S "BEST POSITION TO EXERT PRESSURE" TEST IS INCORRECT

The certified question must be answered in the negative because the Appellate Division contravened the fundamental principle just described—it held that Ford US could be held liable even though it did not manufacture, sell, or distribute the auto parts that allegedly injured Mr. Finerty. Indeed, the Appellate Division recognized that those parts were "manufactured and distributed" *not* by

Ford US, but "by Ford UK, its wholly owned subsidiary." R.1139. But while the court correctly "agree[d] that there is no basis for piercing the corporate veil," *id.*—and plaintiffs have again expressly acknowledged as much, Pls. Br. 23–27—it nevertheless concluded that Ford US could be held "directly liable" on a products-liability theory because a jury could conclude from the record facts that Ford US "was 'in the best position to exert pressure for the improved safety of products' or to warn the end users of these auto parts of the hazards they presented." R.1139–40 (quoting *Godoy*, 302 A.D.2d at 60–61).

The Appellate Division's "best position to exert pressure" test is both unprecedented and wrong. That formulation has never been used by any New York court as an independent basis for concluding that a particular party could be held liable on a products-liability theory. Rather, it is one of several *explanations* for why some parties *within* the distribution chain—i.e., some distributors and sellers—can in some circumstances be held liable for defective products they did not manufacture. Ford Br. 34. Specifically, this Court has explained that sellers that market a product "in the normal course of business" may be held liable in part because they are "most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation." *Sukljian*, 69 N.Y.2d at 95. Thus, the *Godoy* case on which the court below and plaintiffs rely (Pls. Br. 21, 34–

37) explains why "a *manufacturer, wholesaler, distributor, or retailer* who sells a product in a defective condition is liable for injury which results from use of the product," i.e., in part because that party may be in the "best position to exert pressure for the improved safety of products." 302 A.2d at 60 (emphasis added; quotation omitted). But *no* case holds that an entity *outside* the distribution chain can also be held strictly liable. *See supra* Part I.

There is certainly no precedent subjecting a corporate parent to products liability for a defective product manufactured and distributed by its subsidiary merely because the parent was in the "best position to exert pressure" on its subsidiary. Any such rule would be irreconcilable with the principle of corporate separateness fundamental to this State's corporate law. Ford US Br. 31–34. *Every* parent corporation can "exert pressure" on its wholly owned subsidiary, because *every* corporate parent and subsidiary "share a common purpose whether or not the parent keeps a tight rein over the subsidiary," and "the parent may assert *full control at any moment* if the subsidiary fails to act in the parent's best interests." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771–72 (1984) (emphasis added); *see Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) (parent corporation "necessarily exercise[s] a considerable degree of control over the subsidiary corporation").

It is thus well established that control alone cannot result in a parent's vicarious liability for its subsidiary's conduct. Rather, "the key to piercing the corporate veil" is to demonstrate "complete domination" of the subsidiary by the parent, yet even such "domination, standing alone, is not enough." *Morris*, 82 N.Y.2d at 141. And if even complete domination of the subsidiary by the parent is not enough, it necessarily follows that the mere ability to "exert pressure" on a subsidiary cannot justify subjecting the parent corporation to strict liability for its subsidiary's product manufacturing and distribution. Ford US Br. 31–34. If a parent corporation's ability to exert pressure on a subsidiary were enough, then the many New York cases rejecting corporate-parent liability for defective products manufactured or distributed by wholly-owned subsidiaries were all wrongly decided. *See supra* at 9–10.

Plaintiffs have no real answer to this fundamental flaw in the decision below. Their only response is that they seek to hold Ford US directly liable —i.e., for its own conduct—and not vicariously liable for the conduct of Ford UK. Pls. Br. 20. But that is the point—all agree that plaintiffs do not and cannot seek to hold Ford US vicariously liable for Ford UK's manufacture and distribution of defective auto parts, which means that Ford US can be held directly liable only if Ford US was itself within the distribution chain. *See supra* Part I. Yet the Appellate Division's "exert pressure" test would allow a jury to find Ford US

liable even if it was *not* in the distribution chain, merely because Ford US, like *any* corporate parent, was in a position to "exert pressure" on its wholly-owned subsidiary, Ford UK. That conclusion is contrary to this Court's clear precedent. Because the Appellate Division's decision was not "properly made," R.1137, the certified question must be answered in the negative.

III. FORD US IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO REASONABLE DISPUTE THAT THE ASBESTOS-CONTAINING PARTS TO WHICH PLAINTIFF WAS EXPOSED WERE MANUFACTURED AND DISTRIBUTED BY FORD UK, NOT FORD US

The correct legal question is whether Ford US manufactured, distributed, or sold the auto parts that allegedly injured Mr. Finerty. The question is easily answered: the undisputed record established that Ford US did none of those things. The Court accordingly should direct entry of summary judgment for Ford US. *See* CPLR § 5614 ("The order of the court of appeals determining an appeal upon certified questions shall certify its answers to the questions certified and direct entry of the appropriate judgment or order.")

A. There Is No Reasonable Dispute That Ford UK, Not Ford US, Manufactured And Distributed The Auto Parts That Allegedly Injured Mr. Finerty

Mr. Finerty alleges that he was injured through exposure to asbestos contained in "Ford" auto and tractor parts while working as a mechanic in Ireland.[3] Ford Br. 6–8. But as the undisputed record evidence establishes and as both courts below recognized (R.6; R.1139), none of those parts were manufactured, distributed, or sold by Ford US, which did not manufacture, produce, sell, or distribute *any* vehicles, tractors, vehicle parts, or tractor parts directly to dealerships, repair shops, or retailers in Ireland during the relevant time period. Any such products could have been obtained only from Ford UK or its Irish subsidiary. Ford US Br. 8.

[3] Plaintiffs' brief asserts in a footnote that "Mr. Finerty was exposed to asbestos from work he did, and work done in his presence, on Ford vehicles during his time in the United States beginning in the mid to late 1980s, and that Ford USA controlled the entry of these products into the stream of commerce." Pls. Br. 7 n.6. Part of this exposure allegedly occurred while changing brakes in a single, used "Ford" vehicle, and Mr. Finerty could not identify either the maker of the brakes he removed or of the brakes he inserted. R.147–48. The other part of this purported exposure allegedly occurred while observing a friend change brakes in a mechanic's garage. R.148–49. But there too, Mr. Finerty could not identify the maker of the brakes removed, and he identified the makers of the brakes inserted as "Abex, Bendix, [and] Mopar"—*not* Ford. R.148–49. It is no surprise, then, that neither of the lower courts suggested Ford US could be held liable based on this exposure. *See Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 504 (1989) ("In a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required.").

Plaintiffs do not dispute that Ford UK is a corporate entity separate from Ford US. And they cannot reasonably dispute that any auto parts to which Mr. Finerty may have been exposed in Ireland were manufactured and distributed by Ford UK. For example, John Sullivan, a knowledgeable Ford US employee, swore by affidavit that "[d]uring the time period at issue in this case, 1960s through 1980s, Ford [US] did not manufacture, produce, sell or distribute vehicles or parts directly to dealerships, repair shops or retailers in Ireland." R.263; *see also* R.261 (same from affidavit of Ford US employee Mark Taylor). Rather, Mr. Sullivan explained, "[d]uring the time period of the 1960s to the 1980s, dealerships in Ireland would have most likely acquired vehicles and parts for service from an entity whose formal legal name is Ford Motor Company Limited and, to my knowledge, has been informally referred to as Ford of Britain or Ford of the UK." R.336.

Plaintiffs never deposed Mr. Sullivan or any other Ford US witness as to these issues. Nor do plaintiffs cite any evidence to the contrary. Plaintiffs at one point seem to suggest that Ford UK's manufacturing plant at Basildon, England, was in fact owned by Ford US, Pls. Br. 12–13, but the documentary evidence (not to mention Ford US witness's unchallenged affidavits) squarely refutes that assertion. R.593 (internal Ford US document describing Basildon plant as part of "Ford of England"); R.607 (same); R.613 (describing "Basildon Tractor Plant" as

part of "Ford Motor Company, Ltd.," i.e., Ford UK); R.614 (same). The ostensibly contrary evidence plaintiffs cite is the affidavit of a former Ford UK employee submitted fifteen years ago in a different case. R.630–31. Not only is that affidavit demonstrably inadmissible hearsay,[4] but—more important—it *does not say that Ford US owned the Basildon plant*. The affidavit instead claims only that Ford US "controlled" Ford UK's operation of that plant, R.631, a point that is irrelevant to Ford US's *direct* liability for its *own* actions. *See infra* Part III.B. The only fact relevant to that question is whether Ford US itself manufactured, distributed, or sold the defective product. And Ford US did none of those things.

B. Plaintiffs' Evidence Of Ford US's Asserted "Control" Of Ford UK Is Irrelevant To Ford US's Direct Products Liability

As just explained, plaintiffs do not seriously dispute that the products that allegedly injured Mr. Finerty were manufactured and distributed by Ford UK, not Ford US. They instead principally rely on evidence that they believe shows, in the

[4] Plaintiffs say that Ford US "desperately urges this Court to disregard" this affidavit from a different case. Pls. Br. 12 n.9. Actually, it is irrelevant whether the Court considers the affidavit—Ford US is entitled to summary judgment either way. But it is indeed true that summary judgment for a defendant can be denied only based on "the tender of evidentiary proof in admissible form submitted by plaintiff," *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 554 (1980), and the affidavit is obviously inadmissible. Plaintiffs cite (Pls. Br. 12 n.9) *Fields v. Lambert Houses Redevelopment Corp.*, 105 A.D.3d 668, 671 (1st Dep't 2013), which nowhere even suggests that inadmissible affidavits can defeat summary judgment. *See id.* (explaining that evidence in the record can create a triable issue of fact even where an affidavit must be disregarded because it contradicted earlier-given deposition testimony).

trial court's words, that Ford US "exercised significant control over Ford England and Ford Ireland." R.9. Thus, for example, plaintiffs cite evidence that they say shows:

- Ford US acquired a 100% stake in Ford UK to "integrate and coordinate its products and [its] operations." Pls. Br. 8, 13 (quoting R.557).
- Ford USA's tractor division "worked in concert with its subsidiaries' overseas manufacturing plants." Pls. Br. 9 (citing R.585–86).
- Ford US "proposed establishing a 'new, wholly-owned company' in Europe to 'operate [a new] proposed tractor manufacturing facility.'" Pls. Br. 9–10 (quoting R. 596).
- "[C]entralized control and product design interchangeability were fundamental to Ford Tractor Operations' successful application of worldwide sourcing." Pls. Br. 11 (quoting R.624).
- Ford US appointed a manager "to oversee 'directing all Ford Tractor Operations [sic] product planning efforts.'" Pls. Br. 11 (quoting R.627–28) (alteration added by plaintiffs).
- According to Mr. Kelleher's affidavit, "Ford USA advocated a 'common concept of design and manufacturing' for all Ford tractors," and "'[a]ll concepts of design' were 'approved and controlled by'" Ford US. Pls. Br. 12 (quoting R.630).
- As to automobile parts, "regardless of the fact that the physical manufacturing of products occurred overseas, [Ford US's] own internal memorandum overtly states that the manufacturing of passenger vehicle and tractor parts occurred at 'Ford Motor Company [Ford USA] Overseas Manufacturing and Assembly Locations.'" Pls. Br. 14–15 (quoting R. 686–87) (second alteration added by plaintiffs).

The problem for plaintiffs is that this evidence of Ford US's purported control over Ford UK's manufacturing and distribution of allegedly defective products is irrelevant to Ford US's own *direct* products liability. As plaintiffs

themselves explain, they believe the cited evidence shows that Ford US "used its position and exerted its influence to *control* how the defective products were designed, manufactured, marketed, and sold" by Ford UK. Pls. Br. 37 (emphasis added). To be sure, "[c]ontrol of the subsidiary, if extensive enough, gives rise to *indirect* liability under piercing doctrine," but "*not* direct liability." *Bestfoods*, 524 U.S. at 68 (emphasis added); *see* Ford US Br. 41–44. Plaintiffs repeatedly (and properly) disclaim any effort to hold Ford US vicariously liable, Pls. Br. 23–27, but that is the only theory of liability to which their evidence of Ford US's alleged control could be relevant.

The Second Circuit recently applied that rule in another case involving Ford US. *See Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015). The plaintiffs in *Balintulo* alleged that Ford US "controlled [its] South African subsidiar[y] from the United States such that [Ford US] could be found directly—and not just vicariously—liable for [its] subsidiar[y's] conduct." *Id.* at 168. But in the absence of veil-piercing, the court explained, "holding Ford to be directly responsible for the actions of its South African subsidiary . . . would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities." *Id.*

Apart from incorrectly labeling the *Balintulo* decision "unpublished," Pls. Br. 27 n.17, plaintiffs seek to distinguish *Balintulo* on the ground that the plaintiffs

there were "specifically alleging that Ford USA 'controlled' its subsidiary's actions, which would require a piercing of Ford's corporate veil." Pls. Br. 27 n.17. Wrong. The *Balintulo* plaintiffs expressly alleged a "direct liability theory," not a "vicarious liability theory," *Balintulo* Pls. Br., No. 14-4101, 2015 WL 636101, at *33 (2d Cir. Jan. 28, 2015), which is why the court explained that the plaintiffs sought to hold Ford US "directly—and not just vicariously—liable" based on Ford US's "control[]" of its foreign subsidiary, *Balintulo*, 796 F.3d at 168. And the *Balintulo* plaintiffs' theory of direct liability was based on facts much like those on which the plaintiffs here rely, including that "Ford [US] maintained rigid control over South African subsidiaries and operations," that it "made the major decisions regarding product line, design, and manufacture of vehicles" in South Africa, and that it "made critical decisions about other aspects of operations in South Africa, including investments, policy, management (including the hiring of the managing director), … and parts procurement and supplies." *Balintulo* Pls. Br., 2015 WL 636101, at *16–*17 (quotations omitted). The Second Circuit rejected this theory precisely because evidence that Ford US "controlled [its] South African subsidiar[y] from the United States" can *only* support a theory of vicarious liability, and *not* a theory of direct liability. *Balintulo*, 796 F.3d at 168. Plaintiffs' evidence of Ford US's purported control of Ford UK fails for the same reason.

The rule could not be otherwise. The Supreme Court in *Bestfoods* expressly rejected a test for direct liability that turned on whether the parent corporation "actively participated in and exerted significant control over [its subsidiary's] business and decision-making," because that rule would result in the improper "fusion of direct and indirect liability"—if a parent's "direct liability . . . is to be kept distinct from derivative liability for the subsidiary's own operation, the focus of the enquiry must necessarily be different under the two tests." 524 U.S. at 67–68 (quotation omitted). Yet plaintiffs argue for Ford US's "direct" liability on nearly the exact terms *Bestfoods* rejected, asserting that Ford US should be held liable because it "used its position and exerted its influence" over Ford UK "to control how the defective products were designed, manufactured, marketed, and sold." Pls. Br. 37; *see also* Pls. Br. 20 (asserting that Ford US was not "properly distinct" from its subsidiaries).

Again, if a parent's control of its subsidiary is sufficiently extensive, then that control can result in the parent's vicarious liability. But short of veil-piercing, it is "*expected* that a subsidiary will be controlled by its parent; otherwise, the parent would have little reason for creating it." 9-120 Business Organizations with Tax Planning § 120.05[2][c] (emphasis added). And because a parent corporation "necessarily exercise[s] a considerable degree of control over the subsidiary corporation," *Beech Aircraft*, 751 F.2d at 120, holding a parent corporation like

Ford US liable for the type of "control" that all parent corporations exercise over their subsidiaries would effectively eradicate the principle of corporate separateness in products-liability cases.

This is not the first time that a plaintiff has attempted to rely on the same evidence of Ford US's "control" over Ford UK to hold Ford US liable for asbestos-related injuries. In *Smith v. Ford Motor Co.*, 2014 WL 8845355 (Pa. Com. Pl. Jan. 24, 2014), the plaintiffs sought to hold Ford US liable based almost entirely on the documents produced by Ford US *in this case*. R.954–64. The Pennsylvania courts concluded, however, that the *Smith* plaintiffs' argument based on those documents that "Ford Motor Company 'dominated and controlled' Ford of Britain by requiring approval of its officers and directors, supervising its operations and product lines, and approving certain aspects of its day-to-day business activities," was an attempt "to hold Defendant Ford Motor Company liable based on its *normal parent-subsidiary relationship* with Ford of Britain." *Smith*, 2014 WL 8845355, at *3 (emphasis added); *see also* R.940–41 (appellate court affirming this conclusion).

So too here. Plaintiffs cite the very same documents in an effort to hold Ford US directly liable. But as the *Smith* court recognized, those documents establish nothing more than a "normal parent-subsidiary relationship with Ford [UK]." By relying on this evidence, plaintiffs thus unwittingly confirm that the

record here does not suffice to establish Ford US's direct liability, because those documents do not and cannot show that Ford US *itself* manufactured or distributed the auto parts that allegedly injured Mr. Finerty.

C. Plaintiffs' Remaining Arguments Concerning Ford US's Trademark Ownership And Alleged Participation In The Design Of The Allegedly Defective Auto Parts Are Equally Meritless

Beyond their heavy reliance on Ford US's alleged control of Ford UK, plaintiffs also rest on two other arguments: (i) Ford US's role as a trademark holder of products manufactured and distributed by Ford UK, Pls. Br. 48–56, and (ii) Ford US's alleged role in the design of certain Ford UK products, Pls. Br. 56–60. Both arguments are meritless. Ford US Br. 35–41.

1. New York law is clear: "Products liability cannot be imposed on a party that is outside the manufacturing, selling or distribution chain, *and there is no reason to create an exception for licensors of trademarks*." *Porter*, 192 A.D.2d at 211 (emphasis added); *see Laurin*, 301 A.D.2d at 367–38 ("A party that is outside of the manufacturing, selling or distribution chain, including a trademark licensor, cannot be held liable for breach of warranty and strict products liability."); *Kane*, 172 A.D.2d at 720–21 (trademark licensor was not strictly liable for injuries caused by a defective product even though "[t]he licensing agreement gave [the seller] the right to use the [trademark licensor's] name and logo and to participate in the [licensor]'s advertising program."). Plaintiffs cite no other New York case

holding a party that neither manufactured nor distributed nor sold a product liable on a products-liability theory for its role as a trademark holder. And the only New York case that plaintiffs do cite, Pls. Br. 53—*Harrison v. ITT Corp.*, which declined to hold the defendant in that case liable, but stated in dicta that a party *could* be held liable even if was "not formally involved as a manufacturer, designer or seller," *id.* at 198 A.D.2d at 50—relied exclusively on cases from *other* jurisdictions that *do* extend products liability beyond the distribution chain, contrary to the established precedent of this Court. *See supra* n.2.

There is no reason to recognize such a new "trademark" exception for products liability here. The rule plaintiffs favor would automatically subject the parent corporation of nearly every multinational corporate family to strict liability for "branded" products it did not manufacture, distribute, or sell, contrary to the basic policy justifications for strict products liability and to the rules of limited liability and corporate separateness described above. Ford US Br. 35–39.

Plaintiffs argue that Ford US's status as trademark holder should lead to liability for essentially three reasons. None has merit. *First*, plaintiffs believe it relevant that Ford US "'prescribe[d]' that its subsidiaries use the Ford Trademark for all Ford products sold worldwide." Pls. Br. 52 (quoting R.634–35) (alteration added by plaintiffs). But Ford UK's use of the Ford trademark had nothing to do with Mr. Finerty's injuries, nor did the trademark have anything to do with whether

or not the products Ford UK manufactured and sold were defective. And the whole point of owning a trademark is to control its use by other entities, not just subsidiaries. Plaintiffs' view that Ford US's control over the "Ford" trademark should establish Ford US's products liability demonstrates just how outlandish their theory of liability is.

Second, plaintiffs quote an internal Ford US document asserting "Ford Motor Company's exclusive ownership of the FoMoCo mark and *right to control the quality of any product on which the mark is used*." Pls. Br. 53 (quoting R.639) (emphasis added by plaintiffs). But the federal trademark statute affirmatively *requires* trademark holders, on pain of abandonment, to "sufficiently police[] and inspect[] its licensees' operations to *guarantee the quality of the products … sold under its trademarks to the public*." *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (emphasis added); *see also Gen. Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 110 (2d Cir. 1986) (same). Again, plaintiffs' rule would require holding every trademark holder liable on a products-liability theory, contrary to settled New York law.

Third, plaintiffs say that "Ford USA controlled not only its product's trademark, but the design of the very packaging the trademark was printed on." Pls. Br. 54. In a footnote, plaintiffs acknowledge that what they mean is that the packaging required by the relevant trademark agreement "not only contained the

Ford name within a blue oval (Ford's worldwide trademark) but also specified that the product contained in such packaging was a Ford 'Genuine Part.'" Pls. Br. 54 n.33 (citing R.637; R.668). Plaintiffs say that this is relevant because part of plaintiffs' claim is that Ford US "was strictly liable for failing to adequately warn Mr. Finerty of the hazards associated with its defective products." Pls. Br. 54 (footnote omitted). But plaintiffs do not explain how the program specific to use of a trademark on products packaging helps establish a claim for failure to affix *product warnings* to the packaging. For one thing, failure-to-warn claims, like other products-liability claims, can be brought *only* against manufacturers, distributors, and sellers. *See Sukljian*, 69 N.Y.2d at 94–95. For another, plaintiffs do not and cannot allege that Ford US's trademark policy dictated in any way the use or non-use of *product warnings* by manufacturers and distributors of "Ford" trademarked products on the products' packaging. In fact, the trademark program (unsurprisingly) concerned only how the trademark was used. *See* R.634–39; R.647–68. Evidence concerning Ford US's entirely routine policing of its trademark is simply irrelevant to Ford US's liability for allegedly defective products that it neither manufactured, nor distributed, nor sold.

2. Plaintiffs similarly err in relying on evidence that they believe shows that Ford US participated in the design of products manufactured and distributed by Ford UK. Pls. Br. 56–60. As Ford US has already explained, no New York court

has subjected an entity outside the manufacturing and distribution chain to liability merely because the entity participated in the design of a defective product. That unprecedented theory would expand liability far beyond its existing limit, encompassing (for example) patent holders, individual inventors, and trade associations. Ford US Br. 39–41. Plaintiffs cite no case supporting that wildly expansive theory of products liability. Plaintiffs cite this Court's decision in *Sage*, but the designer in that case was *also the product's manufacturer*, *see Sage*, 70 N.Y.2d at 586–87, as plaintiffs themselves acknowledge, Pls. Br. 56 (describing defendant in *Sage* as "a manufacturer that also happened to be the designer of the defective product"). Plaintiffs also cite *Anaya*, but again the defendants there were the seller and manufacturer of the defective product. 44 A.D.3d at 485. Finally, plaintiffs cite this Court's decision in *Sprung*, but the premise of that decision was that the defendant was "in the business of manufacturing specialty sheet metal products, … the [defective] retractable floor was just such a product," and that "product was built for market sale in the regular course of the manufacturer's business." 99 N.Y.2d at 474.

Ford US, in contrast, did *not* manufacture the auto parts that allegedly injured Mr. Finerty. *See supra* Part III.A. Nor did Ford US distribute or sell those auto parts. That should be the end of the matter. This Court should direct summary judgment in favor of Ford US.

CONCLUSION

The certified question should be answered in the negative, and summary judgment should be entered for Ford US.

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Respectfully submitted,

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2291

JONATHAN D. HACKER
BRITTNEY LANE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ELLIOTT J. ZUCKER
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
600 Third Avenue
New York, New York 10016
(212) 593-8055

Counsel for Defendant-Appellant Ford Motor Company