To be Argued by:
James M. Kramer, Esq.
(Time Requested: 30 Minutes)

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Court of Appeals

STATE OF NEW YORK

RAYMOND FINERTY and MARY FINERTY,

Plaintiffs-Respondents,

- against-

FORD MOTOR COMPANY,

Defendant-Appellant,

-and-

ABEX CORPORATION, et al.,

Defendants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELMINARY STATEMENT

The Appellate Division, like Justice Heitler before it, correctly evaluated the substantial evidence in the record establishing that Defendant-Appellant Ford Motor Company ("Ford USA") played a direct role in placing defective products into the marketplace by participating in the products' manufacture, design, marketing, packaging,[1] and sale - actions which subsequently resulted in Plaintiff-Respondent Raymond Finerty's injury.

This same evidence prompted the Appellate Division to label Ford USA the "global guardian of the Ford brand," and rightly so. (R. 1139). Under a summary judgment analysis such as the lower courts performed, such facts are proper for a jury's consideration as to the ultimate question of Ford USA's role in placing defective products into the stream of commerce.

Throughout its brief, Ford USA insists repeatedly that products liability attaches only to those in the "chain of distribution," meaning those who manufactured, distributed or sold products. But Ford USA *was* in the chain of distribution in the very important sense that it made, through its own employees,

[1] Ford USA misconstrues the evidence with regard to its packaging requirements for its parts and accessories which explicitly required its subsidiaries to use specific labels – designed by Ford USA – containing specific words (though never containing a warning for the hazards of the defective products within). As fully explained, *infra*, this evidence goes far beyond the mere use of the "Ford" trademark, but is in fact an explicit mandate from Ford USA on how its products and accessories should be packaged so as to "commonize" the Ford brand.

the critical decisions about how the products would be designed, manufactured, packaged, marketed, and distributed. Put simply, the proper issue is not whether Ford USA controlled its subsidiary, but whether the evidence indicates (as it does) that Ford USA had a role in controlling the products Raymond Finerty ultimately used.

Respondent, however, ignores these decisive facts as well as the proper legal standard by asking this Court to take any factual determination on these issues away from the jury, and instead have it rule as a matter of law that, regardless of the evidence, Ford USA may not be held liable for its own actions as long as its subsidiary played a role in the manufacture and sale of "Ford" products.

In effect, Ford USA simply seeks to reframe the issue to support its factually-flawed conclusion by attempting to conflate direct liability with derivative liability. In reality, Respondent does not allege, and never has, that Ford USA was derivatively responsible for the acts of its subsidiary. Instead, Respondent's evidence points to Ford USA's direct liability for its role in the ushering of defective products into the marketplace, which by definition is a separate legal theory from derivative liability for a subsidiary's conduct.

Of course it is true, as Ford USA says, that a corporate parent is not always responsible for the acts of its subsidiaries. But such a party is undeniably

responsible for its own acts, and Ford USA cannot prevail in this case without overturning this very basic principle.

And overturning this principle, as Appellant attempts to do, would produce dangerous results. The ruling Appellant seeks would effectually immunize parties directly involved in the supply of defective products to consumers simply because their wholly-owned subsidiaries were constructed to facilitate the physical manufacture and sale of these products.

Appellant also chooses to ignore Respondent's other legal theory in this case, which claims that Ford USA acted negligently by failing to warn Raymond Finerty of the hazards of its products. This cause of action, of course, is separate and apart from Respondent's strict liability claims, but notably also involves Ford USA's own direct conduct, as opposed to the conduct of its subsidiary. Respondent's copious evidence, however, applies to both claims.

Plaintiff's legal theories are entirely consistent with New York's public policy to protect its residents from defective products, and to hold accountable those responsible for their direct actions or involvement in introducing a dangerous product to the unknowing public. Ultimately, as the lower courts have ruled, Ford USA's role in placing such products into the stream of commerce should be considered by a jury, a ruling Plaintiff respectfully requests that this Court affirm.

QUESTION PRESENTED

1. Did the Appellate Division correctly affirm the trial court's denial of Appellant's motion for summary judgment where Respondent's evidence presents triable issues of fact regarding Appellant's direct role in placing a defective product in the stream of commerce?

COUNTERSTATEMENT OF FACTS

That Plaintiff-Respondent Raymond Finerty was exposed to asbestos through his regular and long-time work with "Ford" brakes, clutches, and gaskets on cars and tractors is undisputed for purposes of this Court's review; indeed, Ford USA acknowledges this fact on the first page of its brief. Ford USA would instead have the Court ignore substantial evidence that is proper for a jury to consider at trial establishing that Ford USA was directly involved in placing these products into the stream of commerce, irrespective of its relationship with its subsidiary and its subsidiary's role in the manufacture and sale of these products. As shown, *infra*, it is this very evidence (which Appellant largely ignores in its brief) that Justice Heitler and the Appellate Division properly considered when applying New York product liability law to deny Appellant's motion for summary judgment.

A. Raymond Finerty

The record is extensive and undisputed that Plaintiff-Respondent Raymond Finerty worked on Ford[2] tractors and passenger vehicles both at his family farm and as a professional mechanic at McNamee Garage in Ireland[3] up through 1984 when he moved to New York.[4] (R. 110-13, 115, 117-20, 122-23, 132-37, 215-18).

While performing brake and engine repairs on these vehicles, Mr. Finerty recalled using products clearly packaged as "Ford" (R. 162-64), stating they were Ford "Genuine Parts." (R. 132, 222). He similarly recalled the packaging for tractor parts as containing a blue and white "Ford" label. (R. 216). Tractor clutches also came in packaging clearly labeled as "Ford," with the Ford lettering contained in an oval on the box. (R. 218). Similarly, Ford gaskets would have "the famous Ford logo" stamped on the packaging and the gasket. (R. 173).

Importantly, by a design instituted by Ford USA, "Ford" brake systems both foreign and domestic, (R. 679), used asbestos as the "major constituent" during the time Mr. Finerty was performing brake jobs and general repair on Ford vehicles. (R. 726, 729-37, 741), *see generally* pp. 15-16, *infra*.

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[2] As Mr. Finerty recalled, the most popular car manufacturer in Ireland during his time working as a mechanic was Ford. (R. 134).

[3] Mr. Finerty testified that the brakes, gaskets, and clutches that he installed were all manufactured by Ford, among others. (R. 135).

[4] Though his work at McNamee declined in later years, Mr. Finerty testified that he worked there as a mechanic performing this type of work until 1984. (R. 136, 142).

Mr. Finerty remained in New York and in good health until December 2008, when he first experienced the effects of what was soon diagnosed as peritoneal mesothelioma, an incurable cancer whose only recognized cause is exposure to asbestos. Mr. Finerty has continued to survive the devastating effects of this horrendous disease, awaiting his day in court.[5]

B. Ford USA's Exercise Of Direct Control Over The Design, Manufacture, Marketing, And Sale Of Its Products On A World-Wide Basis Rendered It In A Position To Exert Pressure To Cure Its Products' Dangerous Defects

1. Ford USA's Direct Role In The Implementation Of Ford's World-Wide "Commonization" Of Its Products, Which Included Manufacturing, Design, Marketing, and Sales Strategy

Respondent attached voluminous evidence in its opposition to Appellant's motion for summary judgment demonstrating Ford USA's executive and extensive role in the design, manufacture, and marketing of Ford UK's products which the trial court and the Appellate Division properly considered in denying Appellant's motion for summary judgment. This evidence raises clear issues of fact regarding Ford USA's role in the placement of Ford UK products into the stream of commerce, which, under New York law, requires denial of Appellant's motion.

[5] This case was originally scheduled for trial in the Fall of 2014, until Ford USA successfully sought a stay of this action pending its appeal.

Critically, Appellant does not dispute that Mr. Finerty was exposed to Ford products during the relevant time period,[6] but rather challenges the Appellate Division's affirmation that Ford USA had a substantial role in the design, development, and marketing of products manufactured and/or distributed by Ford UK. Appellant, however, does not even attempt to address this evidence in its brief, choosing instead to focus on an irrelevant legal theory that has twice been properly rejected.

Appellant's avoidance of the actual, applicable legal analysis notwithstanding, Respondent's evidence establishes questions of fact regarding Ford USA's direct role in placing Ford UK products into the stream of commerce, which ultimately reached Mr. Finerty in Ireland.

a. Ford's History

Ford Motor Company (Ford USA) was incorporated in Delaware on July 9, 1919, and has been conducting business in the State of New York since 1920. (R. 391-92). In the nearly 100 years since its incorporation, Ford established a world-

[6] It is equally undisputed 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. (R. 147-48, 189).

wide presence including many subsidiaries in other countries,[7] which, in Ford USA's own words, made it "one of the greatest business empires in the world." (R. 555).

In 1960, Ford USA sought a 100% acquisition of its subsidiary Ford UK specifically to meet Ford USA's "fundamental need" to "integrate and coordinate its products and operations." (R. 557). Contrary to its representations to Justice Heitler, the Appellate Division, and this Court, for revenue purposes, Ford has fully embraced the "unification" of its products "into a single market area" with the goal of becoming a "world manufacturer" "on a consolidated basis." (*Id.*).

In Ford USA's words, "product standardization among the American and European manufacturing companies" would result not only in cost savings, but would also allow Ford to follow the "trend toward commonizing certain products and sourcing components in Europe." (*Id.*). Ford USA's goal was thus clear: to acquire Ford UK in order to continue to "communize" Ford USA products throughout the world.

As the evidence shows, Ford USA's "product standardization plan" extended to the components of Ford tractors and passenger vehicles on a global scale.

[7] This world-wide presence included Henry Ford & Son Ltd. ("Ford Ireland"), which was first established in 1917 as a private venture of Ford founder Henry Ford, but soon "became a division of Ford Motor Company." (R. 556).

2. Ford USA's Direct Role In Designing And Manufacturing Its "World-Wide" Line Of Tractors

Contrary to Appellant's representation that it operated separately from a series of "subsidiaries," in reality, the facts illustrate that Ford USA acted as a global implementer and enforcer of its own world-wide product-standardization platform. Further, and importantly, Ford USA's tractor division was not a subsidiary at all, but was indeed a direct division of Ford USA that worked in concert with its subsidiaries' overseas manufacturing plants. (*See* R. 585-86). Such facts render Appellant's position arguing for a veil-piercing analysis wholly moot.

Beginning in 1961, Ford USA's Tractor Operations assumed "full responsibility for directing all Company tractor activities on a world-wide basis" using "centralized management." (R. 607).

One year later, Ford USA acknowledged that both Ford USA and Ford UK manufactured identical motors for their tractors, and were thus competing with each other in the marketplace. (R. 592). As a result, Ford USA intended to manufacture a new class of motors to "provide wider coverage of the market, greater interchangeability, and elimination of this duplication." (*Id.*).

To accomplish this, Ford USA announced its "plan to standardize the present U.S. and Ford of England tractor products," as well as a "world-wide manufacturing plan." (R. 587). To that end, Ford USA proposed establishing a

"new, wholly-owned company" in Europe to "operate the proposed tractor manufacturing facility." (R. 596).

Despite the fact that Ford USA intended to extend its operations in Europe, evidence indicates that Ford products made in England were a joint-manufacturing effort accomplished by both Ford USA and Ford UK. For example, Ford's "new family of engines" were "designed and developed in US by Engine Foundry Engineering" and similarly tractor components, including transmissions similar to those Mr. Finerty described, were to be jointly "designed & developed" by "US & England Engineers."[8] (R. 606, 592).

In 1965, Ford USA "appointed" its own executive, L.E. Dearborn, as Assistant General Manager of Sales and Marketing Operations responsible for "world-wide" marketing operations of the Ford Tractor Division. (R. 585). As a result of this new position within Ford USA, the "International Marketing Operations Manager" with "responsibility for United Kingdom Tractor Operations, European Tractor Operations and Overseas Tractor Operations" was to "report[] directly to Mr. Dearborn." (*Id.*). Additionally, Mr. Dearborn directly oversaw "Engineering," "Manufacturing," and "Product Quality" for the "Ford Tractor Division" of Ford USA. (R. 586).

[8] Importantly, Respondent claims exposure to asbestos from working on Ford tractor engines during his replacement of asbestos-containing head gaskets. (R. 110-13).

By 1972, Ford USA voiced its concern of the necessity of developing a "worldwide sourcing strategy" for its tractor operations. (R. 624). During a meeting on the subject, in a response to a question of how Ford Tractor's worldwide plan was functioning, Ford Tractor Operation "department heads" pointed out "that centralized control and product design interchangeability were fundamental to Ford Tractor Operations' successful application of worldwide sourcing." (*Id.*).

By 1973, Mr. Dearborn of Ford USA appointed an Assistant General Manager to oversee "directing all Ford Tractor Operations [sic] product planning efforts." (R. 627-28). Mr. Dearborn additionally appointed new positions to "direct the Process and Design Engineering Department" as well as to oversee the "Manufacturing Plans Manager" and the "Assistant General Manager – Manufacturing and Supply." (R. 628). Finally, Mr. Dearborn announced that the General Marketing Office (which was part of his own staff at Ford USA) would direct activities of, among other things, "Ford Tractor Operations – Europe." (R. 629).

The above evidence of Ford USA's direct role in the design, engineering, manufacture and marketing as head of Ford Tractor Operations is additionally consistent with and corroborated by the sworn testimony of 40-year Ford Tractor

employee, Patrick Kelleher. Mr. Kelleher testified in another matter[9] regarding his work in tractor design and manufacturing at the Ford Manufacturing Factory in Basildon, England. (R. 630). As Mr. Kelleher confirmed, Ford USA advocated a "common concept of design and manufacturing" for all Ford tractors. (*Id.*). Moreover, Mr. Kelleher confirmed that "all concepts of design" were "approved and controlled by Ford USA Troy, Michigan personnel." (*Id.*). Indeed, Mr. Kelleher had firsthand knowledge of this fact, due to his direct work with many employees of Ford's Troy, Michigan office, including Ford's Executive Engineer, Chief Design Engineer, and Tractor Division Vice President, who were present at the Basildon plant. (R. 631).

In fact, during his entire time with Ford's Tractor Manufacturing Facility, Mr. Kelleher never had contact with Ford UK; rather "[a]ll phone calls and contact were with Ford USA." (R. 630). Moreover, and importantly, Mr. Kelleher did not believe that Ford UK had any involvement with the operation of the Ford Tractor plant in Basildon at all, but rather that it was "Ford USA [that] controlled and

[9] Ford USA desperately urges this Court to disregard Mr. Kelleher's testimony, which itself raises significant issues of fact, merely because it was offered in conjunction with a separate lawsuit. To do so, however, would be to inappropriately disregard the wholly relevant substance of Mr. Kelleher's testimony, which directly addresses Ford USA's role in its tractor design, manufacture, and sale in England and Ireland, subjects unquestionably related to the instant appeal. Moreover, such an affidavit, combined with Respondent's other evidence, is completely appropriate as support in an opposition to a summary judgment motion. *Fields v. Lambert Houses Redevelopment Corp.*, 105 A.D.3d 668, 671 (1st Dep't 2013).

operated the construction and then the tractor manufacturing operations at the Basildon Factory." (R. 631).

3. Ford USA's Direct Role In The Design, Manufacture, And Marketing Of Ford Passenger Vehicle Products On A World-Wide Scale

Ford USA's integral role in its products' design, manufacture, and marketing was not limited solely to its Ford Tractor Operations division. Evidence similarly indicates that Appellant was directly involved in the same manner with its passenger vehicles.

Ford USA prided itself on its "closely knit" relationship with its 100%-owned subsidiary, Ford UK (which operated manufacturing out of Ford Ireland). (R. 554). Far more than acting as a mere parallel entity uninvolved in the actions of its subsidiaries, Ford USA was clear that it and it alone "must" give approval before "any" Ford UK "program or project" could be approved and implemented. (R. 553).

Ford USA acquired Ford UK with the specific goal of uniform Ford product integration wherever Fords were sold: "In view of the increasing trend toward uniformity of product in the automotive markets of the world . . . it is believed that a world manufacturer such as Ford Motor Company [Ford USA] must integrate and coordinate its products and its operations on a consolidated basis." (R. 557).

a) Product Manufacture

With its intent of product coordination and consolidation in mind, in 1965, Ford USA established its "Overseas Automotive Operations" group with the goal of "more concentrated management attention" to Ford's various overseas subsidiaries. (R. 576). The Vice President of Ford Overseas Operations reported "directly" to Henry Ford II, the Chairman of the Board of Ford Motor Company. (*Id.*).

Indeed, Mr. Ford himself laid out the management and departmental structure of overseas operations, which included a Marketing Office, a Product Planning Office, and Manufacturing Staff. (R. 576-77). The very person Ford USA appointed as a new Vice President sat at the top of the management chain, overseeing multiple international components including "Overseas Distribution Operations." (R. 579).

The evidence next shows that Ford USA was intimately involved in the manufacturing process worldwide, including which products were manufactured by Ford UK, and what products Ford Ireland was permitted to assemble. (R. 685-87). Ford USA's "Central Product Planning Office" sent its Overseas Managing Directors "approved product lines" for "overseas manufacturing locations." (R. 685). Importantly, regardless of the fact that the physical manufacturing of products occurred overseas, Appellant's own internal memorandum overtly states

that the manufacturing of passenger vehicle and tractors parts occurred at "Ford Motor Company [Ford USA] Overseas Manufacturing and Assembly Locations." (R. 686-87).

b) Product Design

As with the manufacture of its products, the evidence shows that Ford USA also played a key role in its products' design. Ford USA's Styling Office contained an "International Studio" "responsible for the design proposals relating to Ford of Britain . . . Tractor and other International Styling requirements." (R. 669). Such design specifications were to be used "concurrently or in the future" by both Ford USA and its subsidiaries, including "Ford Britain." (*Id.*).

Per Ford's Chairman of the Board, Henry Ford II, the Styling Committee was to follow "approved product programs" as dictated by Ford USA's Engineering and Product Planning Committee. (R. 671). As Mr. Ford wrote, a purpose of this Committee was to encourage more involvement "at the corporate level on product concepts and strategy at early stages in the development of product plans." (R. 671).

Part of Ford USA's involvement in product design included its proposed product design changes (as well as proposed manufacturing changes) specific to

Ford UK's "Ford Cortina," which Ford USA urged to include a fully-redesigned engine per Ford USA's "Policy and Strategy Committee." (R. 699-701).

Importantly, and consistent with Ford USA's overall "commonization" plan, Ford USA required "common components and design" between certain of its North American models and Ford UK-specific vehicle models. (R. 679-80). Those "common components" included brakes. (R. 679). Indeed, as part of Ford USA's marketing plan for such UK vehicles, advertising to UK and other European consumers boasted the redesign and implementation of "new and improved" "Ford" braking systems on a wide variety of its passenger vehicles. (R. 724).

Significantly, no matter the type, model, or place of manufacture of the passenger vehicle, Ford brake systems were designed to use asbestos-containing parts, and "[a]sbestos [was] the major constituent in brake linings that [were] used for *all* of Ford's passenger vehicles." (R. 726 (emphasis added), 741).

c) Product Marketing

The evidence also illustrates that Ford USA was particularly concerned with the standardization of it passenger vehicle parts on a global scale. For this reason, Ford USA sent its general managers notice that the "Chairman of the Board has approved a world-wide program" covering the use of "branding, packaging and merchandising parts and accessories" and prescribing "packaging and

merchandising procedures to be used with the program." (R. 634). Consequently, Ford USA required that boxes containing Ford parts around the world be stamped with Ford's logo, inscribed within an oval.[10] (R. 637).

Ford USA also specified that the packaging of its products and accessories be identical, regardless of whether they were used during the assembly of Ford UK[11] vehicles or Ford USA vehicles. (R. 638). Stated another way, Ford USA's domestic boxes (which were designed by Ford USA) were identical in every way to the boxes Mr. Finerty encountered in Ireland.

Importantly, the identical packaging that Ford USA required be used on parts assembled by Ford UK did not contain any warnings of the hazards of asbestos.[12]

A further result of Ford USA's "world-wide program" was marketing and advertising,[13] which stressed Ford's uniform "global service" to its passenger vehicles. Indeed, Ford USA appointed its employee, Jack Kemp, as General

[10] Notably, this is exactly what Mr. Finerty testified he recalled from his time handling boxes of Ford replacement parts during his time working on Ford vehicles in Ireland. (R. 218).

[11] The Ford-Dagenham plant manufactured Ford vehicles in England for use in Ireland.

[12] Though Mr. Finerty never saw any warnings, by sometime in the 1980s, Ford USA claims that it started to include warnings on some of its asbestos-containing products indicating that these "parts contain asbestos fibers and that breathing asbestos dust may cause serious bodily harm," indicating the feasibility of providing such a warning had Ford chosen to. (R. 748).

[13] As Ford USA dictated, the specific responsibility "for promoting the sale of Ford of Britain" was assigned to a Ford USA department located in Wixom, Michigan. (R. 1095).

Manager, Overseas Direct Markets Operations, and specified his authority to include "[r]esponsibility for promoting the sale of Ford of Britain." (R. 710).

To that end, Ford USA specifically chose the marketing firm Ford UK was to use for its advertising promotions. (R. 714-16). Ford USA then advertised in Great Britain that its "global service network" included "specially-designed Ford tools and large parts inventory." (R. 1112). Likewise, Ford USA boasted that its service team – located "anywhere you happen to be" – comprised "a great family of 9,420 authorized Ford dealers throughout the world, with specially designed Ford tools and full parts inventories." (R. 1111).

It is these facts[14] – comprising more than a substantial showing that Ford USA directed the implementation of a world-wide standardization program (which included product design, manufacturing, and packaging) of its passenger vehicle parts and tractor design and manufacture – that the trial court and Appellate Division properly considered when determining that significant issues of fact exist regarding Ford USA's role in placing defective products into the stream of commerce.

[14] Ford USA attempts to downplay these significant facts by accusing Respondent of failing to depose its witnesses with knowledge of Ford USA's corporate *structure*. However, the witnesses providing these affidavits appeared to have no knowledge of information relevant to the instant dispute on Ford USA's corporate *role* in the design, manufacturing, and marketing of products used by Ford UK. Equally as important, Respondent had no need to depose these witnesses considering the substantial evidence *in Appellant's own documents*, free of litigation spin, outlining Ford USA's role in its products' distributive chain.

ARGUMENT

This Court has long acknowledged that the doctrine of strict liability shifts the focus of whether a defendant knew or should have known that its product was dangerous to whether the danger inherent in the product, rendering it "defective," was a substantial contributing factor in causing injury. Once established, the defendant "in the best position to have eliminated those dangers must respond in damages." *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 123-24 (1981) (internal quotation omitted).

It is precisely the determination of whether Ford USA was "in the best position" to eliminate the dangers caused by its asbestos-containing brakes, clutches, and gaskets that is at issue in this matter, which the Appellate Division correctly examined when affirming the denial of Appellant's motion for summary judgment.

As the Appellate Division appropriately acknowledged, this evaluation is not a matter of corporate law and does not require that Respondent pierce Ford USA's corporate veil in light of evidence of Ford USA's substantial and direct role in the design, development and use of parts distributed by its wholly-owned subsidiary. (R. 1139). *See, e.g., United States v. Best Foods*, 524 U.S. 51, 55 (1998) (parent company may be held liable for its direct actions related to operations by subsidiary); *Brumbaugh v. Cejj*, 152 A.D.2d 69, 70 (3rd Dep't 1989) (defendant

sought to be insulated from liability as an "agent" of the manufacturer; Appellate Division held such a relationship "may insulate an agent from liability for its contract or agency actions, but not for its tortious conduct").

Appellant's faux concern that the Appellate Division's ruling will somehow result in "limitless liability" is completely unsubstantiated. As the evidence wholly supports, this ruling is not one that would in any way encourage an onslaught of liability against parent corporations whose conduct is properly distinct[15] from the actions of their subsidiaries. Rather, here there are clear questions of fact raised about Ford USA's direct involvement on multiple levels in placing defective products into the stream of commerce. Indeed, as case law fully supports, it is axiomatic that a plaintiff must demonstrate a party's own tortious conduct in order to hold them liable, regardless of whether they are a person, a corporation, or other entity. This case is no different, and affirming the Appellate Division's holding

[15] Ford USA argues, citing to *Banff Ltd. v. Ltd.*, 869 F.Supp. 1103 (S.D.N.Y. 1994), that every parent corporation will necessarily guide the affairs of its subsidiaries, and that it is subsequently no different. While in the most general terms, such a statement is true, the instant facts certainly challenge whether Ford USA took a mere "supporting role" rather than center stage in placing its products in the stream of commerce. Appellant's simplification of its role also ignores the *Banff* court's analysis. Unlike this case, the *Banff* plaintiff only brought a vicarious liability claim against a parent corporation, requiring a showing of actual control over the subsidiary, rather than simply the power to control it. *Id.* at 1109-10. Of note, however, that court also acknowledged that liability is proper where the plaintiff has presented evidence that "the parent has done more in relation to the infringing activity than simply be the parent." *Id.* at 1110. Though Respondent seeks to hold Appellant directly liable, the essence of the *Banff* decision still applies: a parent corporation's liability rests on its own conduct. In this case, that conduct is Ford USA's direct role designing, manufacturing, marketing, and selling its defective products.

will not result in the cataclysmic results Appellant threatens, but will rather simply affirm the legion of case law already governing in New York on this very issue.

As New York's pervasive and well-defined products liability law dictates, the proper legal analysis examines Ford USA's role in ushering products into the marketplace, and whether a jury may determine that Ford USA was in a position to eliminate such products' danger. *See, e.g.*, *Lowe v. Dollar Tree Stores, Inc.*, 40 A.D.3d 264, 264 (1st Dep't 2007) ("as among the parties to an action, a party/distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product");[16] *Brumbaugh*, 152 A.D.2d at 71 (liability should be fixed "on one who is in a position to exert pressure on the manufacturer to improve the safety of the product"); *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 60 (2d Dep't 2003) (even innocent conduits in the sale of a product may be held strictly liable "because liability rests not upon traditional considerations of fault and active negligence, but rather upon public policy considerations which dictate that those in the 'best position to exert pressure for the improved safety of products bear the risk of loss resulting from the use of the

[16] Notably, New York does not require that the actual manufacturer be the only party capable of being held strictly liable, but specifically allows liability for those parties with a close relationship with the manufacturer. *See, e.g., Lowe*, 40 A.D.3d at 264; *Brumbaugh*, 152 A.D.2d at 71.

products'" (quoting *Sukljian v. Charles Cross & Sons, Inc.*, 69 N.Y.2d 89, 95 (2009)); *Perillo v Pleasant View Assoc.*, 292 A.D.2d 773, 774 (4th Dep't 2002) (It is well settled that strict products liability extends to retailers and distributors in the chain of distribution even if they never inspected, controlled, installed or serviced the product (internal quotation omitted)).

As such, the Appellate Division, guided by products liability law and the summary judgment standard, properly considered Respondent's evidence in determining that "issues of fact exist whether Ford USA may be held directly liable as a result of its role in facilitating the distribution of the asbestos-containing auto parts on the ground that it 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)).

I. THE APPELLATE DIVISION PROPERLY REJECTED FORD USA'S ARGUMENT THAT ITS LIABILITY IS CONTINGENT UPON RESPONDENT'S PIERCING APPELLANT'S CORPORATE VEIL

In light of the evidence in this case, Ford USA's repeated cry for "corporate separateness" is unsurprising. As discussed, public policy does not support the corporate shell game Ford USA currently promotes, nor does applicable case law.

Undaunted, Ford USA attempts to shift the Court's focus to an area of law unrelated to the facts of the instant case by arguing that corporate law, and not New York's well-established products liability law, should dictate whether Ford

USA may be held strictly liable. Ford USA bases this argument on the inaccurate premise that its subsidiary, Ford UK, is the true tortfeasor, with Ford USA being a separate, innocent corporate bystander.

The impropriety of Appellant's argument, however, is apparent from its inception: Respondent is not attempting (nor has it ever attempted) to pierce Ford USA's corporate veil for the simple reason that Respondent is not attempting to hold Ford USA liable for its subsidiary's acts. As the Appellate Division acknowledged, Respondent's evidence demonstrates that Ford USA had a direct role in facilitating the distribution of the defective products that ultimately injured Raymond Finerty, and as such, the analysis Appellant has on three occasions attempted to apply is an improper one. A review of the relevant law fully supports the Appellate Division's conclusion.

A. Derivative Liability – Requiring That Plaintiff Pierce Appellant's Corporate Veil – Is Not Necessary Or Appropriate In Light Of Evidence Of Ford USA's Direct Involvement In Placing Defective Products In The Stream Of Commerce

Corporate jurisprudence has long acknowledged the need to distinguish derivative liability cases from those in which "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel or management," in light of evidence that "the parent is directly a participant in the wrong complained

of." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 207-08 (1929).

As the Appellate Division and Justice Heitler's rulings correctly acknowledge, one need look no further than Respondent's evidence to determine that Respondent is not seeking, and has not sought, derivative liability in this case. But without addressing Respondent's evidence at all, Ford USA barrels forth with a legal analysis inapplicable to the instant facts that would require the inaccurate factual determination that Ford USA was completely divorced from the design, marketing, sale (and, for its tractors, the manufacture) of defective products. Ford USA cannot, however, use a self-serving legal analysis to nullify the evidence in this case, a point not lost on the Appellate Division, and rightly so.

When advancing the theory that a parent corporation controlled the actions of its subsidiary such that the parent should be the true tortfeasor, a plaintiff must "pierce the corporate veil" through proof that "1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and 2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" *Conason v Megan Holding, LLC*, 25 N.Y.3d 1, 18 (2015).

This form of liability, however, focuses on the actions or torts of the subsidiary, and not those actions or torts directly committed by the parent

corporation. 14 N.Y. Jur. Business Relationships § 41 (As a general rule, a parent corporation "will not be held liable for the contractual obligations, torts, or acts" of its subsidiary); *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152 (1980) (Parent company not responsible for the acts of its subsidiary, acquired subsequently through merger, that designed and manufactured a defective product that injured plaintiff).

From a business perspective, "corporate separateness" indeed makes sense as it promotes the expansion of smaller divisions without fear of liability for every tortious act that may occur at those separate divisions.

The same cannot be said, however, when evidence illustrates that the parent company itself played a direct role in a tortious act. In such a scenario, the "acts or torts of another" from which a parent would seek protection do not apply. Despite Appellant's protestations, this scenario is not the focus of the instant case, a fact duly acknowledged by both the Appellate Division and the lower court.

Indeed, the Appellate Division is not alone in its determination that a parent's direct actions may subject it to liability. The United States Supreme Court's ruling in *United States v. Best Foods*, 524 U.S. 51, 55 (1998), likewise determined that where "a corporate parent actively participate[s] in, and exercise[s] control over, the operations of" a facility owned by a subsidiary, the corporate parent "may be held directly liable in its own right."

In that case, the plaintiff brought a CERCLA action for pollution caused by a chemical plant in the 1960s which was owned by a subsidiary corporation, but whose parent corporation actively participated in and exercised control over the operations of the subsidiary's facility. *Id.* at 55-57. Though defendants there, like Ford USA here, argued that plaintiff was required to pierce the corporate veil to find the parent liable, CERCLA contains a provision allowing the "operator" of a facility (*i.e.*, the parent corporation) to be held directly liable for its own actions. *Id.* at 65. To determine whether the parent corporation "operated" the facility such that it could be directly liable, the Supreme Court (like the Appellate Division in this case) turned to the evidence which detailed the parent's active participation in the plant's operations via its director, as well as issuing directives to the plant, and its involvement in environmental issues at the plant. *Id.* at 72.

The Supreme Court's review of the evidence thus rejected the type of argument Appellant raises herein (that only vicarious liability should apply), and instead concluded (as the Appellate Division ruled in this case) that the facts were sufficient "to raise an issue of [the parent's] operation of the facility through [its director's] actions," thus indicating the United States Supreme Court's willingness to hold the parent corporation liable for its own actions. *Id.*

The United States Supreme Court's analysis under CERCLA is no different than what the Appellate Division conducted in this case, and is precisely the

analysis this Court should undertake under New York law.[17] Indeed, as will be shown, New York law is explicit that the type of evidence Respondent has put forth may be considered when holding a parent corporation directly liable.[18]

B. The Appellate Division Correctly Applied Controlling New York Law To Determine That A Parent Corporation May Be Held Directly Liable For Its Own Actions, Regardless Of The Acts Of Its Subsidiary

In determining whether to hold a party strictly liable for a defective product, New York courts look to whether the party acted to place the product in the stream of commerce. *See, e.g., Brumbaugh v. Cejj*, 152 A.D.2d 69, 70-71 (3dep't 1989)

[17] Defendant cites the Second Circuit's unpublished decision in *Balintulo v. Ford Motor Co.*, 2015 WL 4522646 *1 (July 27, 2015), to somehow stand for the proposition that a parent company cannot he held directly liable for its foreign subsidiary's torts. In reality, this case addresses the inability to bring suit in the United States for a corporation's conduct as a violation of another sovereign nation's laws. Importantly, the court's review of the complaint in that case revealed that Ford USA only generally supervised its subsidiaries in South Africa, which was not sufficient to establish the "aiding and abetting liability" allowed under the Alien Tort Statute, which was the basis for that plaintiff's criminal allegations against Ford. *Id.* at *16. Moreover, that plaintiff was specifically alleging that Ford USA "controlled" its subsidiary's actions, which would require a piercing of Ford USA's corporate veil. *Id.* The instant Plaintiff, by contrast, makes no such allegation of "control" in an attempt to hold Ford USA liable for Ford UK's conduct. Rather, Plaintiff's evidence demonstrates Appellant's *direct* control over its products, including their packaging specifications, design, and marketing. Ford USA's role is thus separate and distinct from Ford UK's, and Plaintiff's claims are not made under a vicarious or derivative liability theory.

[18] In a desperate attempt to twist this holding into one favorable for Appellant, Ford USA misinterprets the holding in *Best Foods* as a requirement of derivative liability to hold any parent corporation strictly liable for acts of its subsidiaries. Ford USA acknowledges, however, (as it must) that the Supreme Court also held that the difference between direct liability and derivative liability are two separate inquiries governed by two separate tests. 524 U.S. at 67-68. Therefore, the "question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary." *Id.* at 68 (internal citation omitted). Respondent's evidence is precisely the type demonstrating Ford USA's active participation in the design, manufacture, marketing and sale of its products that meet the requirements for direct liability, and derivative liability thus need not be shown.

(Recognizing that the pool of potential defendants in strict products liability actions has been judicially expanded to include "any one responsible for placing the defective product in the marketplace" in a case where a manufacturer's sales agent was found to be so substantially involved in placing a product into the stream of commerce that it was a "mandatory link in the distributive chain" and thus could be found strictly liable); *see also Semenetz*, 7 N.Y.3d 194 (2006) (refusing to extend strict liability to corporate successors since doing so would place "responsibility for a defective product on a party that did not put the product into the stream of commerce").

Moreover, New York courts do not limit strict liability based on corporate structure, as Defendant would have this Court do,[19] but rather on the extent of the party's role in placing the product into the stream of commerce. *See Sukljian*, 69 N.Y.2d at 95 (acknowledging that the extent of a party's role in the sale of a product correlates with that party's "special responsibility for public safety"); *Nutting v. Ford Motor Co.*, 180 A.D.2d 122, 128 (3d Dep't 1992) (determining whether a party's role in placing a product in the stream of commerce is peripheral

[19] Importantly, even a case Defendant relies upon in its brief acknowledges that a parent corporation may be held strictly liable for its direct conduct if the evidence supports such liability. In *Porter v. LSB Industries*, 192 A.D.2d 205 (4th Dep't 1993), the plaintiff sued a parent corporation for injuries caused by its subsidiary's defective lathe. While that plaintiff (unlike the instant Plaintiff) did not set forth sufficient evidence to create a triable issue of fact that the parent corporation was involved in the chain of distribution, the fact remains that the Fourth Department fully explored the parent's possible direct liability when ruling on summary judgment. *Id.* at 215. The instant Plaintiff, by contrast, has met his burden under the very same legal theory as was explored in *Porter*.

rather than extensive is key in furthering the policy considerations underlying strict products liability). *See Brumbaugh*, 152 A.D.2d at 70 (defendant's attempt to characterize itself as an agent, thereby triggering agency law, wholly by the Third Department, recognizing that "[t]he law that determines the use is one of products liability . . . not one of agency relationship").

Subsequently, New York courts have found that where a defendant's activities "involve it so substantially, if not pervasively, in introducing" a product into the stream of commerce "it is fair to say that it is a mandatory link in [the] distributive chain; hence, it may properly be held liable in strict products liability." *Brumbaugh*, 152 A.D.2d at 72; *Houston v. A.O. Smith Water Prod. Co.*, 2014 N.Y. Misc. LEXIS *1, *3-4 (Sup. Ct. Sept. 17, 2014) (Heitler, J.) (rejecting the argument that defendant was outside the stream of commerce where evidence illustrated that defendant, a contractor, specifically licensed and maintained a strong relationship with the manufacturer of an asbestos-containing insulation spray).

Respondent's evidence strongly illustrates Ford USA's direct role and mandatory link in the distributive chain of its defective brakes, clutches, and gaskets which the Appellate Division properly considered. This evidence includes Ford USA's own documentation and admissions regarding its direct control over the design, marketing, supply and indeed the "standardization" of its parts on a

global scale, including the "branding, packaging and merchandizing" of these parts. (R. 576, 1088, 1096, 1101-03).

Critically, Respondent's evidence also includes proof that Ford USA was the "central manag[er]," "worldwide manufacturer," and marketer of its brand of tractors. (R. 607, 587, 629). Through its apparent avoidance of the evidence in this case, Ford USA would have this Court ignore these facts with the end result of sidestepping its clear liability under New York law. *Sukljian*, 69 N.Y.2d at 94 ("Manufacturers of defective products may be held strictly liable for injury caused by their products, regardless of privity, foreseeability or due care").

Respondent's evidence reveals that Defendant's role in placing defective products in the stream of commerce was hardly peripheral; indeed, this copious evidence demonstrates just the opposite – that Ford USA was an active and direct participant in the design, marketing, distribution, and manufacture of Ford "Genuine Parts" on a world-wide scale. Under New York law, the Appellate Division's analysis of Ford USA's role in the distributive chain was proper, rendering a showing of derivative liability under corporate law unnecessary. The Appellate Division's decision should therefore be affirmed.

II. THE APPELLATE DIVISION PROPERLY APPLIED THE STANDARD FOR SUMMARY JUDGMENT TO AFFIRM THE DENIAL OF APPELLANT'S MOTION SINCE RESPONDENT'S EVIDENCE IS SUFFICIENT TO REQUIRE A TRIAL ON THE FACTUAL ISSUE OF FORD USA'S ROLE IN THE USHERING OF DEFECTIVE PRODUCTS INTO THE MARKETPLACE

As New York law dictates, a party's role in placing a defective product in the stream of commerce is a key determination in whether that party may be held strictly liable. Such a determination is consequently contingent upon the facts of any given case.

The Appellate Division in the instant case, like Justice Heitler before it, fully evaluated the extensive record when naming Ford USA as the "global guardian of the Ford brand, having a substantial role in the design, development, and use of the auto parts distributed by Ford UK." (R. 1139). Such an evaluation of the record was completely proper. *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205, 209-10 (1st Dep't 1996) ("[A] motion for summary judgment, irrespective of by whom it was made, empowers the court, even on appeal, to search the record and award judgment where appropriate" (internal quotation omitted)).

Equally proper, as discussed, *supra*, was the Appellate Division's application of well-established law regarding strict products liability. Despite this fact, Ford USA incorrectly claims that the Appellate Division's ruling was somehow "novel."

Ford USA attempts to skirt the summary judgment standard as well as the jury's role at trial by now claiming that it is "undisputed" that Ford UK "manufactured and distributed" the products Mr. Finerty was exposed to as if to suggest that no *other* entity could play a role in the manufacture and distribution process. Such an implication is not only directly disputed by the record, but also disregards New York law in determining what roles parties may play in ushering defective products into the marketplace to be found strictly liable in the chain of distribution. *See Brumbaugh*, 152 A.D.2d at 70-71 (The pool of potential defendants in strict products liability actions has been judicially expanded to include "any one responsible for placing the defective product in the marketplace," not merely manufacturers).

Indeed, at the very least, the record is quite clear that Ford USA was very much a participant in the process, and the Appellate Division properly evaluated this record when rendering its decision.

A. New York Law Adopts The Public Policy Concern That A Party In A Position To Exert Pressure To Improve A Defective Product's Safety May Be Held Strictly Liable

Ford USA ignores the facts of this case and instead creates the incorrect perception that exposing a parent corporation to possible liability under these facts somehow violates public policy. But by failing to acknowledge the proper legal standard at issue in this case, Ford USA ignores (and asks this Court to ignore) the

actual public policy concern existing in cases where individuals are injured as a result of a party's placement of a defective product in the stream of commerce: "that the consumer . . . is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products." Restatement (Second) of Torts § 402A cmt. c.

This Court has in turn expressed two principal policy considerations for imposing strict liability upon parties toward the top of the stream of commerce:

> Where products are sold in the normal course of business, sellers, by reason of their continuing relationship with manufacturers, 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; additionally, by marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.

Sukljian v. Charles Ross & Son Co., 69 N.Y.2d 89, 95 (2009);[20] *see also Brumbaugh*, 152 A.D.2d at 71 (liability should be fixed "on one who is in a position to exert pressure on the manufacturer to improve the safety of the product"); *Bielicki v. T.J. Bentey, Inc.*, 248 A.D.2d 657, 659 (2d Dep't 1998) ("It is well settled that distributors of defective products, as well as retailers and

[20] Appellant cites to *Sukljian* for the proposition that strict product liability should not apply to the occasional seller of a product. That case, which is certainly inapposite to the facts of the case at hand, involved a defendant who occasionally sold used surplus equipment "as is" at a price less than 1% of the original purchase price. 69 N.Y.2d at 93.

manufacturers, are subject to potential strict products liability." (internal quotation omitted)).

It is directly due to these public policy considerations that New York law does not limit strict liability merely to a manufacturer, retailer, or seller[21] or even to a party/distributor lower in the chain of commerce; rather, public policy dictates that the "position to exert pressure" to better ensure the safety of a product belongs to "the party who can most efficiently control risk and distribute the attendant costs." *Lowe*, 40 A.D.3d 264; *Nutting v. Ford Motor Co.*, 180 A.D.2d 122, 128-29 (3d Dep't 1992) (recognizing policy considerations underlying strict products liability include a party's ability to exert pressure on the manufacturer for the improved safety of the products).[22]

In making its analysis, the Appellate Division properly relied on the Second Department's decision in *Godoy v. Abamaster of Miami, Inc.*, which focused on which entities in the marketing of a defective product were in the best position to exert pressure for the improved safety of products. 302 A.D.2d 57 (2d Dep't

[21] Appellant appears to argue that, under strict products liability, only the manufacturer or ultimate seller may be held liable. Defendant's argument is clearly contrary to longstanding strict liability principles finding that the absence of the original manufacturer or producer does not deprive an injured party of a cause of action. W. Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 816 (1966).

[22] Ford USA has made the incredible suggestion that it cannot seek indemnification from its European subsidiary due it its inability to obtain jurisdiction over Ford UK. Putting to one side the fact that Ford USA itself owns 100% of its subsidiary, nothing prevents Ford USA from pursuing this avenue against Ford UK in either Ireland or Britain, where jurisdiction cannot justifiably be contested.

2003). In *Godoy*, a strict products liability action, a retailer (Abamaster) that bought a defective meat grinder that caused the plaintiff's injury sought indemnification from the wholesale distributor of the meat grinder (Carafel). *Id.* at 58.

At trial, the plaintiff introduced evidence that, though Carafel did not manufacture or design the meat grinder, Carafel regularly ordered and shipped the meat grinders to Abamaster without opening or inspecting them. *Id.* at 59. The jury subsequently found Carafel strictly liable as a distributor in the chain of distribution. *Id.*

On appeal, the Second Department determined that, in light of the fact that strict liability "advances the policy of encouraging improved product safety because, by reason of their continuing relationships with manufacturers, sellers and distributors are in a position to exert pressure on them to produce safe products," "the upstream distributor" Carafel was "closest to the manufacturer (at the top of the chain of distribution)," and therefore "in the best position to further the public policy considerations underlying the doctrine of strict products liability." *Id.* at 63. *See also Promaulayko v. Johns Manville Sales Corp.*, 116 NJ 505, 515 (N.J. 1989) (wherein the New Jersey Supreme Court determined, consistent with the same public policy New York adopts, that an upstream intermediate distributor of asbestos "was better positioned 'to put pressure on' the producer to make the

product safe" as a result of that distributor's being closer than the ultimate seller to the producer of the asbestos, and thus responsible for indemnifying the ultimate seller down the chain).

The Appellate Division's decision in the instant case advances these same public policy concerns. Specifically, the decision adheres to public policy by properly determining that issues of fact exist regarding whether Ford USA's "role in facilitating the distribution" of its asbestos-containing auto parts placed it "in the best position to exert pressure for the improved safety of products." (R. 14 (quoting *Godoy*, 302 A.D.2d 57, 60-61)).

In so holding, the Appellate Division appropriately considered Respondent's extensive evidence (which Ford USA neither addressed before the First Department nor before this Court) illustrating that Ford USA played a direct role[23] in the "world-wide" design, distribution, and marketing of its asbestos-containing auto and tractor parts, placing it in a position of influence.

[23] A party's ability to be held liable for its direct role in tortious conduct is a long-acknowledged legal principle that New York has adhered to regardless of other entities' roles in the same conduct. Such acknowledgment was made by this very Court in a case cited by Appellant, *Mondello v. New York Blood Ctr.*, 80 N.Y.2d 219 (1992). There, this Court examined whether a hospital could be held vicariously liable for a separate blood center's use of HIV-infected blood. *Id.* at 223. Just as the Appellate Division did in this case, this Court looked to the party's individual acts, finding "no reason why each should not answer for its own wrongdoing under the general tort principle of personal responsibility, not one for another's wrongdoing under vicarious liability[.]" *Id.* at 229. It is precisely the individual acts of Ford USA that Respondent seeks to hold it accountable for.

Ford USA's attempt to distinguish *Godoy* as only applying to "non-manufacturers within [the] distribution chain" and not applicable at all to "an entity outside the distribution chain" (App. Br. at 34) simply begs the question. Indeed, Appellant baldly suggests, despite overwhelming evidence to the contrary, that it is outside of any conceivable distributive chain.[24] However, in reality, the facts herein are much stronger than those presented in *Godoy*, where the defendant was found to be within the distribution chain, for determining what position Appellant was in to "exert pressure for the improved safety of products." *Godoy*, 302 A.D.2d at 60-61.

While the defendant in *Godoy* was found liable merely because it was in a position to "exert pressure" on the manufacturer's decisions, Ford USA actually *made* those decisions, which were imposed upon its subsidiary. Indeed, Ford USA was not simply "in a position" to influence these decisions – as every parent may be as to every subsidiary – it used its position and exerted its influence to control how the defective products were designed, manufactured, marketed, and sold.

As the evidence indicates, Ford USA acted as the engineer of Ford's campaign to achieve "product standardization among the American and European manufacturing companies" by creating and running its Overseas Automotive

[24] Defendant's supposition, however, ignores the very basis for summary judgment, which is to determine whether factual issues exist appropriate for a jury's consideration. CPLR 3212(b) (a motion for summary judgment "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact"). Plaintiff's evidence clearly renders Ford USA's role in the distributive chain a triable issue.

Operations for its passenger vehicle operations. (R. 558, R. 576). Ford USA likewise directed "all Company tractor activities on a world-wide basis" (R. 607), including the tractor division's Engineering, Marketing, and Product Quality departments. (R. 586).

Such evidence at a minimum creates questions of fact regarding Ford USA's direct role in the design, distribution, marketing (and, in the case of Ford tractors, the manufacture) of asbestos-containing parts, while also complying with New York's important public policy concern of holding those parties accountable who are in a position to influence the safety of their products. *See Lowe v. Dollar Tree Stores, Inc.*, 40 A.D.3d 264, 264 (1st Dep't 2007) (affirming New York's public policy concern of holding those parties accountable who are in a "superior position to exert pressure to improve the safety of the product").

As discussed, *supra*, Ford USA's proposed shift from applying a standard focused on consumer safety to one of corporate protection clearly does not perpetuate New York's public policy concerns, nor does it comply with the controlling precedent in products liability actions. As such, Defendant's arguments must be rejected.

B. Even The Cases Ford USA Cites Condone Examining The Factual Record To Determine A Party's Role In Placing Defective Products In The Stream Of Commerce

Rather than apply the actual public policies pertaining to products liability actions, Ford USA instead focuses on a legal theory that neither Respondent nor any court presiding over this case has advanced or accepted: that strict products liability (which is concerned with ensuring that safe products are placed into the stream of commerce) may only attach to Ford USA upon Respondent's piercing of its corporate veil.

In effect, Ford USA establishes an incorrect premise that, in order to hold it responsible for its own direct actions related to products manufactured and sold by its wholly-owned subsidiary, Respondent is required to pierce the corporate veil. In creating this "straw man," first at the trial level and then again at the Appellate Division and now here, Ford USA triumphantly claims that Respondent has failed to pierce this imaginary veil and thus cannot prevail in holding Ford USA liable. However, Respondent has never, neither before the lower courts or now, attempted to hold Appellant liable under this theory, nor have the courts below required such a theory.

The reason for the courts' rejection of Appellant's argument is clear: New York law in no way requires a veil piercing in a case such as this, where factual issues exist regarding Ford USA's direct role in placing a defective product into

the stream of commerce, as opposed to its derivative role in controlling a subsidiary's actions.

The cases Ford USA misapplies to support its faulty proposition in fact lend further support for the Appellate Division's decision in this case.

For example, Appellant points to *Porter v. LSB Industries, Inc.*, 192 A.D.2d 205, 207-10 (4th Dep't 1993), where Ford USA ignores the Fourth Department's relevant analysis of the facts of that case (as it does in the instant case), and instead selectively cites to that court's vicarious liability analysis, which the instant plaintiff does not allege. Importantly, one of the *Porter* plaintiff's theories involved the defendant's direct conduct in placing its defective product in the stream of commerce. *Id.* at 207. That court, just like the Appellate Division in this case, then looked to the record to determine whether that defendant was involved in "the design, manufacture, distribution, marketing, sale, warranting, maintenance, or repair" of the defective product in question. *Id.* at 215.

Though the evidence in that record was not enough to establish a triable issue,[25] the fact remains that the Fourth Department's analysis regarding the defendant's role in placing its product in the stream of commerce looked to the

[25] The record in *Porter* establishes that the defendant "was not involved in the design, distribution, marketing, sale, warranting, maintenance, or repair" of the defective product in question. 192 A.D.2d at 215 (emphasis added). Instead, the defendant's sole role was as owner of the trademark that was on the defective product. The Fourth Department held that the defendant could not be liable "merely because it is the registered owner of the trademark" absent evidence of some other form of "involvement" with the product. *Id.*

facts and whether they created issues for a jury. *Id.* The Appellate Division in the instant case performed a similar – and correct – analysis here, where Respondent's evidence of Ford USA's role is substantial.

Ford USA's reliance on *Bova v. Caterpillar, Inc.*, 305 A.D.2d 624 (2d Dep't 2003) suffers from a similar misinterpretation of that court's analysis. Again, the Appellate Division examined the plaintiff's evidence to determine whether issues of fact existed regarding whether the defendant Caterpillar "was outside the chain" of distribution. *Id.* at 626. Indeed, the Second Department made no mention whatsoever (nor should it have) of the so-called necessity to pierce Caterpillar's corporate veil; instead, just like the First Department in this case, the Second Department looked to the evidence to determine whether triable issues of fact existed of whether the defendant "took <u>any part</u> in the manufacture, sale, or distribution" of the product. *Id.* (emphasis added).

Significantly, and contrary to Appellant's view, the court did not require proof that the defendant was the one who actually assembled or sold the product in question, but only that it *took part* in such activities. This is in fact the proper analysis, and one that establishes Appellant's liability in light of the instant record.

Ford USA's reliance on *King v. Eastman Kodak Co.*, 219 A.D.2d 550 (1st Dep't 1995) is equally misplaced. In that case, the plaintiff attempted to hold defendant Kodak liable for its wholly-owned subsidiary (Atex) under the

"Apparent Manufacturer Doctrine," which states that a party that did not manufacture a product may nonetheless be liable when that product uses the party's trade name or trademark. *Id.* at 551; Restatement (Second) of Torts § 400. The court's review of the evidence indicated that Atex's name, not Kodak's, appeared on the product at issue, and that there were only "few" references to Kodak's name in the marketing materials. *King*, 219 A.D.2d at 551. Moreover, no evidence existed that Kodak was "involved"[26] in the manufacture, sale, or distribution of the product. *Id.*

The *Kodak* evidence, however, is starkly different from the evidence considered by Justice Heitler and the Appellate Division, which shows Ford USA's direct involvement in the manufacture, sale, and distribution of its products.

Finally, this Court's analysis in the *Semenetz* case in no way contradicts the Appellate Division's ruling (as Ford USA incorrectly contends), but in fact advances the same public policy concerns as the First Department addressed in the instant case. Importantly, *Semenetz* in no way insulates a parent corporation from liability for its direct role in placing a defective product into the chain of commerce. Instead, this Court in *Semenetz* held that, absent certain exceptions, a

[26] The First Department's choice of verbiage is far from incidental. As discussed, the public policy underlying applicable decisions on strict products liability emphasizes that a party need not be the actual manufacturer or seller to be held liable; liability, rather, can attach to the party closest to the manufacturer, and thus in a superior position to apply pressure to ensure that a product is safely made. *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 63 (2d Dep't 2003). Thus, an entity "involved in the manufacture" of a product can be held just as responsible as the actual manufacturer, if the evidence so demonstrates.

parent corporation that purchases another corporation's assets is not liable for that corporation's torts. *Semenetz v. Sherling & Walden, Inc.*, 7 N.Y.3d 194, 196 (2006).

From a public policy perspective, the distinction between successor liability and strict liability for entering a defective product into the chain of commerce cannot be overstated. As this Court noted, public policy discourages holding a successor company liable for its predecessor's product lines due to the potential for "financial destruction" for smaller businesses saddled with liability for their predecessor's torts, thus deterring the purchase of ongoing businesses. *Id.* at 200-01.

The public policy concerns in the instant case – which does not address successor liability – are far different. As this Court acknowledged, the basic justification for strict products liability is to "eliminate the risk" of dangerous products, which may be done by "modifying a manufacturer's behavior." *Id.* at 201 (internal citation omitted). A corporate successor with no role in placing a product into the stream of commerce does not create such risk. *Id.* Here, however, evidence exists that Ford USA was directly involved in its products' design, marketing, distribution, and sale (as well as the manufacturing of its international line of tractors), placing Ford USA in a superior position to "modify[] a manufacturer's behavior," which is "a major purpose of strict liability." *Id.*

The cases Appellant cites not only do nothing to support its wayward argument, but in fact are consistent with Respondent's view that determining a party's role in the chain of distribution is a factual issue. Moreover, these cases consistently hold that a party can avoid being found strictly liable only when such evidence of a defendant's role in the chain of distribution is either completely lacking or minimal. *See Laurin Mar. AB v. Imperial Chem. Indus. PLC*, 301 A.D.2d 367 (1st Dep't 2003) (summary judgment for defendant was appropriate where plaintiff's only evidence of its role in the chain of distribution was that it owned the trademark for the defective product); *Passaretti v. Aurora Pump Co.*, 201 A.D.2d 475, 475-76 (2d Dep't 1994) ("Because the plaintiffs failed to produce even the slightest evidence that the appellants had anything whatsoever to do" with the defective product, appellants were not strictly liable where the evidence "demonstrated that they had no role" in the chain of distribution);[27] *Porter*, 192 A.D.2d at 215 (summary judgment appropriate where the record failed to establish that defendant had any role in the chain of distribution, and instead that defendant's only role was as owner of the trademark that was on the product); *Kane v. A.J. Cohen Distrib. Of Gen. Merch., Inc.*, 172 A.D. 720 (2d Dep't 1991) (finding the mere ownership of a licensing agreement for use of the defendant's

[27] Indeed, the court's analysis in the *Passaretti* case highlights the appropriateness of the Appellate Division's full consideration of Respondent's record in the instant case where, unlike in *Passaretti*, Respondent has produced voluminous evidence to meet his burden on summary judgment.

name was an insufficient basis by itself to impose liability for injury caused by a defective product which contained the defendant's name); *Watford v. Jack La Lanne Long Island, Inc.*, 151 A.D.2d 742, 744 (2d Dep't 1989) (finding that plaintiffs "failed to submit any evidence as to any involvement" of defendant in manufacturing the defective product at issue); *Smith v. City of New York*, 133 A.D.2d 818, 819 (2d Dep't 1987) (summary judgment for defendant appropriate where defendant was only the lessor of the premises where the plaintiff was injured, and where no evidence existed that defendant was involved in the manufacturing, selling, or distributive chain of the product that caused plaintiff's injury); *Zwirin v. Bic Corp.*, 181 A.D.2d 574 (1st Dep't 1992) (summary judgment for defendant appropriate where plaintiffs failed to present "any evidence" that defendant had "any connection" with its partially-owned foreign subsidiary which would render it legally liable).

In sum, by its tortured readings of case law, Appellant seeks to justify having the Court impose a standard whereby the party in a superior position to influence the removal of dangerous products from the stream of commerce would receive immunity simply because a "parent-subsidiary" relationship exists. Such avoidance certainly does not comply with New York's public policy concerns, nor does it adhere to established precedent in applicable products liability cases. As such, Ford USA's attempt to redefine when a tortfeasor should be considered to

have a role in the ushering of a defective product into the marketplace to be held strictly liable must be rejected.

III. A JURY SHOULD BE PERMITTED TO EVALUATE FORD USA'S INVOLVEMENT IN USHERING FORD UK PRODUCTS INTO THE MARKETPLACE, REGARDLESS OF HOW FORD USA'S ROLE IS CHARACTERIZED

As case law indicates, a jury is certainly entitled to determine the significance of Appellant's role in light of evidence that Ford USA made explicit determinations of how its products and accessories were designed, packaged and labeled, and how to "commonize" these parts and accessories across various subsidiaries, including Ford UK.

Allowing a party so involved in all aspects of a product's placement in the stream of commerce, as was Ford USA, to be held strictly liable does not hinder New York's public policy, as Appellant inaccurately claims, but indeed furthers it. As discussed, *supra*, such policy in regard to products liability is primarily concerned with the safety of consumers, which is precisely why New York courts look to the hierarchy of the chain of distribution to see which party may "exert pressure for the improved safety of products." *Godoy*, 302 A.D.2d at 60-61; *see also Lowe*, 40 A.D.3d at 264; *Brumbaugh*, 152 A.D.2d at 71; *Nutting*, 180 A.D.2d at 128-29.

Therefore, the party's label, whether it be manufacturer, designer, seller, distributor, retailer, or trademark licensor is incidental; it is the role the party plays in placing a defective product into the stream of commerce which is the focus of not only New York law, but other jurisdictions' law as well. *See, e.g.*, *Brumbaugh*, 152 A.D.2d at 70-71 (Pool of potential defendants in strict products liability actions has been judicially expanded to include "any one responsible for placing the defective product in the marketplace"); *Promaulayko,* 116 NJ at 510 ("In a strict-liability action, liability extends beyond the manufacturer to all entities in the chain of distribution"); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 163 (Ill. 1979) ("The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the 'negligence' of the manufacturer." (internal quotation omitted));[28] *Kosters v. Seven-Up Co.*, 595 F.2d 347, 352 (6th Cir. 1979) (defendant liable for its exploding bottle contained in its franchisees carton since the evidence showed that

[28] Of note, the Supreme Court of Illinois recognized in *Connelly* that a trademark licensor could be considered a part of the chain of distribution where evidence showed that the trademarked product "bears no indication that it was manufactured by any other entity." *Id.* at 163. That court's ruling is particularly pertinent to the instant facts, where Ford USA mandated that the very "genuine parts" boxes it designed containing its trademark for use in the United States bearing the North American Ford logo also be used by Ford UK. (R. 637-38). Put simply, Appellant's packaging at the very least made a representation that the products contained therein were manufactured by Ford USA. (R. 638 (mandating that product packaging for Ford UK use the Ford USA package design)).

defendant entered its product into the stream of commerce by assuming and exercising a degree of control over the design of the carton in which its product was to be marketed); *Kasel v. Remington Arms, Inc.*, 24 Cal. App.3d 711, 725 (Cal. Ct. App. 1972) (**"**as long as the franchisor or trademark licensor can be said to be a link in the marketing enterprise which placed a defective product within the stream of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity.").

Appellant's role was unquestionably multifaceted; indeed it was intimately involved with these products at several key steps along the way, from their design, to their packaging, to how they were marketed to the public. *See, e.g., Brumbaugh*, 152 A.D.2d at 71 ("liability should be imposed only where the defendant actively ushers a product into the initial market").

A. Plaintiff's Evidence Of Ford USA's Mandated Use Of Its Trademark - As Well As The Design Of The Packaging On Which The Trademark Appeared – Is But One Example Demonstrating Ford USA's Direct Role In The Distributive Chain

Ford USA selectively compartmentalizes the evidence in an attempt to minimize its import. For example, Appellant spends pages arguing that its control over the Ford trademark should not alone subject it to strict liability.[29]

[29] Of course, in so arguing, Defendant focuses on only one aspect of the voluminous evidence detailing its direct involvement in the chain of distribution. Ford USA's cherry-picked evidence does not, however, eliminate the triable issues of fact created by the entirety of Plaintiff's record in this case.

As even the case law Appellant cites acknowledges, however, a party's trademark ownership is simply one element in the record a court may consider when examining a party's direct liability. *See Porter*, 192 A.D.2d at 215 (in addition to trademark ownership, which is the only evidence that plaintiff set forth in that case, the Fourth Department additionally reviewed the record for indications of the defendant's involvement in "the design, manufacture, distribution, marketing, sale, warranting, maintenance, or repair" of the defective product); *Laurin Mar. AB v. Imperial Chem. Indus. PLC*, 301 A.D.2d 367 (1st Dep't 2003) (holding that the defendant, who was merely a trademark licensor, was outside the distributive chain).

Respondent's evidence, by contrast, is precisely in line with the type of evidence the Fourth Department sought in *Porter*. Unlike in that case, the record here contains evidence of Ford USA's direct role in the design, manufacture and marketing of its vehicle and tractor parts. Indeed, in addition to this evidence, the record also includes evidence of Ford USA's control of its trademark. (R. 634-39).

Other cases Appellant relies on for its faulty proposition, such as *Kane v. A.J. Cohen Distrib. Of Gen. Merch., Inc.*, 172 A.D. 720 (2d Dep't 1991) and this Court's ruling in *Semenetz*, are equally unsupportive. In *Kane*, which did not address product trademarks, the defendant, a wholesale distributor, held a licensing agreement with a storeowner that sold defendant's defective slingshot. 172 A.D.2d

at 720. The Second Department concluded that, though the licensing agreement gave the storeowner the right to use the manufacturer's name and logo in its store, and although under the licensing agreement the defendant "reserved the right to inspect the premises," the storeowner nonetheless had ultimate control[30] over what it sold in its store, rendering the licensing agreement an insufficient basis by itself to impose liability. *Id.*

The connection between Ford USA and the products at issue herein is much more extensive. For example, the Chairman of the Board of Ford USA *required* Ford's overseas subsidiaries to abide by its "world-wide program" (R. 634), and that these subsidiaries "will establish and administer such methods and procedures as may be necessary to ensure adherence by all locations to the provisions" of the program, (R. 636).

The instant facts are certainly not similar to those contemplated by the Second Department in *Kane*. Here, Appellant not only had the right to impose

[30] The question of a party's control over placing a product in the chain of distribution is one that courts (including the Appellate Division in this case) universally examine. It is for this reason that a review of the evidence is so essential. It is also for this reason that Appellant's reliance on cases where no control over the product was proven (save for merely holding a trademark license) is misplaced as such cases do not prove that the Appellate Division's decision was an aberration, but rather that a review of the evidence is necessary to establish to what degree a defendant played a role in placing its product in the chain of distribution. *See, e.g.*, *Laurin*, 301 A.D.2d at 367-68 (1st Dep't 2003) (evidence that defendant was a trademark licensor alone was insufficient to prove that it was in the distribution chain); *D'Onofrio v. Boehlert*, 221 A.D.2d 929 (4th Dep't 1995) (absent evidence of actual control, proof that defendant merely held a trademark license was insufficient to hold a party strictly liable).

control over the products in question, it actually controlled and was intimately involved in the manufacture, design, marketing, and sale of these products.

Semenetz likewise did not address evidence of a parent's requirement of how its subsidiaries use its trademark, as this case does. Instead, that case addressed the inability of a corporate successor that purchases a seller's assets to be held liable for the seller's torts. 7 N.Y.3d at 196. As this Court noted, it would be inconsistent to place liability on a successor that had no role in placing the product into the stream of commerce since the corporate successor did not aid in creating the risk. *Id.* at 201. Moreover, from a policy perspective, allowing corporate successors to assume liability (absent certain exceptions) would stymie the goal of encouraging purchase of smaller businesses with limited assets, thereby forcing these smaller companies to liquidate. *Id.* at 200-01.

The instant case does not face the same public policy hurdles or address the same type of evidence.[31] Indeed, allowing Ford USA to be held liable for its direct role in placing defective products into the stream of commerce furthers New York's public policy concern of protecting consumers by forcing those entities with the most influence on product manufacture to apply pressure to ensure safer

[31] Ford USA's reliance on a 10th Circuit decision where a parent corporation did not directly participate in placing a product into the stream of commerce is similarly unavailing, and does not address the type of evidence at issue in this case. *See Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1222 (10th Cir. 1997) (under Colorado law, plaintiff's proof of a parent's licensing agreement, without more, was insufficient to hold a parent liable for acts of its subsidiary under an "apparent manufacturer" liability theory).

products. *See Sukljian*, 69 N.Y.2d at 95; *Godoy*, 302 A.D.2d at 60-61. This is the very public policy concern the Appellate Division recognized in its decision. (R.1139-40).

Ford USA also argues that its continuing obligation to control its trademark is an obligation it must perform lest it abandon the right to the trademark, citing *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367-68 (2nd Cir. 1959) (to ensure that the public will not be unwittingly deceived, trademark licensors have a duty to police their trademarks to guarantee the quality of the products sold). However, a trademark holder's general policing focuses on the use of the trademark itself "to prevent misuses" so that the public will not be misled.[32] *Id.* at 367.

The evidence, however, demonstrates that Ford USA did not simply police its trademark, but that it "prescribe[d]" that its subsidiaries use the Ford Trademark for all Ford products worldwide. (R. 634-35). As part of this requirement, Ford USA mandated that its UK subsidiary "should be sold under the standard FoMoCo

[32] The *Dawn Donut Co.* case involved the question of whether the plaintiff, a wholesale distributor of doughnuts, could enjoin the defendant from using its trademark under the Lanham-Trade-Mark Act for the sale of its doughnuts in certain counties in New York. 267 F.2d at 360. The defendant also counterclaimed that the plaintiff's trademark registration should be canceled on the grounds that the plaintiff did not exert sufficient control over it, in violation of the Act. *Id.* at 360-61. The Second Circuit determined that the plaintiff exerted enough control over the nature and quality of food products that were sold under plaintiff's trademark name to retain its license of its trademark. *Id.* at 367-68. The case does not involve product liability law in the slightest, but even so, the court relied on the trial court's determination of what constitutes a reasonable degree of supervision and control over a trademark, which is a question of fact. *Id.* at 367-68.

packaging" and should use the phrase "Genuine Parts" along with the Ford symbol in an oval. (R. 638). Though this evidence is simply one aspect of the entirety of Plaintiff's evidence, it remains a further strong example of Ford USA's pervasive role in placing "Ford" asbestos-containing products in the stream of commerce, which a jury should properly consider.

Plaintiff's evidence additionally shows that Ford USA's role in controlling its trademark went well beyond merely approving where its trademark could be used, but also focused on controlling the actual products themselves: "These agreements, in general, will acknowledge 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*, and will be terminable at any time at the Company's option." (R. 639 (emphasis added)). Such proof of a trademark holder's exercised control over the quality of its product is itself sufficient to hold a party strictly liable. *See, e.g., Harrison v. ITT Corp.*, 198 A.D.2d 50, 50 (1st Dep't 1993) (acknowledging that a trademark licensor 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).

Importantly, Ford USA controlled not only its product's trademark, but the design of the very packaging the trademark was printed on.[33] (R. 634). This is particularly significant considering Plaintiff's claim that Ford USA was strictly liable[34] for failing to adequately warn Mr. Finerty of the hazards associated with its defective products. Thus, Defendant's reliance on trademark license cases in no way addresses the evidence in the instant case.

Indeed, Ford USA's refusal to acknowledge the significant evidence in this case makes its use of scattered holdings of inapposite cases that much more misleading. One notable example is Appellant's reliance on *Moffett v. Goodyear Tire & Rubber Co.*, 652 S.W.2d 609 (Tex. Ct. App. 1983). In that case, a foreign subsidiary manufactured and sold tires using the parent's trademark, a fact the plaintiff pointed to when arguing that the subsidiary was the "alter ego" of the parent. *Id.* at 612. The Texas Court of Appeals determined that the use of a trademark was insufficient by itself to prove that the subsidiary was an "alter ego." *Id.* at 613-14.

Respondent's allegation, however, is far different. The evidence regarding Ford USA's mandated use of its trademark – and the packaging it appeared on

[33] Ford USA's package 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." (R. 637, 668).

[34] As Appellant is aware, Plaintiffs have an additional claim that Ford USA was negligently liable for failing to warn of the hazards of asbestos associated with its products.

(which did not contain asbestos warnings) – are demonstrations of Ford USA's direct involvement with the design of "branding, packaging and merchandising parts and accessories." (R. 634). This evidence goes beyond mere trademark licensure, and instead goes to the heart of the issue: Ford USA's direct role in ushering defective products into the marketplace. Indeed, Ford USA's requirements for use of its trademark are entirely consistent with its worldwide standardization plan to "communize" its products.

Next, the Texas plaintiffs did not present any evidence to demonstrate the parent corporation's role in the manufacture or design of the tire itself. The instant Plaintiff's evidence, by contrast, abounds with indications (proper for a jury to consider) that Ford USA was integral in its products' design, marketing, proliferation, and "communization" among its various subsidiaries.[35] It is for this very reason that, unlike in the Texas case, Ford USA is in the superior position to exert pressure for the improved safety of "Ford" products, since it acted as the engineer of distribution. *See Godoy,* 302 A.D.2d at 60-61.

In sum, the instant facts simply do not support Appellant's concern that holding a trademark licensor liable would result in a flood of subsequent liability. Quite to the contrary, Respondent's evidence, which includes Ford USA's mandate that Ford UK use packaging containing the trademark and the words "Ford" and

[35] Ford USA was also directly involved with the manufacture of tractors at Ford's Basildon facility in the United Kingdom.

"Genuine Parts," is powerful supporting evidence, combined with Respondent's other evidence, that Ford USA was directly entrenched in its products' distribution. As such, "issues of fact exist whether Ford USA may be held directly liable" for "facilitating the distribution" of its defective products. (R. 1139-40).

B. Evidence That Ford USA Contributed To The Design Of Its Defective Products Adds To The Triable Issues Of Fact Regarding Defendant's Role In The Chain Of Distribution

As it did with the evidence of Ford USA's control of its trademark and packaging, Appellant downplays the ample evidence in the record reviewed by the Appellate Division that Ford USA also took a direct role in designing its defective products. In so doing, Appellant once again misinterprets the law and fails to acknowledge the actual significance of Respondent's evidence.

While Ford USA suggests that having a role in the design of a defective product does not subject a defendant to strict liability (App. Br. at 39), the cases Appellant relies on for such a proposition say no such thing. Indeed, they suggest or say just the opposite.

For instance, *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579 (1987), does not stand for this proposition in the slightest. Instead, this Court determined that a manufacturer that also happened to be the designer of the defective product, a ladder, was properly liable since it was the party that placed the product in the stream of commerce. *Id.* at 587. Significantly, this issue was found to be and

upheld as a proper question of fact for the jury. *Id.* at 587-88. Such a finding, of course, is entirely consistent with the Appellate Division's order in this case, where evidence exists that Appellant designed the defective product in question and played a significant role in placing its products in the stream of commerce.

Likewise, *Robinson-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471 (1980) does not hold that designers cannot be held liable for defective products manufactured by others. That case makes the important distinction that manufacturers who enter a *non-defective* product into the stream of commerce cannot later be held liable when a third party out of the manufacturer's control alters that product, thereby creating a defect.[36] *Id.* at 478-79. The products at issue here, by contrast, which were specified by Ford USA to contain asbestos, were defective from their inception. Ford USA's failure to warn about this danger

[36] Appellant also cites *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153 (7th Cir. 1987) in support of its factually-deficient argument that it, as a parent corporation, should not be held liable for products manufactured by its foreign subsidiary. In that case, the Sixth Circuit was compelled to apply "Wisconsin law, which holds sellers and manufacturers strictly liable, but not designers." *Id.* at 154. There, defendant parent corporation designed a product which was modified, with no input from the parent, by its foreign subsidiary. The Federal appeals court, noting its limited discretion, refused to abide by the plaintiff's urging to "extend the scope of product liability law in Wisconsin beyond what the legislature and Supreme Court have adopted." *Id.* at 155. No such legislatively-mandated law applies in New York, where designers are capable of being held strictly liable. Moreover, that court pointed out that while the plaintiff had the prospect of trying the case on negligence grounds alone, such claim had been voluntarily dismissed with prejudice. *Id.* As stated, New York courts have looked to the evidence presented to determine a party's role in the distributive chain, such as here, where Ford USA directed the "commonization" and "standardization" of its products and mandated their packaging requirements (without warnings). Further, Respondent's claims for negligence continue to be viable herein.

(despite evidence of control of product packaging), renders Appellant strictly liable under the law. *Id.* at 478-79 (a defect in a product may consist of the inadequacy or absence of warnings).

Finally, Appellant's reliance on *Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468 (2003), is equally misapplied and if anything is supportive of Respondent's argument. In *Sprung*, this Court overturned the Appellate Division's dismissal of a defendant that manufactured a retractable floor under the theory that the defendant was only a casual manufacturer. *Id.* at 472. Though part of the Court's analysis turned to whether the facts supported that defendant was a casual manufacturer, the Court also reviewed the entirety of the record to fully examine the defendant's role. As a result, the Court reversed the Appellate Division's decision in part because the record indicated "that [defendant] may have participated in the design of the retractable floor," allowing this Court to "conclude that the record otherwise presents disputed issues of fact as to [defendant's] involvement in the design" of the defective product. *Id.* at 474-75.

The Appellate Division's decision in this case fully conforms to this Court's ruling in *Sprung*, and indeed the record here is even more compelling[37] in its presentation of issues of fact. Respondent's record demonstrates that Ford USA

[37] This Court found issues of fact existed with regard to the defendant's role as a product designer in *Sprung* despite the fact that the record in that case was "not altogether clear." *Id.* at 474-75. As discussed above, Respondent's record is very clear regarding Ford USA's role in the design of its products and brake systems.

played a direct role in the design of Ford products manufactured in the United Kingdom. This evidence includes Appellant's own internal documents admitting Ford USA's direct role in designing tractor engines and parts, (R. 606), as part of its focus on " centralized control and product design interchangeability," which Appellant admitted were "fundamental" to Ford Tractor Operations, (R. 624). Indeed, Ford USA itself appointed positions to "direct the Process and Design Engineering Department" for its tractor division. (R. 628).

Ford USA's role also extended to design of passenger vehicle products, as evidenced by Ford USA's utilization of its "International Studio" which was "responsible for the design proposals relating to Ford of Britain." (R. 669).

Ford USA also admits that these design specifications were to be used "concurrently" by both Ford USA and Ford Britain. (*Id.*). As this Court acknowledged in *Sprung* – where the defendant similarly worked side-by-side with General Electric to install the defective flooring – evidence of such collaboration added to the factual issues regarding that defendant's overall role in the chain of distribution. 99 N.Y.2d at 475.

The Appellate Division's decision in this case fully accounts for the many factual issues in the record regarding Appellant's role in the design of its products. Though Appellant continuously protests that it is outside the chain of distribution, Ford USA ignores that this is a factual conclusion the jury should properly

consider, particularly in light of the abundant evidence creating triable issues of fact on this very inquiry. *See* Counterstatement of Facts Sec. B. Appellant would bypass this process, though, in an attempt to circumvent trial entirely.

Appellant's tactic aside, the law fully supports the Appellate Division's decision to allow a jury to weigh the evidence of whether Ford USA is strictly liable for designing defective products and failing to warn of the inherent dangers in these products. *Anaya v. Town Sports Int'l., Inc.*, 44 A.D.3d 485, 487 (1st Dep't 2007) (granting summary judgment for product manufacturer was improper where the question of whether defendant's design of its product was defective was a question for the jury).

Therefore, neither Justice Heilter nor the Appellate Division erred in permitting these factual issues to be decided by a jury at trial, and those Orders respectfully should be affirmed.

CONCLUSION

For the foregoing reasons, the Appellate Division properly reviewed and considered the record evidence when determining, under applicable products liability law, that questions of fact exist regarding Ford USA's role in the chain of distribution of its defective products. Accordingly, that order should be affirmed.

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