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Court of Appeals

STATE OF NEW YORK

RAYMOND FINERTY and MARY FINERTY,

Plaintiffs-Respondents,

—against—

ABEX CORPORATION *et al.*,

Defendants,

FORD MOTOR COMPANY,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF FORD MOTOR COMPANY

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus* briefs in cases raising issues of concern to the Nation's business community.

This case presents two questions of importance to the Chamber and its members. The first is whether the Appellate Division erred in holding that, even in the absence of any basis for corporate veil-piercing, a parent company can be held liable for allegedly defective products manufactured and sold by its subsidiary on the theory that the parent is "in the best position to exert pressure for the improved safety of products." Because this holding is contrary both to well-settled Court of Appeals precedent on corporate separateness and to basic principles of corporate law uniformly recognized by courts across the country, this Court should reverse.

The second question raised by Plaintiffs' brief is whether Plaintiffs' claims may nonetheless proceed based on their alternative theory that a parent company is strictly liable for defective products manufactured and sold by its subsidiaries if the parent participated in designing and marketing the products as part of its global standardization efforts. This question, too, is resolved by this Court's well-settled precedent that strict liability extends only to the entities involved in placing the allegedly defective product into the stream of commerce, and not to the design and marketing activities alleged by Plaintiffs.

The Chamber's members have a strong interest in the proper resolution of these important questions.

ARGUMENT

Plaintiffs seek to hold Ford Motor Company ("Ford USA") strictly liable for injuries allegedly arising from products manufactured and sold in Ireland by Ford UK. Because Plaintiffs do not seriously contest that Ford USA did not manufacture, distribute, or sell a single one of the products at issue, well-established New York law forecloses their claims. Plaintiffs base their arguments to the contrary on two flawed legal theories: both conflict with basic principles of corporate law, and one also conflicts with basic principles of products liability law.

First, Plaintiffs defend the Appellate Division's holding that, even though no basis exists for piercing the corporate veil between Ford USA and Ford UK, Ford USA is nonetheless strictly liable for products manufactured and sold by Ford UK based on its ability as the parent company to "exert pressure" on Ford UK. As even Plaintiffs recognize, however, a corporation cannot be held liable for its subsidiary's acts based on the parent's control unless the conditions for piercing the corporate veil have been met. Although Plaintiffs attempt to circumvent this rule by characterizing a parent's ability to "exert pressure" on a subsidiary as an act taken by the parent itself, this novel

theory of corporate liability would wholly eviscerate basic principles of corporate separateness long recognized under New York law and indeed the laws of all 50 states. Under Plaintiffs' theory, the narrow exception for veil-piercing would be meaningless because, by definition, *every* parent company is in a position to exert pressure on its subsidiary and therefore is liable for products manufactured and sold by that subsidiary regardless of veil-piercing requirements. Obviously, that is not the law of this State or any other, and should be flatly rejected by this Court.

Second, perhaps recognizing this fatal problem with the Appellate Division's reasoning, Plaintiffs alternatively argue that Ford USA is strictly liable for the allegedly defective products based on its role in the design and marketing of Ford products globally—or, in the Appellate Division's words, as "global guardian of the Ford brand." It is well-established under New York law, however, that strict liability extends only to corporate activities within the distribution chain, specifically the manufacture, distribution, or sale of the product. Plaintiffs fail to identify a single case or other authority suggesting that a corporation is strictly liable for designing or marketing an allegedly defective product.

And indeed, the conduct on which Plaintiffs rely—Ford USA's effort to standardize its brand globally—is part of the normal parent-subsidiary relationship for multinational corporations. Accepting Plaintiffs' theory would essentially eliminate the principle of corporate separateness in that context, at least as applied to products liability law. Neither principle nor precedent supports that result.

I. This Court Should Reject The Appellate Division's "Pressure" Theory Of Parent Liability As An End Run Around Well-Established Veil-Piercing Requirements.

Because a corporation exists separately from its owner, federal and state courts across the country uniformly recognize that a parent corporation is not liable for the acts of its subsidiary absent narrow circumstances where the parent has abused the corporate form. Only then may the "corporate veil" be "pierced."

The Appellate Division's decision disregards this important tenet of corporate law. Everyone—including the Appellate Division—agrees that the conditions for piercing the corporate veil are not met here. Yet the Appellate Division held that Ford USA may be held strictly liable for products manufactured and sold by Ford UK based on its ability to

control ("exert pressure on") Ford UK. That decision is wrong and should be reversed.

A. Courts across the country uniformly recognize that parent companies are not liable for their subsidiaries' acts unless the requirements for veil-piercing are satisfied.

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). The concept is so fundamental that it is "an almost indispensable aspect of the public corporation." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983).

New York law has long recognized this basic truth of corporate separateness. S*ee Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656 (1976) ("Corporations, of course, are legal entities distinct from their managers and shareholders and have an independent legal existence."). As this Court has explained, "the avoidance of personal liability for obligations incurred by a business enterprise is one of the fundamental purposes of doing business in the corporate form." *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (1980).

Indeed, nearly a century ago, this Court pronounced that "[m]any a man incorporates his business" and that "[h]e may do so for the very purpose of escaping personal liability." *Rapid Transit Subway Constr. Co. v. City of New York*, 259 N.Y. 472, 487-88 (1932) (internal quotation marks omitted). And the Court recognized that the principle that a corporation is separate from its owner "is true equally where the corporation is controlled by a natural or an artificial person." *Id.* at 488.

The policy rationale for corporate separateness, as Plaintiffs acknowledge, is that it "promotes the expansion of smaller divisions without fear of liability for every tortious act that may occur at those separate divisions." Respondents Br. 25; *see also* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148, 173 (1992) (noting that incorporating subsidiaries allows a corporation to "subdivid[e] risks" which in turn promotes investment in the parent). Treating parent and subsidiary corporations as distinct entities serves several beneficial purposes by supporting the formation of capital, extension of credit, optimal allocation of risk, efficient use of assets, and compliance with

local laws (such as investment and tax laws). *See generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study,* 76 Cornell L. Rev. 1036, 1039-41 (1991) (describing the purposes behind the principle of corporate separateness); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability,* 107 Yale L.J. 1363, 1389-91 (1998) (describing the purposes of subsidiaries).

To prevent the corporate form from being abused, there are narrow circumstances where the "corporate veil" may be "pierced." Under New York law, "piercing the corporate veil requires a showing 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." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Similar veil-piercing requirements exist in all 50 states and under federal law.[1]

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[1] *See, e.g., Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996) ("The law allows a corporation to organize so as to isolate liabilities among separate entities. Under the doctrine of limited liability, a corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances, commonly referred to as piercing the

corporate veil.") (internal citation omitted); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 349 (4th Cir. 1998) ("A corporate parent cannot be held liable for the acts of its subsidiary unless the corporate structure is a sham and the subsidiary is nothing but a 'mere instrumentality' of the parent.") (citation omitted); *Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 513 (3d Cir. 1996) ("Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated. A court may not depart from this principle and pierce the corporate veil unless it finds that a subsidiary was a mere instrumentality of the parent corporation.") (internal citations and quotation marks omitted); *Minton v. Ralston Purina Co.*, 146 Wash. 2d 385, 399, 47 P.3d 556, 563 (2002) ("[A] parent corporation is not liable for the torts committed by its wholly owned subsidiary absent a showing of an intentional disregard for the corporate entity or an intentional fraud."); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634, 561 S.E.2d 663, 669 (2002) (en banc) ("[C]ourts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.") (internal quotation mark and citation omitted); *In re Birmingham Asbestos Litig.*, 619 So. 2d 1360, 1362 (Ala. 1993) ("It is well settled that a parent corporation, even one that owns all the stock of a subsidiary corporation is not subject to liability for the acts of its subsidiary unless the parent so controls the operation of the subsidiary as to make it a mere adjunct, instrumentality, or alter ego of the parent corporation. . . . Thus, it is the law in Alabama that a plaintiff must first 'pierce the corporate veil' before the parent corporation's liability may be established."); *BASF Corp. v. POSM II Properties P'ship, L.P.*, No. CIV.A. 3608-VCS, 2009 WL 522721, at *8 n.50 (Del. Ch. Mar. 3, 2009) (Strine, J.) ("Delaware public policy does not lightly disregard the separate legal existence of corporations. The reason for that is that the use of corporations is seen as wealth-creating for society as it allows investors to cabin their risk and therefore encourages the investment of capital in new enterprises.") (internal citation omitted); Stephen B. Presser, *Piercing the Corporate Veil* §§ 2:1-55, 3:1-15, Westlaw (database updated Sept. 2015) (outlining veil-piercing law in all 50 states and under federal law).

According to the Appellate Division, holding a parent strictly liable for its ability to "exert pressure" on a subsidiary is a form of "direct" liability and therefore does not require piercing the corporate veil. But that theory flips "limited liability" on its head, opening the door for near limitless liability of a parent for the acts of its subsidiary. Nearly every parent corporation is in a position to "exert pressure" on its subsidiary; the parent *owns* the subsidiary.

No matter what Plaintiffs or the Appellate Division label their "exerting pressure" theory of liability, it operates the same way: Ford USA is strictly liable for its *subsidiary's* manufacture and sale of allegedly defective products. It was Ford USA's "role in facilitating" *Ford UK's* distribution of auto parts and its ability "to exert pressure" *on Ford UK* that led the court to conclude that *Ford USA* could be held liable. Imposing strict liability on a parent company based on its ability to "exert pressure" on a subsidiary is incompatible with New York law requiring that a parent exercise "complete domination" over the subsidiary to "perpetrate a wrong or injustice" before the parent may be held liable for the subsidiary's acts. *Morris*, 82 N.Y.2d at 141-42.

B. *United States v. Bestfoods* demonstrates that the Appellate Division's decision violates corporate separateness.

Although Plaintiffs suggest that the U.S. Supreme Court's decision in *Bestfoods* supports the Appellate Division's theory of liability, *see* Finerty Brief 19, 25-27, *Bestfoods* in fact demonstrates why the Appellate Division's decision is wrong. The issue in that case was "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Bestfoods*, 524 U.S. at 55. The Court's resolution of that question was clear: "We answer no, unless the corporate veil may be pierced." *Id.* The Court went on to explain that because liability in that case attached to those "operating" certain facilities, a parent can be held liable when the *parent itself* operated the facility. *Id. Bestfoods* thus establishes a straightforward principle: Veil-piercing is unnecessary to hold a corporation liable for its own actions, but veil-piercing requirements do apply when a plaintiff attempts to hold a corporation liable based on its control over a subsidiary.

Plaintiffs do not contest this reading of *Bestfoods*, but instead argue that the Appellate Division's decision is consistent with *Bestfoods* because it rests on "Ford USA's substantial and direct role in the design, development, and use of parts distributed by its wholly owned subsidiary." Finerty Brief 19. This is a manipulation of the Appellate Division's decision: Although the opinion notes that Ford USA was involved in the design and development of the allegedly defective products "as the global guardian of the Ford brand," Op. 13, it specifically states that the contemplated liability rests on Ford USA's control over its subsidiary, not its own conduct: Plaintiffs' claims may proceed, the Appellate Division held, because "issues of fact exist whether Ford USA may be held directly liable . . . on the ground that it was in the best position to exert pressure for the improved safety of products" distributed by Ford UK. Op. 13-14.

The Appellate Division certified the question of whether its decision was "properly made." The answer is no. Holding Ford USA liable for its ability to exert pressure on Ford UK violates corporate separateness and undermines the policy rationales underlying it—whether or not it is incorrectly labeled "direct" liability.

II. Plaintiffs' Alternative Theory Of Liability Based On Ford USA's Global "Design And Marketing" Role Is Foreclosed By Well-Established Law Limiting Strict Liability To Manufacturers, Distributors, And Sellers.

Because *Bestfoods* blocks liability based on the "exertion of pressure," Plaintiffs also put forward a splattering of facts that supposedly show Ford USA's involvement in the design and marketing of the allegedly defective products. Finerty Brief 15-18.[2] In essence, Plaintiffs appear to argue that even without the "exert pressure" test adopted below, they can prevail against Ford USA because it served as the "global guardian of the Ford brand," with the "apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." R.1139.

Plaintiffs' alternative theory fails for two reasons. *First*, New York law has long limited strict liability to the manufacturers, distributors, and sellers of the allegedly defective product, and rightly

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[2] Although Plaintiffs also make a half-hearted attempt to argue that Ford USA itself manufactured the products at issue, Finerty Brief 14, the allegations they rely on for this proposition do not actually involve Ford USA manufacturing anything. *See id.* (alleging that one of Ford USA's goals fifty years ago was "'more concentrated management attention' on Ford USA's various overseeing *subsidiaries*" (emphasis added)); *id.* (alleging that Ford USA controlled which products were "manufactured *by Ford UK*" (emphasis added)).

so: Those are the entities that potentially expose the public to danger by placing the product into the stream of commerce.

Moreover, product standardization is common among major corporations with subsidiaries across different markets. If the global design and marketing role that Plaintiffs assert were enough to trigger strict liability, then principles of corporate separateness would be meaningless in the real world, where parents and their subsidiaries need to interact to balance the competing interests of standardizing products across the globe and adapting them for the unique needs of a particular location.

A. Strict liability does not apply to entities outside the distribution chain.

This Court has explained that the "basic justification for strict product liability" is "to place responsibility for a defective product on the manufacturer who placed that product into commerce." *Semenetz v. Sherling & Walden, Inc.*, 7 N.Y.3d 194, 201 (2006). It is those entities that actually put the public at risk of harm, and those entities for whom that harm "should be treated as a cost of business against which insurance can be obtained." *Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 473 (2003).

The same is not true for those who simply market or design a product. An advertising firm, for example, should not be held strictly liable for defects in a product manufactured by someone else. Similarly, a mere patent holder puts the public in no danger. As the Supreme Court of Texas aptly explained: "[S]trict liability [applies only] to those 'engaged in the business of selling' a product. . . . [W]e have limited the scope of those 'engaged in the business of selling' to those who actually placed a product in the stream of commerce. . . . An advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries all might be 'engaged' in product sales, but they do not themselves sell the products." *New Tex. Auto Auction Servs., L.P. v. Gomez De Hernandez*, 249 S.W.3d 400, 403 (Tex. 2008) (declining to extend strict liability to auctioneers). Other jurisdictions across the country likewise recognize that a defendant must place the product into the stream of commerce for strict liability to attach.[3]

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[3] *See, e.g.*, *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978) (liability rests on the defendant "placing [a product] into the stream of commerce"); *St. Clare Hosp. of Monroe, Wis. v. Schmidt, Garden, Erickson, Inc.*, 148 Wis. 2d 750, 757, 437 N.W.2d 228, 231 (Ct. App. 1989) (citation omitted) (strict liability "is imposed only on

B. The design and marketing role Plaintiffs allege simply reflects the typical product standardization efforts made by major corporations.

Plaintiffs' design and marketing allegations—e.g., that "Ford USA specifically chose the marketing firm Ford UK was to use for its advertising promotions" or that it had a division "responsible for the design proposals relating to Ford of Britain," Finerty Brief 15-17—amount to nothing more than the typical product standardization efforts undertaken by major corporations.

As discussed above, *supra* at 7-8, operating through a subsidiary has many benefits, especially with foreign subsidiaries that have expertise in their own distinct legal, business, and cultural landscape.

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manufacturers, distributors and sellers—those who place or maintain the product in the stream of commerce"); *Lopez v. Am. Baler Co.*, No. CIV 11-0227 JB/GBW, 2013 WL 4782155, at *13 (D.N.M. Aug. 12, 2013) ("[A] party who does not sell or otherwise place an allegedly defective product in the stream of commerce may not be strictly liable. . . ."); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 (5th Cir. 2001) (parent company not liable because it did "not produce anything or place anything in the stream of commerce"); *Ford v. GACS, Inc.*, 265 F.3d 670, 680 (8th Cir. 2001) ("The common thread among Missouri products liability cases is that an entity must have 'plac[ed] a defective product in the stream of commerce.'"); *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745 (7th Cir. 2007) ("'[T]he policy reasons which justify extending the doctrine of strict liability to parties such as retailers or distributors are [not] applicable to product installers' when the installer does not participate in placing the product into the stream of commerce.").

At the same time, it is critical for the parent to maintain its brand. Successfully selling a product globally thus requires a balance between "standardizing products across country markets" and "adapting them to the differences among markets." Mohan Subramaniam & Kelly Hewett, *Balancing Standardization and Adaptation for Product Performance in International Markets: Testing the Influence of Headquarters-Subsidiary Contact and Cooperation*, 44 Mgmt. Int'l Rev. 171, 172 (2004). "[B]y balancing standardization and adaptation, [multinational corporations] can not only simultaneously harness the benefits of efficiency and responsiveness, but also coalesce into their products inputs of both headquarters and foreign subsidiaries for greater competitive advantage." *Id.*

A study of 128 products in foreign markets of 62 multinational corporations showed that this balance was best achieved "through direct contact between headquarters and subsidiary managers," which "positively influences product performance in international markets." *Id.* at 186. That positive influence is "strengthened by headquarters-subsidiary cooperation." *Id.* The cooperation allows "headquarters and subsidiaries to integrate and harness their unique and differentiated

knowledge." *Id.* at 188. In short, the study found that to achieve an effective balance between standardization and adaptation, corporations "*need* . . . high headquarters-subsidiary contact." *Id.* at 187 (emphasis added).

Parent-subsidiary cooperation is thus a fact of life for multinational corporations. There is nothing controversial about a parent creating a subsidiary explicitly to avoid liability, while also taking a strong interest in its subsidiary's activities. Plaintiffs themselves recognize that corporate separateness "promotes the expansion of smaller divisions without fear of liability for every tortious act that may occur at those separate divisions." Finerty Brief 25. But that benefit becomes an empty promise if a parent is protected only when it allows the subsidiary to run amok. No corporation would set up its subsidiary in that way.

Indeed, looking at the *exact* same evidence that Plaintiffs presented here, a Pennsylvania trial court found nothing more than a typical parent-subsidiary relationship between Ford USA and Ford UK. In *Smith v. Ford Motor Co.*, No. 1814, 2014 WL 8845355 (Pa. Ct. Com. Pl. Jan. 24, 2014), the plaintiff obtained through discovery nearly 6,000

pages of documents from this very case. R. 954 n.5. They were even labeled "FNRTY 000001 through FNRTY 005856." *Id.* The plaintiff in *Smith* extensively cited this evidence in an attempt to demonstrate that Ford USA could be held liable for products manufactured and sold by Ford UK. *See* R. 954-63 ("FNRTY" appears 67 times); *compare also, e.g.*, R. 958 ("Ford's International Studio was 'responsible for design proposals relating to' Ford/Britain[]") *with* Finerty Brief 15 ("Ford USA's Styling Office contained an 'International Studio' 'responsible for the design proposals relating to Ford of Britain.'"). The Pennsylvania court saw past the noise, and concluded that "Plaintiff essentially seeks to hold Defendant Ford Motor Company liable based on its normal parent-subsidiary relationship with Ford of Britain." R. 928. The appellate court affirmed. R. 940-41.

This Court should reach the same conclusion on the same evidence.

CONCLUSION

The Court should reverse the decision of the Appellate Division.

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