SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

YANG-NING PI CHEN, Individually, and as Independent Executrix for the Estate of CHI-CHUNG CHEN,

Plaintiff,

- against -

AERCO INTERNATIONAL, INC., et al.,

Defendants.

INDEX NO. 190133/17
MOTION DATES 05-23-2018
MOTIONS SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion Volkswagen Group of America, Inc., pursuant to CPLR 3212, to dismiss this action for lack of personal jurisdiction, pursuant to CPLR 301 and 302 (a), alternatively to dismiss this action pursuant to CPLR 327(a), for forum non conveniens:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause —Affidavits Exhibits ...	1- 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 9

Cross-Motion: ☐ Yes X No

Motions bearing sequence numbers 004, 005 and 006 are consolidated for disposition.

Upon a reading of the foregoing cited papers, it is ordered that defendants Volkswagen Group of America, Inc. (VWGoA) and Nissan North America, Inc. (NNA)'s motions for summary judgment to dismiss the action based on lack of personal jurisdiction, pursuant to CPLR 301 and 302 (a), are denied. It is further ordered that the motions of VWGoA, NNA and Ford Motor Company (Ford), pursuant to CPLR 327(a), to dismiss this action on the ground that New York is an inconvenient forum are denied.

Plaintiffs commenced this personal injury action on April 20, 2017 to recover for damages resulting from Chi-Chung Chen's work with asbestos-containing materials made, manufactured, distributed, and/or utilized by defendants and from defendants' failure to warn of the hazards associated with working with asbestos. The matter was included in the October 2017 in extremis cluster docket entitled to trial preference (NYSCEF Doc. No. 250).

On January 21, 2018, plaintiff-deceased Chi-Chung Chen (Chen or the decedent) passed away at his Houston, Texas residence after being diagnosed with mesothelioma. Plaintiff Yang-Ning Chen, Chen's wife, was appointed as executrix of Chen's estate on May 8, 2018. Plaintiffs filed the note of issue on March 22, 2018.

Defendants VWGoA and NNA, move, respectively, in motions sequence numbers 004 and 005, for summary judgment to dismiss the complaint for lack of personal jurisdiction, pursuant to CPLR 301 and 302(a), or in the alternative, for forum non conveniens, pursuant to CPLR 327(a).

In motion sequence number 006, defendant Ford moves, pursuant to CPLR 327(a), to dismiss the complaint on the basis of forum non conveniens.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

I. Procedural and Discovery Status

On June 6, 2018, this court denied defendants NNA's and VWGoA's joint motion to vacate the Special Master's discovery ruling dated April 8, 2018 (Mot. Seq. No. 13) and held that plaintiffs made a sufficient start to obtain jurisdictional discovery based on Chen's testimony (NYSCEF Doc. No. 708).

This court found that "he was exposed to Nissan products in New York while removing and installing an asbestos-containing clutch associated with Nissan vehicles and did bodywork with asbestos-containing bondo on Nissan-manufactured vehicles" (*id.* at 3). In addition, this court ruled that "[p]laintiff also testified that he was exposed to Volkswagen products in New York when performing work on a valve associated with a Volkswagen rabbit, when he did bodywork with asbestos-containing bondo on Volkswagen manufactured vehicles, and removing and installing asbestos-containing brakes on Volkswagen vehicles" (*id.*).

II. Background

Chen testified at his deposition that he was exposed to asbestos-containing products while working at various automobile repair shops in Taipei, Taiwan from approximately 1981 through 1982; in Queens, New York from 1982 through 1985 and in Houston, Texas from 1985 to 2016 (NYSCEF Doc. No. 152).

The decedent's medical records also reveal that he reported asbestos exposure from working in his family's construction business from age 10 through 28 in Taiwan (NYSCEF Doc. No. 153). In particular, Chen related that he supervised the installation of insulators for approximately three years in the cities of Ha Lin and Tonghua, Taiwan (NYSCEF Doc. No. 152 at 42-43; 354-357). In addition, in 1980 or 1981, Chen enrolled in a six-month vehicle maintenance training program in Taiwan where he learned to perform various repairs, including clutch and brake replacements (*id.* at 56-79).

Upon moving to Queens in July 1982, Chen alleged that he worked part-time off the books at an unspecified Exxon or Chevron gas station for approximately one month replacing brakes and cleaning engines (NYSCEF Doc. No. 152 at 86-87 and 94). At that location, he worked principally on American brand name cars, including Ford automobiles (*id.* at 94).

In 1983, Chen found part-time off the books work in an unidentified body shop in Queens and worked there until he moved to Texas (*id.* at 100-101). His employer would write out checks for Chen's wages to Chen's brother (*id.* at 104-105). At that location, Chen replaced brakes from mostly American brand name cars, including Ford automobiles; and worked on some foreign cars, including Nissan (*id.* at 392-393) and Volkswagen automobiles (*id.* at 517-519; 521-522; 529-530).

Chen also did mechanical work on cars that had been in accidents whereby he changed radiators as well as straightened frames (*id.* at 103-104). In addition, he performed body work applying and sanding an automotive body filler called Bondo to smooth out imperfections (*id.* at 133-134).

The decedent also related that he was exposed to asbestos while performing automotive repairs in Texas (*id.* at 149-162; 166-179; 181-207) and that he was present during the renovation of one of his homes where the contractors cut and erected sheetrock using a joint compound (*id.* at 369-372).

III. Motion Seq. No. 004

VWGoA argues that this court lacks general or all-purpose jurisdiction as well as long-arm jurisdiction over it as a matter of law. In the event, this court finds that personal jurisdiction has been asserted, defendant argues that, pursuant to the doctrine of forum non conveniens, the action should take place in Texas.

A. Personal Jurisdiction

The court must first determine whether it has personal jurisdiction over defendant before entertaining that branch of the motion raising forum non conveniens issues (*Prime Props. USA 2011, LLC v Richardson*, 145 AD3d 525, 525 [1st Dept 2016]).

1. CPLR 301: General or All-Purpose Jurisdiction

According to CPLR 301, "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

a. "At home" Requirement

It is well established that a corporation's place of incorporation and principal place of business are considered paradigm all-purpose forums where the corporate defendant is considered to be "at home" (*BNSF Ry. Co. v Tyrrell*, 137 S Ct 1549, 1558 [2017], citing *Daimler AG v Bauman*, 571 US 117, 137 [2014]).

VWGoA argues that it is organized under the laws of the State of New Jersey (NYSCEF Doc. No. 155) and that its headquarters and principal place of business are in the State of Virginia (NYSCEF Doc. No. 154). Because New York is neither VWGoA's state of incorporation nor its principal place of business, VWGoA is not at first blush "at home" here.

Plaintiffs fail to establish that this is an exceptional case in which VWGoA's local operations in New York are "so substantial and of such a nature as to render the corporation at home in that State" (*Daimler*, 571 US at 139, n. 19). Indeed, *Daimler* highlighted that *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915 [2011] had determined that "'[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.'" (*Daimler*, 571 US at 127 [2014], quoting *Goodyear*, 564 US at 919 [2011]).

Where a corporation, such as VWGoA operates in many places, the magnitude of the foreign corporation's in-state contacts is not the sole focus (*Daimler*, 571 US at 139, n. 20 [2014]). A general jurisdiction inquiry requires "an appraisal of a corporation's activities in their entirety, nationwide and worldwide" (*id.*). Plaintiffs' conclusory assertions are insufficient to demonstrate the systematic and continuous course of doing business required to subject VWGoA, pursuant to CPLR 301.

b. Consent by Registration Jurisdiction

The court now turns to the question of whether VWGoA's registration to do business in New York qualifies as a constitutional form of consent to general jurisdiction even though this state is not considered its "at home" state.

Pursuant to Business Corporation Law (BCL) §§ 304, 1301 and 1304, VWGoA is authorized to do business in New York as a foreign corporation based on its registration with and appointment of the Corporation Service Company as agent for service of process (NYSCEF Doc. No. 260).

Here, plaintiffs rely on pre-*Daimler* jurisprudence, namely *Aybar v Aybar*, 2016 NY Slip Op 31138[U], *6 [Sup Ct, Queens County 2016], which cited *Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432 [1916], for the proposition that registration and designation of a local agent for service of process amounts to consent to jurisdiction. Plaintiffs' argument also hinges on *Bailen v Air & Liquid Sys. Corp.*, 2014 NY Slip Op 32079 [U], *4 [Sup Ct, NY County 2014], which is case law relying on dictum in *Beach v Citigroup Alternative Investments LLC*, 2014 WL 904650, *7-8 [SDNY No. 12 Civ 7717 (PKC), March 7, 2014], which is not related to the viability of predicating general jurisdiction on consent based on BCL §1304(a). Rather, the *Beach*

court held that defendant, a foreign corporation incorporated under the laws of the United Kingdom with its principal place of business there and not registered to do business in New York, was not subject to jurisdiction, pursuant to CPLR 301 (*id.* at * 7). Furthermore, the court cited pre-*Daimler* cases for the proposition that a corporation may consent to jurisdiction in New York through registration and designation of a local agent (*id.* at * 6).

Defendant's reliance on *Techo-TM, LLC v Fireaway, Inc.*, as First Department precedent post *Bailen* and *Daimler*, to bolster its argument is unpersuasive (123 AD3d 610 [1st Dept 2014]). *Techo-TM, LLC* merely states that New York recognizes consent as a basis for personal jurisdiction, pursuant to CPLR 301, but not as a basis for long-arm jurisdiction. The Appellate Division's analysis focused mainly on the question of the jurisdictional overlap between CPLR 302 and BCL § 1314(b). Indeed, it appears that the First Department held that defendant foreign corporation's motion to dismiss for lack of subject matter jurisdiction, pursuant to BCL § 1314(b), should be granted because plaintiff non-domiciliary did not set forth that New York had any specified connections with the defendant or the claim warranting personal jurisdiction pursuant to CPLR 302.

Based on the foregoing, this court finds that plaintiffs failed to make a prima facie case supporting jurisdiction over VWGoA, pursuant to CPLR 301.

2. CPLR 302 (a) (3): Long Arm Jurisdiction

Defendant argues that CPLR 302 (a) (1), (2) and (4) are not relevant to this case, and focuses its analysis solely on subdivision (a) (3) of the long-arm jurisdiction statute.

a. Standard of Law

Section (a) (3) of New York's long-arm jurisdiction statute provides:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or"

The Court of Appeals' seminal case, *LaMarca v Pak-Mor Mfg. Co.*, informs the court's construction of the long-arm jurisdiction statute under the present circumstances (95 NY2d 210 [2000]). According to *LaMarca*, in order to confer jurisdiction under this provision, plaintiffs must first assert, respectively, four or five elements depending on whether subparagraph (i) or (ii) is relied upon:

> "First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce"
> (95 NY2d at 214 [2000]).

If plaintiff's assertion of jurisdiction comports with the requirements of the statute, then the court may turn to the due process inquiry, which is composed of a

two-part analysis: a "purposeful availment" test requiring minimum contacts between the defendant and the forum and a "reasonableness" test ensuring that the assertion of jurisdiction does not offend traditional notions of "fair play and substantial justice" (*Burger King Corp. v Rudzewicz*, 471 US 462, 475-478 [1985]).

b. Contentions

VWGoA does not dispute that plaintiffs met the first two elements of specific jurisdiction set forth in LaMarca (NYSCEF Doc. No. 148 at 6). However, VWGoA argues that plaintiffs cannot prove the third element, namely, that Chen was injured in New York by a product manufactured, designed, sold or distributed by VWGoA.

VWGoA further argues that plaintiffs' claims against it are limited to the repair of a single cold-start injector on a Volkswagen Rabbit. VWGoA's affiant, Neal Palmer (Palmer), who has been serving as Product Liaison Engineer since 2002 states that, based upon his personal knowledge and experience and upon a search of VWGoA records, Volkswagen's cold-start injectors and genuine replacement parts were asbestos-free during the years pertinent to the lawsuit to date (NYSCEF Doc. No. 154).

In opposition, plaintiffs dispute VWGoA's representation that their allegations are limited to a single cold-start injector. Chen testified that he was exposed to asbestos from performing work on a valve associated with a Volkswagen Rabbit (NYSCEF Doc. No. 251 at T517:1-520:5); from applying asbestos-containing Bondo on Volkswagen cars for bodywork (*id.* at T1157-1207:16); and from removing and installing asbestos-containing brakes on Volkswagen vehicles (*id.* at T1263:9-20).

Plaintiffs point to VWGoA's corporate representative, Robert Cameron's (Cameron) examination before trial (EBT) testimony in an unrelated litigation wherein Cameron stated that Volkswagen sold vehicles and replacement parts which contained asbestos-containing parts from 1955 through the late 1980s, including brakes and clutches (NYSCEF Doc. No. 294 at 38-40).

Furthermore, plaintiffs qualify Palmer's affidavit as self-serving in that he does not address any of Chen's other alleged exposures and lacks any explanation as to the basis of Palmer's knowledge about events occurring before he was employed by Volkswagen. In addition, the records Palmer refers to were never shared with plaintiffs during discovery.

As to element four of the *LaMarca* threshold, plaintiffs contend that VWGoA is licensed to do business in New York and that, according to its website, it sells its vehicles "through a 1,000-strong dealer network" with many of those dealers located in New York (NYSCEF Doc. No. 302). Based on the foregoing, plaintiffs argue that Volkswagen could reasonably foresee that its vehicles could end up in New York and cause injury if defective.

Finally, plaintiffs argue that Volkswagen's engagement in interstate and international commerce satisfies element five (NYSCEF Doc. No. 262 and 303 at 185).

In reply, VWGoA argues that no tortious act occurred in New York. VWGoA insists that Chen's exposure is limited to the repair of a cold-start injector on a Volkswagen Rabbit of an unknown model year, with an unknown prior ownership or repair history. VWGoA directs the court to Palmer's affidavit to establish that Volkswagen cold-start injectors and genuine replacement parts for same were asbestos-free at the time the work was allegedly performed.

VWGoA highlights portions of Chen's testimony, which expose his uncertain memory as to whether he replaced any brake on a Volkswagen Rabbit in New York (NYSCEF Doc. No. 251 at T1263:9-1264:17).

As to Chen's work with Bondo on Volkswagen vehicles, VWGoA argues that any allegation of exposure to another unrelated entity's products, such as Bondo cannot

establish jurisdiction over it.

c. Analysis

i. Statutory Requirements

The decedent's EBT testimony shows first that Chen recalls removing original brakes from a Volkswagen automobile and breathing the dust associated with that process at the body shop (NYSCEF Doc. No. 251 at T1206-1207), but later the testimony reveals that he is unsure whether he performed that work:

> "Q. Okay. Did you do any brake removal –
> "A. Maybe."
>
> * * *
>
> "A. Okay. 40 – 35, 40 years ago, if I can remember where, I'm cheat (sic) you. Okay? That clear? The answer is I cannot be sure. But I can guarantee you, if my boss go outside, 'Hey, this guy can diagnosis (sic) and do all kind of jobs.'"

(*id.* at T1263:17-18 and T1264:6-10).

Notwithstanding Chen's spotty memory as to whether he performed brake removals on Volkswagen automobiles, which is, in any event, not fatal to this case (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]), plaintiffs raise an issue of fact with his testimony that he cleaned the valve on a cold-start injector Volkswagen Rabbit to make it run again (NYSCEF Doc. No. 251 at T518:12-22).

Plaintiffs offer admissible evidence in the form of Cameron's EBT testimony from another litigation that VWGoA sold vehicles and replacement parts which contained asbestos-containing parts from 1955 through the late 1980s (NYSCEF Doc. No. 294 at 38-40), which supports Chen's contention that he worked with an asbestos-containing component and raises a triable issue of fact (*see Knee v A.W. Chesterton Co.*, 52 AD3d 355, 356 [1st Dept 2008]).

Furthermore, defendant does not contest *La Marca's* last two elements, namely that defendant expected or should reasonably have expected the alleged tortious act to have consequences in the state; and that defendant derived substantial revenue from interstate or international commerce.

ii. Due Process Requirements

In addition to the requirements of CPLR 302, constitutional safeguards of due process must also be satisfied. Under the Fourteenth Amendment of the Constitution, personal jurisdiction may only be extended over a non-resident where "minimum contacts" exist between the defendant and the forum state and maintenance of the lawsuit is consistent with "traditional notions of fair play and substantial justice" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291-292 [1980], quoting *International Shoe Co. v State of Wash.*, 326 US 310, 316 [1945]). Indeed, the defendant should "reasonably anticipate being haled into court there" (*id.* at 297).

aa. Purposeful Availment Test

In *Walden v Fiore*, the United States Supreme Court held that minimum contacts must be established between the defendant and the forum state and that defendant's expectation that plaintiff might suffer harm is not sufficient to predicate jurisdiction (571 US 277 [2014]). In particular, plaintiff must show that "defendant's conduct connects him to the forum in a meaningful way" (*id.* at 290).

To demonstrate VWGoA'S significant and consistent contacts as well as presence in New York, plaintiffs submit a print-out from the NYS Department of State website of defendant's registration to do business in New York State as a foreign corporation

(NYSCEF Doc. No. 260). Plaintiffs provide a print-out of defendant's webpage listing and mapping out locations of dealers in New York, which sell its automobiles and replacement parts, and service its vehicles (NYSCEF Doc. No. 261); a print-out of defendant's US Media Site, which includes a hyperlink to auto shows and events as well as a 2013 press release highlighting its partnership with the Museum of Modern Art (MoMA) and MoMA PS1, which show its targeted promotional efforts towards the New York market (NYSCEF Doc. No. 262); and a print-out of defendant's LinkedIn page listing managers and a director as being based out of the Greater New York City area (NYSCEF Doc. No. 263).

Plaintiffs also highlight that Volkswagen of America, Inc. is the exclusive importer of Volkswagenwerk Aktiengesellschaft's products in the United States *(Delagi v Volkswagenwerk AG of Wolfsburg*, 29 NY2d 426, 430, n.1 [1972]) and that the wholesale distributor for Volkswagen in New York was World-Wide Volkswagen Corp. (*id.* at 430).

Discovery was still pending, at the time this motion was marked submitted, and plaintiffs argue that additional facts needed are not available to them. Notwithstanding the foregoing, considering the record before the court, This court finds that defendant has established numerous meaningful contacts with the New York jurisdiction, thus satisfying the purposeful availment prong of the due process requirement.

bb. Reasonableness Test

Under the reasonableness test, the defendant has the burden of demonstrating that the following considerations make the exercise of jurisdiction unreasonable: (1) the burden on the defendant of litigating away from home; (2) the interest of the forum state in adjudicating the dispute; (3) plaintiff's interest in obtaining convenient and effective relief; (4) the interest of the interstate judicial system in efficient dispute resolution; and (5) the shared interest of the several states in furthering fundamental social policies (*Burger King Corp.*, 471 US at 476-477 [1985], quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286 at 292 [1980]; *see also Chloé v Queen Bee of Beverly Hills, LLC*, 616 F3d 158, 164-165 [2d Cir. 2010], citing *Asahi Metal Indus. Co., Ltd. v Superior Court of California, Solano County*, 480 US 102, 113 [1987]).

Here, in light of the modern advances in transportation and technology, including the availability of videoconferencing (*see Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 305 F3d 120, 129-130 [2d Cir 2002]) and defendant's multinational stature warranting its corporate representatives' travel to New York for business, as well as its resources and connections, defendant would suffer no appreciable hardship to adequately defend this lawsuit in New York (*see Simon v Philip Morris, Inc.*, 86 F Supp 2d 95, 133-134 [EDNY 2000]).

Second, New York has a strong interest in providing relief to a former citizen of its state who suffered an injury within its territory as a result of the alleged commission of a tortious act in New York in order to deter further harmful conduct from being directed at its state (*id.* and *see also Burger King Corp.*, 471 US at 473 [1985]).

Plaintiffs argue that Chen's widow and son consent to traveling to New York for the trial (NYSCEF Doc. No. 313 at 1). The court notes that, presumably, plaintiffs will not experience any inconvenience in maintaining the action in New York as they chose the forum of their own accord. Plaintiffs also contend that they have not designated nor are they likely to call Chen's treating physicians as witnesses, and that, in any event, defendant did not demonstrate these witnesses' inability to travel to New York or participate in the proceedings by video (*id.*).

In addition, the court has established the New York City Asbestos Litigation (NYCAL) docket, currently governed by Hon. Peter H. Moulton's July 20, 2017 Case Management Order (CMO), which encourages the fair, expeditious, and inexpensive resolution of cases.

As to the fourth factor, NYCAL's efficient, standardized and uniform docket for the resolution of asbestos litigation benefits plaintiffs, the interstate judicial system and defendants by avoiding unpredictable or variable procedures, or results and by "eliminating the need for repetitious litigation around the country and abroad" (*see Simon*, 86 F Supp 2d at 134 [EDNY 2000]).

Finally, New York has a shared interest with other states in furthering fundamental social policies addressing corporations' manufacture, distribution, and use of asbestos-containing materials and their failure to warn of the hazards to health that asbestos represents by awarding compensation to workers and consumers for any injuries resulting from exposure to asbestos dust.

In light of the above analysis, the reasonableness test is satisfied as defendant fails to demonstrate that the court's assertion of jurisdiction is unreasonable.

Based on the foregoing, this court finds that VWGoA failed to make a prima facie case on the basis of lack of personal jurisdiction, and therefore denies that branch of VWGoA's motion for summary judgment seeking dismissal on that ground.

IV. Motion Seq. No. 005

A. Personal Jurisdiction

1. CPLR 301: General or All-Purpose Jurisdiction

NNA is a California corporation with its principal place of business in the State of Tennessee. NNA is registered to do business as an authorized foreign corporation in the State of New York, pursuant to Business Corporation Law §§ 304 and 1304.

NNA argues that this court lacks general or all-purpose jurisdiction over it as a matter of law.

Plaintiffs' conclusory assertions are insufficient to demonstrate the systematic and continuous course of doing business required to subject NNA, pursuant to CPLR 301.

For the reasons stated in motion seq. no. 004, this court finds that the court does not have general or all-purpose jurisdiction over NNA.

2. CPLR 302 (a) (3): Long Arm Jurisdiction

a. Contentions

NNA concedes that the first element is met by plaintiffs' allegation that the act was committed outside New York (NNA mot, mem at 6).

Turning to the second element, which does not appear to be disputed either, plaintiffs argue that the deceased's mesothelioma was caused by exposure to NNA's asbestos-containing products, which were manufactured, recommended or supplied by NNA and foreseeably used by end users for NNA's vehicles.

Third, plaintiffs assert that the exposure to these aforementioned products caused him injury in New York. During his depositions, Chen testified that he was exposed to asbestos-containing products in approximately 1984 while working in a body shop in New York where he replaced a clutch on a used approximately eight year old Datsun 210 (NYSCEF Doc. Nr. 251 at T106:5-12; T1159:23-1160:9; T1201:8-1202:10; T1253:14-16; T1259:3-16; NYSCEF Doc. Nr. 252 at T264:15-23).

NNA points out that the decedent couldn't recall the brand, trade or manufacturer's name of the old or new clutch and that he testified that he only remembered the brand names of the aftermarket parts for the new clutch, namely BorgWarner and Cumberland (NYSCEF Doc. Nr. 251 at T107:5-11). NNA also highlights

that Chen testified that Nissan was one of the brand name cars he did Bondo work on (*id.* at T1159:22-1160:9). The court notes that in connection with the foregoing, the decedent added that the work was dusty, and that he ingested the dust (*id.* at T1201:8-24).

Plaintiffs draw the court's attention to NNA's Responses to Standard Interrogatories in an unrelated California proceeding where NNA states that:

> "since its incorporation on September 28, 1960, NNA has acted as the distributor of automotive brake linings, automotive gaskets, and automotive manual transmission clutch disc facings in and sold as service parts for Datsun and Nissan motor vehicles. In the past, some but not all of these component parts contained some percentage of commercial chrysotile in a bonded matrix"

(NYSCEF Doc. No. 289 at 7).

NNA characterizes plaintiffs' decedent's testimony as contradictory, presumptive and speculative, rendering it insufficient to identify NNA as the manufacturer fails to adequately support any allegation of injury resulting from an NNA product having occurred in New York. In support of this argument, NNA hones in on the fact that Chen offered testimony as to the brand name and manufacturer of the clutch wherein he first stated that he removed an unidentified brand (NYSCEF Doc. Nr. 251 at 106:16-19) and then indicates that he thinks he replaced an original clutch (*id.* at T1202:3-10).

Furthermore, NNA points out that the use of another manufacturer's asbestos-containing product, whether aftermarket clutch parts, rather than Nissan Genuine Part replace service parts, or the use of Bondo, which is an unrelated entity, cannot establish jurisdiction over NNA.

b. Standard of Law

i. Duty to Warn

A manufacturer may be held liable for failure "to provide adequate warnings regarding the use of its product" (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). In particular, a manufacturer has a "duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]).

Generally, a manufacturer's duty to warn a user of any defects is restricted to products the manufacturer designs and produces (*Rastelli*, 79 NY2d at 298 [holding that a tire manufacturer has no duty to warn of a defect in a tire rim compatible for use with its tire, but produced by another manufacturer]). However, in recent years, the Appellate Division, First Department, has interpreted a manufacturer's duty to warn to include products it neither manufactures nor installs, but which are used in conjunction with its equipment (*Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 [1st Dept 2001]):

> "While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos."

In 2016, the Court of Appeals affirmed this failure-to-warn jurisprudence relying on cases from the First Department, including *Berkowitz* and *Rogers v Sears, Roebuck & Co.*, 268 AD2d 245, 246 [1st Dept 2000] as well as cases from the Second and Third Departments:

> "Consistent with our decision in *Rastelli* . . . we hold that the manufacturer of a product has a duty to warn of the danger arising from the known and

reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended"

(*In re New York City Asbestos Litigation* [*Dummitt*], 27 NY3d 765, 778 [2016]).

The court turns to *Sawyer v A.C. & S., Inc.* to discuss the interpretation of the principle of foreseeability in this context (32 Misc 3d 1237[A], *2 [Sup Ct, NY County, June 24, 2011], *mot. to vacate denied*, 2011 WL11707702 [Sup Ct, NY County 2011]). Relying on *Curry v Am. Std., et al.*, Justice Heitler explained in *Sawyer* that a manufacturer's liability for third-party components hinges on the "degree to which injury from the component parts is foreseeable to the manufacturer" (*id.*, citing *Curry v Am. Std.*, 201 US Dist Lexis 142496, *5 [SDNY Dec. 6, 2010, Gwin J.]). In that vein, there is no duty to warn in *Rastelli* because the manufacturer's products merely could have been used with asbestos-containing components, whereas a manufacturer may potentially be held liable under a failure to warn theory, pursuant to *Berkowitz*, if that manufacturer "meant its products to be used with asbestos-containing components or knew that its products would be used with such components" (*id.* at *5).

In addition to the foreseeability element, there must be circumstances which strengthen the connection between the manufacturer's equipment and the defective third-party components (*Surre v Foster Wheeler LLC*, 831 F Supp 2d 797, 801 [SDNY 2011], citing *Rogers*, *supra* and *Berkowitz, supra*).

ii. Causation

Under a summary judgment standard, a defendant has "the initial burden of establishing prima facie that its product could not have contributed to the causation of plaintiff decedent's asbestos-related injury" (*Matter of New York Asbestos Litig. [Kestenbaum]*, 116 AD3d 545, *1 [1st Dept 2014], citing *Matter of New York City Asbestos Litig. [Comeau]*, 216 AD2d 79, 80 [1st Dept 1995], and *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). Plaintiff in turn is not required to show the precise causes of his injuries (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 225 [1st Dept 1993], *affd* 82 NY2d 821 [1993]), but rather, plaintiff only has the "burden of alleging facts and conditions from which defendant's liability may be reasonably inferred" (*Matter of New York Asbestos Litig. [Kestenbaum]*, 116 AD3d at *1).

Here, Chen testified at his deposition that he was exposed to injury-causing asbestos dust caused by defendant's product, or in the alternative a third party component. NNA's own witness submitted a response to an interrogatory in a separate case stating that it sold and distributed "automotive manual transmission clutch disc facings" service parts for Datsun and Nissan motor vehicles, which contained a percentage of asbestos. Based on these responses, plaintiffs established that it is "reasonably probable" that the service parts contained asbestos (*compare Healy v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601-602 [1996] [plaintiff failed to proffer sufficient circumstantial evidence of identity of manufacturer to establish reasonable probability that manufacturer's allegedly defective product caused injury]).

In *Matter of New York City Asbestos Litig. [Berensmann]*, the First Department affirmed the trial court's denial of defendant's motion for summary judgment (122 AD3d 520 [1st Dept 2014]). The Appellate Division affirmed the trial court's ruling, deferring the assessment of plaintiff's credibility to the jury. The court held that there remained issues of fact because the evidence showed that defendant manufactured a product containing asbestos at the relevant time, and failed to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*id.* at 521).

"Where causation is disputed, summary judgment is not appropriate unless 'only one conclusion may be drawn from the established facts'" *(Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 44 [2003], quoting *Kriz v Schum*, 75 NY2d 25, 34 [1989]).

iii. Product Identification

In addition to Chen's EBT testimony that he removed an original clutch, plaintiffs offer admissible evidence in the form of Responses to Standard Interrogatories from an unrelated asbestos litigation, which supports plaintiffs' contention that Chen worked with an asbestos-containing component and raises a triable issue of fact (*Knee*, 52 AD23d at 356 [1st Dept 2008]; *see also Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002]).

Defendant challenges Chen's testimony as he first stated that he installed BorgWarner or Cumberland aftermarket clutches for which NNA was not responsible, but ultimately speculated that the clutch he removed was original equipment based solely on the age of the car (NYSCEF Doc. No. 251, T1253-1257). Defendant further highlights that Chen did not know the prior maintenance of the used vehicle, the name of its owner, whether it came from New York or New Jersey (*id.*).

However, the court notes that "failure to identify the brand of product is not fatal where a defendant, who has made an asbestos-containing product, has been identified" (*In re New York City Asbestos Litig.* [*Fogel*], 2017 NY Slip Op 30224 [U], *4 [Sup Ct, NY County 2017], citing *Matter of New York City Asbestos Litig.* [*Krok*], 146 AD3d 700 [1st Dept 2017]).

As in *Matter of New York City Asbestos Litig.* [*Diedrich*], plaintiffs "identified specific brands of the subject asbestos products, including those of defendant, in use at the relevant work site during the relevant time" (7 AD3d 285, 285-286 [1st Dept 2004]). In addition, Chen's testimony that these products were interchangeable or "customarily used" in the work site at that time and that he was exposed to asbestos dust at that site during the relevant time sets forth "'facts and conditions from which [NNA's] liability may be reasonably inferred'" (*Petteys v Georgia Pac. Corp.*, 214 AD2d 363, 363-364 [1st Dept 1995], quoting *Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 AD2d at 225] [1st Dept 1993]).

While NNA highlights Chen's inability to remember precisely and points to gaps in his testimony, the foregoing is insufficient to demonstrate defendant's entitlement to the drastic remedy of summary judgment, especially in light of the lack of a first hand knowledge affidavit in the record (*Koulermos*, 137 AD3d at 576 [1st Dept 2016]).
La Marca's Fourth and Fifth Elements

Defendant does not contest *LaMarca's* last two elements, namely that defendant expected or should reasonably have expected the alleged tortious act to have consequences in the state; and that defendant derived substantial revenue from interstate or international commerce.

iv. Due Process Requirements

aa. Purposeful Availment Test

To demonstrate NNA's significant and consistent contacts as well as presence in New York, plaintiffs submit a print-out from the NYS Department of State website of defendant's registration to do business in New York State as a foreign corporation (NYSCEF Doc. No. 264). Plaintiffs provide a print-out of defendant's webpage listing and mapping out locations of dealers in New York, which sell its automobiles and replacement parts, and service its vehicles (NYSCEF Doc. No. 265); a print-out of Nissan's Official Newsroom webpage, which includes a press release about its presence at the 2018 New York International Auto Show, which shows its advertisement targeted at the New York market (NYSCEF Doc. No. 266); and a print-out of defendant's LinkedIn page listing several executives as being based out of the Greater New York City area (NYSCEF Doc. No. 267).

In addition, plaintiffs argue that defendant is the sole provider of vehicles to be used as taxis for a period of time in New York City as its bid was accepted by the Taxi &

Limousine Commission (*Committee for Taxi Safety, Inc. v City of New York*, 40 Misc 3d 930, 938 [Sup Ct, NY County 2013]).

Discovery was still pending, at the time this motion was marked submitted, and plaintiffs argue that additional facts needed are not available to them. Notwithstanding the foregoing, considering the record before the court, defendant has established numerous meaningful contacts with New York jurisdiction, thus satisfying the purposeful availment prong of the due process requirement.

bb. Reasonableness Test

The court directs the parties to its analysis under motion seq. no. 004 in connection with the reasonableness test.

Based on the foregoing, and in light of the analysis in motion seq. no. 004, I find that NNA failed to make a prima facie case on the basis of lack of personal jurisdiction, and therefore denies that branch of NNA's motion for summary judgment seeking dismissal on that ground.

V. Forum Non Conveniens (Motions Seq. No. 004, 005 and 006)

Since plaintiffs have established that the court has personal jurisdiction over defendants, the burden now lies with defendants to demonstrate that New York is inconvenient and that another forum is more appropriate (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985]).

A. Contentions

1. Moving Defendants' Arguments

VWGoA's, NNA's and Ford's contentions will be summarized together below as they set forth very similar arguments. Defendants argue that plaintiffs are forum shoppers and the case should have been filed in Texas as New York has little to do with the lawsuit.

Defendants argue that a plaintiffs' residence is the "most significant factor" in a forum non conveniens determination, and here, plaintiffs have been residents of Texas for the past three decades, including at the time this lawsuit was commenced. Furthermore, Chen was voluntarily deposed in Texas as it was more convenient to him. In contrast, plaintiffs lived, respectively, only less than two years according to VWGoA and NNA, or less than three years according to Ford in New York, and about 28 years in Taiwan.

Second, while Ford concedes that several of the defendants named in plaintiffs' pleadings are New York residents, it argues that none of the real parties in interest in the matter, namely the parties who manufacture the products, are New York residents, thus weakening the connection between the other parties and the forum (NYSCEF Doc. No. 180 at 6). In a similar, but somewhat contradictory vein, VWGoA and NNA stress that no defendants reside in New York and highlight that the corporate headquarters of at least one of the defendants, XL Parts LLC, is located in Texas (NYSCEF Doc. No. 148 at 11).

Third, defendants contend that the vast majority of Chen's exposure in the United States occurred in Texas over the course of approximately three decades. Whereas Chen's exposure in New York was less than two years, according to VWGoA and NNA, or less than three years according to Ford. Even Taiwan bears a stronger connection with at least 10 years of exposure to asbestos from employment in construction and in the automotive fields. Moreover, Chen was unable to identify the name of any of the locations at which he allegedly worked in Queens. Therefore, in light of the overwhelming amount of alleged exposure which occurred outside of New York, there is no substantial nexus with New York.

Fourth, defendants argue that the burden of defending themselves in New York is great as all known fact witnesses, medical providers, medical records and employment records as well as supervisors, co-workers and customers are located outside of New York, in Texas. Indeed, plaintiffs's fact witness list names only Chen's son and wife who both reside in Texas. In addition, VWGoA and NNA point out that Chen's brother and business partner also resides in Texas. Plaintiffs have not noticed any single fact witnesses who reside in New York. Chen was never diagnosed or treated for mesothelioma in New York. All of Chen's medical providers, treating physicians and medical records regarding the disease are in Texas. In addition, as mentioned previously, Chen was voluntarily deposed in Texas because it was a more convenient location and he is unable to identify the name of any of the locations he worked in New York.

Furthermore, Ford argues that discovery would be expensive, time-consuming and burdensome as much of the evidence Ford needs to defend itself must be obtained from individuals and companies in Texas. The process would require a petition to the court for an open commission, pursuant to CPLR 3018, and then the court's issuance of a subpoena to the State of Texas for the requested piece of discovery.

Fifth, defendants argue that Texas is an available alternative forum which would be more economical and efficient than New York. In addition, plaintiffs' cause of action is still viable in Texas as Chen was diagnosed with mesothelioma in August 2016, which is still within the two years prescription of the Texas statute of limitations. VWGoA and NNA also highlight that Harris County, plaintiffs' county of residence, has established a Multi District Litigation (MDL) system to manage asbestos claims.

Sixth, defendants conclude that in light of the lack of substantial nexus with New York, there is no justification to add to the heavy burden on New York courts, which are overburdened and have a backlog.

Finally, VWGoA and NNA add that New York's choice of law rules would require the application of Texas substantive law on the primary tort claims because Texas is where Chen's exposures occurred. Therefore, to avoid any inconvenience and delay on this court in connection with the application of foreign law, a Texas forum should be favored under the circumstances. In conclusion, VWGoA and NNA argue that plaintiffs cannot establish why Texas would be inconvenient.

2. Plaintiffs' Opposition

Plaintiffs jointly oppose all motions submitted by defendants in an omnibus memorandum of law.

First, plaintiffs argue that the current and prior Special Masters have repeatedly stated that forum objections do not follow a traditional forum non conveniens analysis, but rather, the court focuses on two factors: whether there is significant New York exposure and whether there is another forum where there is significant exposure that is more appropriate.

Plaintiffs contend that defendants failed to follow the practice and procedure established by CMO Section VIII and NYCAL custom, which provide that any forum objection is handled by defendants' Liaison Counsel and is first taken up with the Special Master with respect to in extremis cases.

Plaintiffs argue that defendants did not meet their burden to disturb plaintiffs' choice of forum as (1) Chen has had significant exposure to asbestos-containing products in New York City for approximately three years where he personally performed work at two separate locations and was exposed to asbestos dust while performing clutch and brake replacements and bodywork; (2) Chen is a former resident of New York, and his widow and son consent to traveling to New York for trial; (3) plaintiffs have not designated, nor are they likely to call on any of Chen's treating physicians, and, in any event, defendants did not show that they would be unable to travel to New York to testify; (4) most of plaintiffs' expert witnesses and many of defendants' witnesses are

residents of and located in New York; (5) no hardship is posed to defendants who are multinational corporations registered to do business in New York and their counsels in this matter are located and licensed to practice law in New York; (6) no burden is placed on this court, which has established an efficient system for dealing with asbestos-related cases, and this court has a substantial interest in protecting its former residents from torts committed within its borders; (7) another forum more appropriate than New York does not exist; and (8) defendants have not shown that Texas law will apply to this case.

3. Defendants' Reply Papers

In reply, all three defendants argue that they have not failed to follow the CMO's procedures. In addition, defendants assert that plaintiffs misconstrue Liaison Counsel's role and authority as to forum non conveniens objections, and that the CMO does not mandate that forum objections be handled by Liaison Counsel. Moreover, CMO Section VIII and as a whole, is actually silent as to forum objections and thus the CPLR governs.

Defendants argue that the Special Masters' recommendations are neither binding on this court nor are they applicable to the instant matter. Indeed, the Special Masters' recommendations cited by plaintiffs refer to Liaison Counsel's forum objections in reference to the cluster application process for inclusion of certain cases in the accelerated in extremis docket. This NYCAL procedural case management tool was designed to provide trial preference over other NYCAL cases for matters that clearly belong in the New York City venue. The foregoing tool does not affect any substantive dispositive issue nor does it deny a party's right to assert a motion to dismiss.

Defendants also contend that the Islamic Republic of Iran factors control. NNA and VWGoA highlight that Chen's alleged exposure in New York is limited to 1 year and 10 months split between 1 month at a gas station and 10 months of part-time work at a body shop, and Ford asserts that plaintiffs' allegation that Chen's approximately 3 years of asbestos exposure in New York City does not constitute significant exposure in this jurisdiction according to the record, and specifically in light of Chen's long career, asbestos exposure history, diagnosis and treatment in Texas. In comparison, decedent's full-time exposure at three automotive repair shops for approximately 30 years in Texas is much more significant.

Defendants reiterate that Houston, Texas is an available alternative forum as Harris County has established a Multi District Litigation (MDL) system similar to NYCAL to manage asbestos claims.

Ford disputes plaintiffs' suggestion that the case is trial ready in support of the proposition that this matter should be tried in New York. Ford points out that multiple motions to vacate Hon. G. Lebovits' pre-trial order are pending before the court and that discovery requests are still outstanding.

B. Analysis

The doctrine of forum non conveniens permits a court to dismiss an action, pursuant to CPLR 327, notwithstanding its jurisdiction over a claim where "in the interest of substantial justice the action should be heard in another forum" (*id.*).

In particular, CPLR 327(a) provides that:

> "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

Plaintiffs' reliance on the Special Masters' recommendations is inapposite as they relate to forum objections to the application for inclusion of a case in the in extremis group, which were interposed by defense Liaison Counsel, or by defendants. These

applications are granted to plaintiffs who are "terminally ill from an asbestos-related disease with a life expectancy of less than one year or who have a diagnosis of mesothelioma," pursuant to the CMO and give eligible plaintiffs NYCAL trial preference (*see* CMO Section XIV and XV). Instead, New York courts have been guided by well-established factors outlined by the Court of Appeals to determine whether to retain jurisdiction on forum conveniens grounds.

In *Islamic Republic of Iran*, the Court of Appeals held that the dismissal of a case on the basis of forum non conveniens is within the court's discretion when "considering and balancing the various competing factors" (62 NY2d at 479 [1984]). Said factors include "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit" (*id.*). In addition, the court may also consider "that both parties to the action are nonresidents" and "that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction" (*id.*). Furthermore, "[n]o one factor is controlling" and the rule of forum non conveniens is flexible and depends on "the facts and circumstances of each case" and "rests upon justice, fairness and convenience" (*id.*; *see also Matter of New York City Asbestos Litig.* [*Smith*], 239 AD2d 303, 304 [1st Dept 1997]; *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294 [1st Dept 2005]).

In order to prevail, the moving defendant has the "heavy burden" to show that the balance of factors weighs strong enough in its favor so as to disturb plaintiff's choice of forum (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]). Furthermore, "'[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*Anagnostou v Stifel*, 204 AD2d 61, 61 [1st Dept 1994], quoting *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991], quoting *Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]).

At the outset, this court disagrees with plaintiffs' suggestion of a purported prejudicial delay by defendants' motion practice at this time (NYSCEF Doc. No. 246 at 27-29). The action was commenced on April 20, 2017. Upon plaintiffs' application, the matter was included in the in extremis trial cluster. Chen's discovery EBT was held over the course of several days in June and July 2017 and his de bene esse deposition was completed in October 2017.

VWGoA's and NNA's motions were filed on February 6, 2018 and Ford's motion was filed on February 16, 2018, merely 4 months after Chen's oral examination, or 10 months after the commencement of this action (*compare National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 232 [1st Dept 1999] [holding that "defendant has substantially delayed in invoking the forum non conveniens doctrine," specifically waiting "until nearly 21 months after the commencement of this action and after National Union had served discovery and moved for summary judgment"]; *compare also Defazio v A. W. Chesterton*, 2011 NY Slip Op 31212[U] [Sup Ct, NY County 2011] [in this almost ten year old case, the court ruled that "at this stage of the proceedings New York is a suitable forum as any" as the parties had spent "a great deal of time and resources in furtherance of this matter in this jurisdiction").

The record shows that defendants were only able to obtain sufficient information for the making of their motions until substantial discovery was complete. Given the complexity of the subject matter and the challenges associated with gathering evidence, a 4- to 10-month delay in moving to dismiss on the grounds of forum non conveniens is not so substantial as to constitute a reason, in itself, for denial of the motion to dismiss (*see Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 14 AD3d 414, 415 [1st Dept 2005]).

Notwithstanding the foregoing, on this record, this court finds that the balance of factors and circumstances favor retention of the case in New York.

Contrary to defendants' assertions, this court finds that there is a substantial nexus between the action and New York (*see Travelers Cas.& Sur. Co. v Honeywell Intl. Inc.*, 48 AD3d 225, 226 [1st Dept 2008] [denying dismissal on forum non conveniens where there was a substantial nexus between the action and New York, as most

insurance policies at issue were negotiated, issued and brokered in New York]; *see also American BankNote Corp. v Daniele*, 45 AD3d 338, 339 [1st Dept 2007] [denying dismissal on forum non conveniens where New York is the place where parties met on a regular basis and where during such meetings, false representations and assurances were made and where defendant's bank accounts, a central part of the claimed fraudulent scheme, were located).

Indeed, Chen was a resident of New York for three years before moving to Texas. He was exposed to asbestos from defendants' products during this time period and thus sustained an injury in this jurisdiction. Plaintiffs have demonstrated that their causes of action arise from activities within New York while Chen worked as a mechanic on defendants' automobiles.

While the court is mindful that Chen was diagnosed and treated for mesothelioma in Texas, plaintiffs do not intend to call any of Chen's physicians at trial. Furthermore, Chen's widow and son have stated that they are willing and not inconvenienced to come to New York to testify.

Also militating in favor of keeping the matter in New York is that defendants have not shown how any of their witnesses would be inconvenienced by having the action remain in New York.

Finally, although this is not dispositive on a motion to dismiss, pursuant to CPLR 327(a), defendants are international corporations with the connections and resources to litigate this dispute in New York and it has been established that the court has asserted personal jurisdiction over them.

The balance of factors weighing in defendants' favor is not strong enough to overcome their heavy burden on a motion to dismiss for forum non conveniens and to overturn plaintiffs' choice of forum, which must be given great weight. Based on the foregoing, defendants' motions to dismiss, pursuant to CPLR 327 (a), in favor of an alternative forum in Texas, shall be denied.

VI. Conclusion

Accordingly, it is ORDERED that defendant Volkswagen Group of America, Inc.'s motion for summary judgment pursuant to CPLR 3212, to dismiss this action for lack of personal jurisdiction pursuant to CPLR 301 and 302 (a), alternatively to dismiss this action pursuant to CPLR 327 (a) on forum non conveniens grounds is denied and it is further,

ORDERED that Nissan North America, Inc.'s motion for summary judgment pursuant to CPLR 3212, to dismiss the action based on lack of personal jurisdiction, pursuant to CPLR 301 and 302(a), alternatively to dismiss this action pursuant to CPLR 327(a) on forum non conveniens grounds, filed under Motion Sequence 005, is denied, and it is further,

ORDERED that defendant Ford Motor Company's motion pursuant to CPLR 327(a), to dismiss this action on forum non conveniens grounds, filed under Motion Sequence 006, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 2, 2018

MANUEL J. MENDEZ
J.S.C.

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