No. 19A___

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY OF CANADA, LTD.,

Applicant,

v.

GEORGE BELL, ET AL.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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March 2, 2020

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Ford Motor Company of Canada ("Ford") respectfully requests a 30-day extension of time, to and including May 1, 2020, within which to file a petition for a writ of certiorari to review the decision of the California Court of Appeal in this case.

1. The California Superior Court for San Francisco County issued its opinion directing judgment in favor of Ford on June 16, 2017. *See* Order Granting Defendant's Motion for Entry of Judgment, *Automobile Antitrust Cases I, II*, No. CJC-03-004298 (Appendix A). The California Court of Appeal for the First Appellate District issued its decision reversing the trial court on September 25, 2019. *See In re Automobile Antitrust Cases I and II*, No. A152295 (Appendix B). Ford sought rehearing, which the court denied after modifying its opinion on October 23, 2019 (Appendix C). Ford sought a writ of certiorari in the Supreme Court of California, which denied review on January 2, 2020. *See In re Automobile Antitrust Cases I and II*, No. S258963. Unless extended, the time to file a petition for certiorari in this Court will expire on April 1, 2020. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). *See Cox Broad. Corp.* v. *Cohn*,

420 U.S. 469, 482-483 (1975) (acknowledging this Court's jurisdiction over a state-court case when a federal issue has been "finally decided").

2. This case deepens an existing conflict among lower courts regarding an important and recurring issue in federal preclusion law. In *Taylor* v. *Sturgell*, 553 U.S. 880 (2008), this Court held that claim preclusion can apply, consistent with federal law, when a party has "assume[d] control over the litigation in which [a] judgment was rendered." *Id.* at 895 (internal quotation marks omitted) (first alteration in original). Because such a person has already "had the opportunity to present proofs and argument, he has already had his day in court even though he was not a formal party to the litigation." *Id.* (internal quotation marks omitted). In this case, the California Court of Appeal adopted an erroneous test for the necessary level of "control," leading it to break from the decisions of several lower courts. *See* App'x B 19-20.

3. This class-action suit began nearly twenty years ago, in 2003, when more than a dozen lawsuits filed in California were coordinated into this proceeding. *Id.* at 2. The plaintiffs allege that Ford, along with other manufacturers and associations, "conspired to keep lower-priced, yet virtually identical, new cars from being exported from Canada to the United States." *Id.* Similar actions were filed in various state and federal courts all over the country. *See id.* at 2-3. All of these actions were premised on the same alleged conspiracy, and all plaintiffs contend that the possibility of additional Canadian vehicles in the United States would have led

all automobile manufacturers to lower their suggested retail prices on *all* vehicles sold in the United States. *See id.*

4. The federal actions were eventually consolidated in the District of Maine by the Judicial Panel on Multidistrict Litigation. *Id.* at 3. The federal plaintiffs amended their complaint to add state law class-action claims, including California law claims. *Id.* The California state court and federal MDL court then brokered an arrangement among the various parties and counsel designating the federal MDL as the "lead action." *Id.* All discovery and pre-trial litigation—for both the federal and state cases—would occur under the auspices of the federal MDL. *Id.* Counsel for the state and federal parties entered into a "joint prosecution agreement" to handle the coordinated proceedings. *Id.* at 17. As a result, "[t]he lawyers" in this California action "were the lawyers in the federal case, for years," through all of discovery and "briefing of and argument on the ultimate summary judgment motion." App'x A 6.

5. After the federal MDL court heard oral argument on summary judgment but before its decision, the plaintiffs pressing the California law class claims in the federal MDL had a sudden change of heart. *Id.* at 1-2. They moved to voluntarily dismiss their claims under Federal Rule of Civil Procedure 41. *Id.* at 2. Over Ford's objection, the federal MDL court granted that motion and dismissed the California claims. App'x B 7. The federal MDL court proceeded to grant summary judgment in favor of all defendants on all remaining claims in federal court. *Id.* at 8.

6. Proceedings resumed in these California state-court cases, with the same counsel pressing the same class-action claims on behalf of different named lead plaintiffs. App'x A 4, 6. Ford moved for judgment, asserting that plaintiffs were barred from pressing these claims under principles of claim and issue preclusion. *Id.* at 2. The trial court granted that motion on claim-preclusion grounds. *Id.* at 12. As the court explained, "the main purpose of res judicata is to protect not just defendants subject to relitigation, but also more generally to inhibit multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*." *Id.* (internal quotation marks omitted). The court found that the doctrine therefore barred plaintiffs from choosing "to leave a forum where they have a full opportunity to litigate all their claims, have that case go to final judgment, and * * * then engage in further suits on the same cause of action" in California. *Id.*

7. The California Court of Appeal reversed. App'x B 2. The court considered two different forms of nonparty preclusion under *Taylor*. First, the court rejected Ford's argument that the plaintiffs were "adequately represented" by the parties to the federal MDL. *Id.* at 13-19 (internal quotation marks omitted). Then, turning to "control," the court determined that this Court's precedent required Ford to show that the California plaintiffs were "directing the federal court plaintiffs as to the steps they should take in advancing the litigation." *Id.* at 19. The court found the evidence insufficient to support such a showing. *Id.* at 19-20. But the court acknowledged that courts in other states had reached the opposite conclusion

"in these circumstances." *Id.* at 20 (collecting cases). The court below "respectfully disagree[d] with" those courts' "conclusions." *Id.*

8. Ford petitioned for rehearing, arguing that the court had applied a more stringent definition of "control" than this Court had articulated in *Taylor*. *See* App'x C 1-2. The court added a paragraph of analysis regarding the test for "control," rejecting the definition advanced by Ford without explaining how its definition squared with *Taylor*. *Id.* The court otherwise denied rehearing. *Id.* The California Supreme Court denied Ford's petition for certiorari.

9. The decision below exacerbated an acknowledged division among lower courts regarding when a party may be said to have "controlled" another within the meaning of *Taylor*. App'x B 20. By applying the wrong test, the California court in this case placed itself on the wrong side of that split. *Id*. The frequency of nationwide class actions and MDL proceedings ensures that this issue is likely to recur. This Court's review is therefore warranted to resolve important questions left open by *Taylor* and guide lower courts regarding the proper application of federal preclusion principles in such cases.

10. Ford has retained Jessica Ellsworth of Hogan Lovells US LLP as counsel to file a petition for writ of certiorari. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including: (a) oral argument in *Eni US Operating Co.* v. *Transocean Offshore Deepwater Drilling, Inc.*, No. 4:13-cv-3354 (S.D. Tex.), on March 5; (b) a petition for writ of certiorari in *U.S. ex rel. J. William Bookwalter, III, M.D.* v. *UPMC*, No. 18-1693 (3d Cir.), due

on March 19; (c) an amicus brief in support of the petition for certiorari in *Ford Motor Company* v. *United States*, No. 19-1026, due on March 19; (d) oral argument in *New Jersey Coalition of Automotive Retailers* v. *Mazda Motor of America, Inc.*, No. 19-2961 (3d Cir.), due on March 24; (e) a response brief in *Stand Up for California* v. *United States*, et al., No. 19-5285 (D.C. Cir.), due on March 27; (f) an opening brief in *United States ex rel. Integra Med Analytics LLC* v. *Providence Health & Services*, No. 19-56367 (9th Cir.), due on April 1; (g) a brief in *Ezaki Glico Kabushiki Kaisha* v. *Lotte International America Corp.*, Nos. 19-3010, 19-3147 (3d Cir.), due on May 6; and (h) preparation for oral argument in *Tech Pharmacy Services LLC* v. *Alixa Rx LLC*, No. 19-1488 (Fed. Cir.); *Ford Global Technologies, LLC* v. *New World International, LLC*, No. 19-1746 (Fed. Cir.); and *Merck Sharp & Dohme Corp., et al.* v. *Microspherix LLC*, No. 2197(L) (Fed. Cir.). Applicants request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including May 1, 2020.

Respectfully submitted,

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