APPENDIX

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

IN RE AUTOMOBILE ANTITRUST CASES I AND II

A152295

(San Francisco City & County,
JCCP Nos. 4298 & 4303; CJC03004298)

Filed: 09/25/2019

After years of litigation, the sole remaining defendant in this coordinated antitrust proceeding, Ford Motor Company of Canada, Ltd. (Ford Canada), filed in the superior court a request for entry of judgment on grounds of claim preclusion and issue preclusion. Ford Canada argued that a summary judgment entered by a federal court in a related proceeding precluded the plaintiffs here (certain purchasers of new automobiles in California) from pursuing their claims under California state antitrust and unfair competition statutes. The superior court agreed that the claim preclusion doctrine barred plaintiffs' claims (while finding that issue preclusion did *not* apply) and entered judgment for Ford Canada.

On appeal, plaintiffs contend the superior court erred in concluding the federal judgment has claim-preclusive effect. Ford Canada counters by arguing that (1) claim preclusion does apply, and (2) as an alternative ground for affirmance, issue preclusion bars plaintiffs from litigating an essential element of their claims (causation of injury), and the superior court's holding to the contrary was error. We conclude neither claim preclusion nor issue preclusion applies in the present case because the plaintiffs here were not parties to the federal proceeding, and were not in privity with the parties against whom the judgment in that case was entered. We therefore reverse the superior court's judgment.

I. BACKGROUND

A. The Coordinated Proceeding in California State Court

In our opinion addressing a prior appeal in this matter, we described the underlying litigation: "In this coordinated proceeding, certain purchasers of new automobiles in California (plaintiffs) brought state law claims against a number of automobile manufacturers and dealer associations under the Cartwright Act (Bus. & Prof. Code, §§ 16720–16728) and the unfair competition law (Bus. & Prof. Code, §§ 17200–17210). Specifically, plaintiffs allege that defendant manufacturers and associations conspired to keep lower-priced, yet virtually identical, new cars from being exported from Canada to the United States, thereby keeping new vehicle prices in California higher than they would have been in a properly competitive market." (*In re Automobile*

Antitrust Cases I & II (2016) 1 Cal.App.5th 127, 131 (*Automobile Antitrust Cases*).)

"This litigation began over a decade ago when, in early 2003, more than a dozen different lawsuits were filed in California against various automobile manufacturers and trade associations, each alleging state law causes of action for antitrust conspiracy and unfair business practices and each filed as a class action on behalf of individuals who purchased or leased new vehicles in California that were manufactured or distributed within a certain period of time by one of the named defendants. The lawsuits were eventually coordinated into this proceeding. [Citation.] Thereafter, in October 2003, plaintiffs filed their consolidated amended class action complaint, the operative pleading in this matter. In addition to [Ford Canada], the class action complaint named numerous other automobile manufacturers [and two trade organizations] as defendants." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at pp. 132–133, fn. omitted.)

"Plaintiffs—the majority of whom eventually became class representatives in this litigation—are George Bell, Wei Cheng, Laurance de Vries, Joshua Chen, Jason Gabelsberg, Ross Lee, Jeffrey M. Lohman, Christine Nichols, Local 588 of the United Food & Commercial Workers Union, Estelle Weyl, Michael Wilsker, and W. Scott Young. Each plaintiff alleges an injury caused by one or more of the defendants." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at pp. 132–133, fn. 2.) "Plaintiffs filed their motion for class certification in the instant matter in the Spring of 2005. Proceedings were stayed, however, while the parties conducted

extensive coordinated discovery and litigated their class certification motion in" a related federal proceeding. (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.)

B. The Federal Proceeding and the Coordination Order

"In addition [to the California state court proceeding], a similar lawsuit had been filed in federal court against many of the same defendants, alleging violation of federal antitrust laws. (See *In re New Motor Vehicles Canadian Export* (D.Me. 2004) 307 F.Supp.2d 136, 137–138 (the federal multidistrict litigation or federal MDL).) Parallel cases were also pending in a number of other state courts. In June 2004, the trial court issued an order, after consultation with Judge Hornby—the judge in the federal MDL [sitting in the District of Maine]—coordinating discovery among this action, the federal action, and other state actions." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.)

C. Proceedings in the Federal District and Appellate Courts: The Dismissal of the Federal Claims and the Vacatur of Class Certification (2004–2008)

In March 2004, Judge Hornby dismissed the federal antitrust damage claims brought by the plaintiffs in the federal MDL but declined to dismiss the federal claims for injunctive relief. (*In re New Motor Vehicles Canadian Export, supra,* 307 F.Supp.2d at pp. 136, 137, 141–144.) The federal plaintiffs then amended their complaint to add damage claims under the laws of various states, including California. (*In re New Motor Vehicles*

Canadian Export Antitrust (D.Me. 2004) 335 F.Supp.2d 126, 127.) In September 2004, Judge Hornby decided to exercise supplemental jurisdiction over these state law claims under title 28 United States Code section 1367. (*In re New Motor Vehicles Canadian Export Antitrust, supra,* 335 F.Supp.2d at pp. 127–128, 132.)

In rulings issued in 2006 and 2007, Judge Hornby certified a nationwide injunctive class under federal antitrust law, as well as 20 state damage classes (including a California class) seeking recovery under state antitrust and consumer protection statutes. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. Mar. 10, 2006, MDL Docket No. 1532) 2006 WL 623591, pp. *1–*2, *10 [certifying nationwide injunctive class]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2006) 235 F.R.D. 127, 129, 148 [preliminarily approving certification of five exemplar state damage classes, including a California class]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2007) 241 F.R.D. 77, 78–79, 84 & fn. 11 [concluding certification was appropriate for the five exemplar states and for 15 additional states]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2007) 243 F.R.D. 20, 21–23 [certifying class action and appointing class counsel]; see *Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136, fn. 7.) As to the federal court class seeking damages under California law, the class representatives were Lindsay Medigovich and Parry Sadoff (the federal California plaintiffs). (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 243 F.R.D. at p. 23.)

In March 2008, the First Circuit Court of Appeals reversed Judge Hornby's certification of the injunctive class under federal law and ordered dismissal of the federal claim for injunctive relief. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (1st Cir. 2008) 522 F.3d 6, 9, 16, 30.) As a result, no federal claims remained in the case. (*Id.* at p. 16.) The First Circuit noted, however, that there might still be a basis for the federal district court to exercise jurisdiction over at least some of the state law damage claims (either diversity jurisdiction under 28 U.S.C. § 1332 or supplemental jurisdiction under 28 U.S.C. § 1367). (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 522 F.3d at pp. 9, 16–17.) The appellate court stated that, on remand, the district court should consider these potential grounds for jurisdiction. (*Id.* at p. 16.)

As to supplemental jurisdiction, the First Circuit stated: "The district court may . . . consider whether to exercise its discretion to continue exerting supplemental jurisdiction, see 28 U.S.C. § 1367, over the state damages claims," despite the dismissal of the federal claims. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 522 F.3d at p. 16.) The appellate court stated that, "[i]n weighing this option, the district court should consider 'the totality of the attendant circumstances,' including considerations of judicial economy, fairness to the parties, and the nature of the applicable state law." (*Ibid.*)

Because there was a potential basis for jurisdiction over the state law claims, the First Circuit reviewed the order certifying the state damage classes. (*In re New Motor Vehicles Canadian Export Antitrust*

Litigation, supra, 522 F.3d at pp. 9, 17.) The appellate court vacated that certification order and stated that, on remand, the district court could reconsider whether to certify state law damage classes in light of principles outlined in the appellate court's opinion and a more fully developed record. (*Id.* at pp. 9, 16, 29–30.)

D. Subsequent Proceedings in the Federal District Court (2008–2009)

On remand, Judge Hornby addressed whether he should continue to exercise supplemental jurisdiction over the state law damage claims under 28 United States Code section 1367. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me., Apr. 29, 2008, MDL Docket No. 1532) 2008 WL 1924993, pp. *1–*2.) In an April 2008 order following a conference with counsel, Judge Hornby stated the parties agreed he should exercise supplemental jurisdiction over the claims brought under the laws of 15 of the 20 states at issue.[1] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.) But as to the remaining five states (including California), where parallel class actions were pending in state court, the parties took differing positions. (*Ibid.*) The plaintiffs argued Judge Hornby should decline to assert supplemental jurisdiction, while the defendants argued judicial economy supported the continued exercise of jurisdiction over all the cases pending in

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[1] The parties agreed diversity jurisdiction was unavailable except as to one Nebraska case. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *1.)

federal court.[2] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.)

In his April 2008 order, Judge Hornby concluded "that at this time the prudent course is to exercise supplemental jurisdiction over all the state law claims pending in this Court." (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.) In reaching this decision, Judge Hornby noted that briefing on defense summary judgment motions was underway, and that he would have to examine the factual record and expert opinions to resolve those motions. (*Id.* at pp. *1–*2.) "Thus, there is efficiency in using that record familiarity to resolve the summary judgment issues here as to all the states rather than require other judges to duplicate that effort." (*Id.* at p. *2.)

One year later, however, in an April 2009 opinion, Judge Hornby revisited the question of whether to resolve the claims brought under California law by the federal California plaintiffs, Lindsay Medigovich and Parry Sadoff. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2009) 609 F.Supp.2d 104, 106–107.) By that time, discovery was complete, a class certification motion by some of the federal plaintiffs had been refiled and rebriefed,

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[2] According to a case management conference statement subsequently filed in the California state court proceedings, counsel for the California state court plaintiffs appeared at the April 2008 conference in the federal action and (consistent with the position taken by counsel for the federal court plaintiffs) asked Judge Hornby not to continue to exercise supplemental jurisdiction over the California law claims pending in federal court.

and summary judgment motions had been filed, briefed and argued. (*Id.* at p. 105.) Counsel for the federal California plaintiffs, however, had decided not to renew their request for certification of a California class in federal court. (*Ibid.*) Also, the federal California plaintiffs, Medigovich and Sadoff, had filed a motion to dismiss their claims without prejudice.[3] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 106.)

Judge Hornby granted the motion over the defendants' objection. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at pp. 106– 107.) Noting that rule 41 of the Federal Rules of Civil Procedure (28 U.S.C.) required court approval for the voluntary dismissal in light of the advanced stage of the federal proceeding, Judge Hornby concluded dismissal was appropriate under the circumstances. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at pp. 106–107.) In reaching this conclusion, Judge Hornby relied in part on the supplemental jurisdiction statute, 28 United States Code section 1367, which provides that "[federal] district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . if . . . [¶] . . . the claim raises a novel or complex issue of [s]tate law." (28 U.S.C. § 1367(c)(1); see *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.)

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[3] The federal California plaintiffs had filed this motion several months earlier, and defendants filed an opposition in August 2008.

Judge Hornby concluded the claims before him raised a novel or complex issue of California state law, specifically the question of how a plaintiff may prove antitrust causation or injury in an indirect purchaser case. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) Judge Hornby had initially ruled (at an earlier phase of the case) "that, unlike some other states, California law allows a presumption of antitrust injury to an indirect purchaser once the plaintiff proves the antitrust conspiracy," which "is a critical element in this indirect purchaser case." (*Ibid.*) Judge Hornby noted, however, that the California Supreme Court had not definitively resolved this question, and the parties disagreed as to the correct interpretation of the existing case law on the point. (*Ibid.*)

Judge Hornby decided it would be preferable for the California state courts to resolve this issue. He stated: "How to prove antitrust causation or injury in this indirect purchaser case is central to decisions on both class certification and liability. I conclude that it makes most sense to have that issue decided in California where it can be appealed to the California Supreme Court for a final and definitive resolution. My decision on the issue here is likely to contribute to confusion over the status of California law on the subject, and an appeal to the First Circuit cannot provide the definitive resolution that the California Supreme Court can." (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) Judge Hornby therefore revisited his initial decision to exercise supplemental jurisdiction over the California claims and granted

the motion by Medigovich and Sadoff to dismiss those claims without prejudice. (*Ibid.*)

In July 2009, Judge Hornby granted summary judgment for defendants as to the remaining plaintiffs' claims under the laws of 19 states. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (2009) 632 F.Supp.2d 42, 45, 63.) Judge Hornby concluded the plaintiffs could not prove the element of causation, i.e., that the alleged conspiracy had caused "antitrust (or consumer protection) injury" by raising the prices paid by consumers for new vehicles. (*Id.* at pp. 45–47; see *id.* at p. 56.) Specifically, applying principles set forth in the First Circuit's earlier opinion addressing class certification, Judge Hornby determined the plaintiffs could not prove that every transaction sales price was affected by the alleged conspiracy. (*Id.* at pp. 58–59, 63.) This was true under the laws of each of the 19 states at issue, all of which required affirmative proof of causation. (*Id.* at p. 63.) Judge Hornby did not determine what the result would be under California law (with its "shifting presumption" as to injury), because, in light of the dismissal of the federal California plaintiffs' claims a few months earlier, California was "no longer in the mix." (*Ibid.*)

Following issuance of his summary judgment order, Judge Hornby entered judgment for the remaining defendants in the federal case (i.e., the defendants that had not settled or filed for bankruptcy protection), including both Ford Motor Company (Ford U.S.) and Ford Canada.

E. Class Certification and Summary Judgment Proceedings in the California Superior Court and the Subsequent Appeal to this Court (2009–2016)

In May 2009, the trial court in the present California state court proceeding (Judge Kramer, who previously had stayed class certification proceedings pending developments in the federal case) granted the plaintiffs' motion for class certification. (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.) The certified class included persons who purchased or leased new automobiles in California between 2001 and 2003.

Between 2010 and 2012, the parties litigated summary judgment motions in the trial court. (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at pp. 137–140.) By May 2011, as a result of settlements, bankruptcies and summary judgment rulings, the only remaining defendants were Ford U.S. and Ford Canada. (*Id.* at pp. 137–139.) In November 2011, Judge Kramer granted summary judgment in favor of Ford U.S. and Ford Canada, concluding plaintiffs had not presented sufficient evidence that these defendants participated in an unlawful conspiracy. (*Id.* at p. 140.) Plaintiffs appealed the ensuing judgment to this court. [4]

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[4] At some point during this time period, the then-remaining defendants, including Ford U.S. and Ford Canada, filed a joint motion for summary judgment on the issue of antitrust impact. (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 137, fn. 9.) That motion was fully briefed but was not then argued or decided by the trial court. (*Ibid.*) The defendants did not file a motion during this period arguing the federal court's 2009 summary judgment decision had preclusive effect.

(*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 140.) In 2016, this court affirmed the judgment for Ford U.S. but reversed and remanded as to Ford Canada, concluding triable issues of material fact precluded summary judgment on the question whether Ford Canada participated in an unlawful conspiracy. (*Id.* at pp. 172–173.)

F. Subsequent Proceedings in the Superior Court (2016–2017)

On remand, the trial court (Judge Karnow, to whom the case had been reassigned) conducted further proceedings between plaintiffs and the sole remaining defendant, Ford Canada. In May 2017, Judge Karnow denied Ford Canada's pending motion for summary judgment on the issue of antitrust injury or causation (initially filed in 2010 by multiple defendants). In reaching his conclusion that a triable issue of fact existed on causation, Judge Karnow focused primarily on the expert and other evidence submitted by plaintiffs, as well as Ford Canada's attacks on the opinions of plaintiffs' expert. As to the governing legal standards, Judge Karnow referred to Judge Hornby's July 2009 decision addressing causation and injury, but Judge Karnow stated that California law "may not be in accord" with the First Circuit standards applied by Judge Hornby, specifically because California law may provide for a presumption of injury once there is proof of an unlawful conspiracy.

In April 2017, Ford Canada filed a motion for entry of judgment, arguing that, under principles of claim preclusion and issue preclusion, Judge Hornby's 2009 summary judgment in the federal action barred the plaintiffs in this action from pursuing their

claims. Ford Canada argued (1) the two proceedings involved the same claims, and (2) the plaintiffs in the present action were in privity with the plaintiffs in the federal action. As to issue preclusion, Ford Canada contended Judge Hornby had resolved the issue of antitrust injury or causation, precluding the California state court plaintiffs from litigating that issue.

After receiving briefing and holding a hearing, Judge Karnow granted Ford Canada's motion in June 2017. Judge Karnow concluded that, for purposes of claim preclusion, the California and federal actions involved the same "cause of action" because they alleged the same harm, i.e., the plaintiffs paid higher prices for vehicles as a result of Ford Canada's illegal conduct. Judge Karnow also held the plaintiffs in the present California state court action were in privity with the plaintiffs in the federal proceeding. He therefore granted summary judgment on the basis of claim preclusion.

Although he did not need to reach the question, Judge Karnow also addressed issue preclusion (the alternative basis for Ford Canada's motion) and concluded Judge Hornby's ruling as to causation did *not* meet the requirements of the issue preclusion doctrine. While Judge Hornby had decided the federal plaintiffs could not prove causation of injury, Judge Karnow found California law "follows a different standard" on that issue because it allows an inference or presumption of injury once a plaintiff proves the existence of an unlawful conspiracy. Because the federal court "decided the causation issue on a standard of proof different than what might apply in this state court, the specific issue of

causation was not litigated and decided in the prior proceeding," so issue preclusion did not apply.

Judge Karnow entered judgment for Ford Canada.[5] Plaintiffs appealed.

G. Preclusion Rulings by Courts in Other States

As noted, in addition to the federal action, which by July 2009 involved plaintiffs asserting claims under the antitrust and consumer protection laws of 19 states (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 45, fn. 2), similar cases were pending in the courts of several states. (See *Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.) Between 2010 and 2018, trial courts in five states—Minnesota, Arizona, Tennessee, New Mexico and Wisconsin—granted motions finding the federal judgment had preclusive effect and barred the parallel actions before them.[6]

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[5] The judgment entered by Judge Karnow in 2017 recites the definition of the plaintiff class previously certified by Judge Kramer and states that "[p]laintiffs" will take nothing from Ford Canada. The parties interpret Judge Karnow's judgment as a ruling that both the named plaintiffs and all members of the certified class in this action are bound by the 2009 federal court judgment.

[6] The written rulings of the Minnesota and Arizona trial courts (issued in 2010 and 2011) are in the record, as they were submitted to Judge Karnow as exhibits to Ford Canada's 2017 motion for entry of judgment. We grant Ford Canada's request that we take judicial notice of the rulings of the Tennessee, New Mexico and Wisconsin trial courts (issued in 2017 and 2018).

We also grant Ford Canada's request that we take judicial notice of certain documents filed in the federal action. We previously granted similar judicial notice requests filed by plaintiffs.

(*Lerfald v. General Motors Corporation* (Minn.Dist.Ct., Sep. 16, 2010, No. 27-CV-03-3327) (*Lerfald*); *Maxwell v. General Motors Corporation* (Ariz.Super.Ct., Mar. 2, 2011, CV 2003-003925) (*Maxwell*); *Johnson v. General Motors Corporation* (Tenn.Dist.Ct., June 12, 2017, C.A. No. 35028) (*Johnson I*); *Corso v. General Motors Corporation* (N.M.Dist.Ct., Jan. 19, 2018, D-101-CV-2003-00668) (*Corso*); *Rasmussen v. General Motors Corporation* (Wisc.Circ.Ct., Mar. 19, 2018, 03-CV-001828) (*Rasmussen*).) The Tennessee trial court's ruling was affirmed by that state's Court of Appeals. (*Johnson v. General Motors Corporation* (Tenn.App. 2018) 574 S.W.3d 347, 352–356 (*Johnson II*).)

Unlike California, each of the above five states was among the 19 whose laws were at issue when Judge Hornby granted summary judgment in the federal action in 2009. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 45, fn. 2, 46, 56, 63 & fn. 30.)

II. DISCUSSION

We review a trial court's dismissal on preclusion grounds de novo as an issue of law. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.) Under the doctrines of claim preclusion and issue preclusion (collectively referred to as "res judicata"), a final judgment prevents successive litigation of certain claims and issues in later proceedings. (*Taylor v. Sturgell* (2008) 553 U.S. 880, 892 (*Taylor*); *People v. Barragan* (2004) 32 Cal.4th 236, 252–253 (*Barragan*).) While issue preclusion "applies only to issues that were actually litigated," claim preclusion applies "more broadly to what could have been litigated." (*Guerrero v.*

Department of Corrections & Rehabilitation (2018) 28 Cal.App.5th 1091, 1098 (*Guerrero*).)

Application of the claim preclusion and issue preclusion doctrines prevents parties " 'from contesting matters that they have had a full and fair opportunity to litigate[.]' " (*Taylor, supra,* 553 U.S. at p. 892; see *Guerrero, supra,* 28 Cal.App.5th at p. 1098.) In *Taylor*, the United States Supreme Court noted: "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." (*Taylor, supra,* 553 U.S. at p. 892.) Accordingly, the "general rule" is that a person who was not a party to a prior action is not bound by the judgment entered in that case, subject to certain recognized "exceptions," which collectively are sometimes referred to as establishing "privity" between the nonparty and a party to the prior action.[7] (*Taylor,*

[7] In addressing this issue, the *Taylor* court applied (1) the "federal common law of preclusion" (because the prior judgment at issue there was entered by a federal court in a federal question case) (*Taylor, supra,* 553 U.S. at p. 891; see *id*. at p. 904; see also *Guerrero, supra,* 28 Cal.App.5th at p. 1101), and (2) "due process limitations" that define the maximum reach of nonparty preclusion (*Taylor, supra,* at p. 891; see *id*. at pp. 896–898, 900–901). The parties here contend state preclusion law should play a role in determining the preclusive effect of Judge Hornby's 2009 federal court judgment, with plaintiffs urging application of Maine law and Ford Canada arguing for California law. But as to the question of "privity" or "nonparty preclusion" (see *Taylor, supra,* 553 U.S. at p. 894, fn. 8), neither party argues, and the trial court did not hold, that state law permits nonparty preclusion here on any ground beyond the "exceptions" recognized in *Taylor*. We therefore focus on the applicability of those exceptions and do not address the parties' choice-of-law arguments.

supra, 553 U.S. at p. 893; see *id.* at p. 894, fn. 8; accord, *Barragan, supra,* 32 Cal.4th at p. 253 [a prerequisite to applying claim preclusion or issue preclusion is that " 'the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding' "].)

The plaintiffs in the present case were not parties to the federal proceeding. Ford Canada, however, argued in the trial court, and contends in its appellate brief, that two exceptions to the general rule against nonparty preclusion recognized in *Taylor* apply here, specifically (1) an exception allowing preclusion when a nonparty was " 'adequately represented' " by someone who was a party to the prior suit (*Taylor, supra,* 553 U.S. at pp. 894–895), and (2) an exception permitting preclusion when a nonparty " 'assume[d] control' " over the prior action (*id.* at p. 895). We agree with plaintiffs that Ford Canada did not establish the applicability of either exception. (See *Taylor, supra,* 553 U.S. at pp. 906–907 [party who asserts claim or issue preclusion applies must establish all necessary elements]; *Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 489 [same].)

A. Adequate Representation

In *Taylor*, the Supreme Court stated that, " 'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit. [Citation.] Representative suits with preclusive effect on nonparties include properly conducted class actions, [citation], and suits brought by trustees, guardians, and other

fiduciaries, [citation]." (*Taylor, supra,* 553 U.S. at pp. 894–895.)

Due process principles limit the circumstances in which representation may be found to be "adequate" for purposes of nonparty preclusion. (*Taylor, supra,* 553 U.S. at pp. 896–898, 900–901.) Specifically, "[a] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned, [citation]; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, [citation]. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, [citation]." (*Taylor, supra,* 553 U.S. at p. 900.)

When Judge Hornby entered judgment for defendants in 2009, there were no certified classes in the federal action. (See *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 63.) And none of the individual plaintiffs remaining in the federal case was pursuing claims under California law. (*Ibid.*) The question presented thus is whether the individual plaintiffs advancing claims under the laws of other states (the federal non-California plaintiffs)—the losing parties to the federal court judgment—adequately represented the California state court plaintiffs and class members.

Judge Karnow, relying in part on decisions by some of the other state courts that have considered the preclusion question since the 2009 entry of the

federal court judgment, found the *Taylor* test for adequate representation was met here.[8] We disagree.

1. Alignment of Interests

As to the prerequisite element of aligned interests, it is true the interests of the federal court plaintiffs and the California state court plaintiffs were aligned in the basic sense that the two groups did not have opposing interests. (Cf. *Hansberry v. Lee* (1940) 311 U.S. 32, 43–44 (*Hansberry*) [no preclusion where relevant groups of property owners had conflicting interests], cited in *Taylor, supra,* 553 U.S. at p. 900.) Both groups of plaintiffs sought to establish that the defendant auto manufacturers conspired to keep lower-priced cars from being exported from Canada to the United States, resulting in higher vehicle prices. (See *Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 131; *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 45.) And due to the coordination of

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[8] Judge Karnow considered the issue of "adequate representation" as one component of a test of privity articulated in a California appellate decision, *Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070, but he relied on the United States Supreme Court's decision in *Taylor* as establishing the minimum requirements for a finding of adequate representation. An additional element of the privity test stated in *Citizens for Open Access* and applied by Judge Karnow is a requirement that " ' "[t]he circumstances [were] such that the nonparty should reasonably have expected to be bound by the prior adjudication." ' " (*Citizens for Open Access, supra,* 60 Cal.App.4th at p. 1070.) Since we find the essential element of adequate representation as defined in *Taylor* was not established here, we do not address the parties' arguments as to whether the additional requirement pertaining to reasonable expectations was met.

discovery, the same body of evidence apparently was available to both sets of plaintiffs.

Of course, the showing of aligned interests here is weaker than in the other state courts that have addressed this question, all of which relied in part on the fact that the two sets of plaintiffs at issue were advancing *identical state law claims*. (See *Johnson II, supra,* 574 S.W.3d at pp. 351, 353 [same Tennessee statutes at issue in federal and state cases]; *Rasmussen, supra,* at pp. 17–18 [federal and Wisconsin state-court plaintiffs asserted the "same claims"]; *Corso, supra,* at p. 6 [federal and state cases involved alleged "violations of the same New Mexico statutes"]; *Johnson I, supra,* at pp. 5–6 [claims in federal and Tennessee state court were the same]; *Maxwell, supra,* at p. 4 [both sets of plaintiffs relied on same Arizona statute]; *Lerfald, supra,* at p. 4 [federal and state plaintiffs asserted claims under same Minnesota statute].)

That factor is not present here—none of the plaintiffs against whom summary judgment was entered in the federal action asserted any claims under California state law.[9] We need not determine, however, whether the absence of that factor precludes a finding of aligned interests, because we conclude below that the second essential element of the *Taylor* test for adequate representation—"either the party understood herself to be acting in a representative capacity or the original court took

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[9] Judge Karnow noted this issue but found it was not significant because "the elements for proving antitrust claims are the same across the states." As noted, however, he concluded later in his opinion that California applies a different standard of proof as to the causation element.

care to protect the interests of the nonparty" (*Taylor, supra,* 553 U.S. at p. 900)—was not established here.

2. Representative Capacity or Protection of Interests

a. Representative Capacity

Ford Canada did not meet its burden to show the federal court plaintiffs asserting claims under the laws of states other than California (the parties to the summary judgment) understood they were acting as representatives of the named California state court plaintiffs or the members of the California state court class (i.e., persons who purchased vehicles in California). As discussed, no certified classes existed in the federal action when the summary judgment was entered, so it is not clear the individual federal court plaintiffs could have believed they were representing *anyone else* at that point. (See *Taylor, supra,* 553 U.S. at pp. 894–895 [adequate representation exception is typified by class actions]; *Corso, supra,* at p. 7 [New Mexico trial court concludes that, because federal classes were "never properly certified," federal plaintiffs "could not have thought their actions were as class representatives"].)

More to the point for our purposes, the remaining federal court plaintiffs had never even purported to serve as representatives for any California vehicle purchasers seeking damages flowing from the alleged conspiracy. The certified classes that existed earlier in the federal proceeding included a separate damage class for each involved state, with different class representatives. (See *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 243

F.R.D. at pp. 21–23.) The plaintiffs who remained in federal court when summary judgment was entered could not have brought claims under California law.[10]

The evidence cited by Ford Canada on this point (some of which Judge Karnow also cited) does not establish the federal non-California plaintiffs understood they were acting in a representative capacity with respect to the California state court plaintiffs. Ford Canada points to the discovery coordination order entered in 2004 by the federal and state courts, which, to reduce duplication of expense and effort, designated the federal action the "lead case *for discovery and discovery-related pretrial scheduling*" and allowed parties in the state court proceedings to participate in discovery in the federal action. (Italics added.) The order does not state or suggest that a party to a state court case will be bound by the federal court's non-discovery rulings in the absence of a certified federal court class.

Ford Canada also notes the attorneys for the plaintiffs in the federal and state actions entered what one of them described as a "joint prosecution agreement" that was "intended to protect the interests of all plaintiffs." The agreement itself apparently was kept confidential and is not in the record, but statements made by counsel in the trial

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[10] We note that some of the state courts that gave Judge Hornby's summary judgment decision preclusive effect distinguished the California plaintiffs' situation on this basis. (See *Corso, supra,* at p. 8 [noting federal court plaintiffs asserting claims under New Mexico law did not seek dismissal from the federal action, unlike the federal California plaintiffs]; *Maxwell, supra,* at p. 5 [Arizona]; *Lerfald, supra,* at p. 6 [Minnesota].)

court suggest it addresses such matters as coordination of discovery and expert preparation. We cannot conclude from this evidence that there was an agreement by the federal court plaintiffs to represent the state court plaintiffs. Nor does the participation of California state court counsel in other joint activities, such as settlement discussions with some defendants, establish that one group of plaintiffs represented the other.

b. Court's Protection of Nonparty's Interests

Ford Canada also did not establish that, for purposes of nonparty preclusion, "the original court took care to protect the interests of the nonparty" (*Taylor, supra,* 553 U.S. at p. 900). On this point, Judge Karnow noted that Judge Hornby "sent updates to state judges to keep them informed of developments in the federal action." Ford Canada also mentions these updates, as well as referring again to the coordination of discovery that we have discussed above.

Those factors do not provide a basis for nonparty preclusion here. The way Judge Hornby sought to protect the interests of the California plaintiffs was to carve out and dismiss the California-law claims from the federal case because, in his view, California law differed from that of the other involved states and it would be preferable for the California state courts to resolve unique and unsettled questions of California law. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) To now rely on Judge Hornby's actions as a basis for precluding the California plaintiffs from

pursuing their claims in state court would stand that ruling on its head.

We note that, when *Taylor* referred to protection of interests by the prior court as a path to showing adequate representation (see *Taylor, supra*, 553 U.S. at pp. 896, 900), it cited *Richards v. Jefferson County* (1996) 517 U.S. 793, 801–802, which in turn cited *Hansberry, supra,* 311 U.S. at p. 43. The *Richards* court stated: "Our opinion [in *Hansberry*] explained that a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that *the litigation is so conducted as to insure the full and fair consideration of the common issue*.' " (*Richards*, *supra*, 517 U.S. at p. 801, italics added, citing *Hansberry, supra,* 311 U.S. at p. 43; see *Richards*, *supra*, 517 U.S. at p. 802.) As discussed, Judge Hornby took an approach that did *not* include full consideration of the federal California plaintiffs' claims. As to the pivotal question of antitrust injury presented on summary judgment, he decided not to determine what California law provides. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) There is no basis for preclusion.

3. Notice

Because the essential second element of the *Taylor* test for adequate representation has not been established here, we need not address the third element specified in *Taylor*, i.e., the extent to which notice of the federal action was required, and whether adequate notice was provided to the

California state court plaintiffs and class members here. (See *Taylor, supra,* 553 U.S. at p. 900.)

B. Control

Apart from adequate representation, Ford Canada briefly invokes another exception noted in *Taylor* that allows preclusion when a nonparty " 'assume[d] control' " over the prior action (*Taylor, supra,* 553 U.S. at p. 895). Judge Karnow did not rely on this control exception as a separate ground for applying claim preclusion, although he stated (as part of his discussion of the parties' expectations) that "[p]laintiffs' counsel here had a financial interest in and controlled the conduct of the federal litigation, suggesting their clients should have expected to be bound by the result there." We hold the control exception does not provide a basis for preclusion here because Ford Canada did not show the California state-court plaintiffs controlled the federal action.

In *Montana v. United States* (1979) 440 U.S. 147 (*Montana*) (cited by *Taylor, supra,* 553 U.S. at p. 895 as the basis for this exception), the plaintiff in the second case, the United States, had exercised extensive control over the first action. (*Montana*, *supra*, 440 U.S. at p. 155.) Specifically, the United States required the first action to be filed, reviewed and approved the complaint in that action, paid the attorneys' fees and costs, and directed the conduct of the appeal taken in the first case. (*Ibid.*) In contrast, Ford Canada has pointed to no evidence in the record showing the California state court plaintiffs (much less the members of the California class) assumed control over the federal action, such as by directing the federal court plaintiffs as to the steps they should take in advancing the litigation.

Instead, Ford Canada relies again on the fact that counsel for the plaintiffs in the federal and state actions cooperated pursuant to a joint prosecution agreement. We are not persuaded that such cooperation establishes that the plaintiffs in each case controlled the prosecution of the other actions. We note that, even within the group of federal court plaintiffs, different courses of action were sometimes taken, such as the decision by the federal California plaintiffs to seek dismissal of their claims, while other federal court plaintiffs proceeded to summary judgment. To the extent some of the state courts addressing this issue found a sufficient degree of control in these circumstances, we respectfully disagree with their conclusions. (See *Johnson II, supra,* 574 S.W.3d at p. 355 [Tennessee]; *Rasmussen, supra,* at p. 25 [Wisconsin]; *Lerfald*, *supra*, at p. 4 [Minnesota]; but see *Corso*, *supra*, at pp. 4–5 [New Mexico court finds no control]; *Maxwell*, *supra*, at p. 4 [Arizona court finds no control].)

Finally, we do not agree with Ford Canada that *Aronow v. Lacroix* (1990) 219 Cal.App.3d 1039 supports a finding that plaintiffs here are precluded on a freestanding control theory. In *Aronow*, the appellate court discussed whether a party before it (Aronow) had exercised control over a prior action, but did so in the context of assessing whether Aronow reasonably should expect to be bound by the prior judgment (*id.* at pp. 1050–1051), and only after determining a party to the prior action had adequately represented Aronow's interests, which the court held was a requirement of due process (*id.* at pp. 1049–1050). In that context, the *Aronow* court noted control did not have to be complete (*id.* at p.

1050) and stated Aronow "at least had the power to suggest courses of action" in the prior case (*id.* at pp. 1050–1051). We do not read *Aronow* as establishing that a nonparty's ability to suggest courses of action to a party in a prior case, without more and without a showing of adequate representation, is enough to bind the nonparty to the result in the prior case.[11]

Because the essential element of privity is missing, neither claim preclusion (the basis for Judge Karnow's ruling) nor issue preclusion (the alternative ground for affirmance urged by Ford Canada) applies here. (See *Taylor, supra,* 553 U.S. at pp. 893, 894, fn. 8; *Barragan, supra,* 32 Cal.4th at p. 253.) We therefore will reverse the judgment.[12]

III. DISPOSITION

The judgment in favor of Ford Canada is reversed. The matter is remanded to the trial court with directions to enter an order denying Ford Canada's request for entry of judgment. Plaintiffs shall recover their costs on appeal.

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[11] Because Ford Canada did not show the California state court plaintiffs exercised sufficient control over the federal action to provide a basis for preclusion, we do not address plaintiffs' argument that the *Taylor* control exception can only support issue preclusion, not claim preclusion. (See *Montana, supra,* 440 U.S. at p. 154.)

[12] Since we reverse on the grounds discussed in the text, we do not address plaintiffs' other asserted grounds for reversal, including their arguments that (1) principles of waiver and judicial estoppel bar Ford Canada from invoking claim and issue preclusion, (2) the federal and California actions involved different causes of action, and (3) constitutional or statutory provisions limit the application of preclusion doctrine here.

STREETER, Acting P.J.

We concur:

TUCHER, J.

BROWN, J.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

IN RE AUTOMOBILE ANTITRUST CASES I AND II

A152295

(City & County of San Francisco Super. Ct. Nos.
JCCP Nos. 4298 & 4303; CJC03004298)

Filed: 10/23/2019

ORDER MODIFYING OPINION AND DENYING REQUEST FOR REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed herein on September 25, 2019, be modified as follows:

1. On page 20, before the paragraph that begins "Finally, we do not agree," a new paragraph shall be added that reads as follows:

   In a rehearing petition, Ford Canada argues that, under comment a to section 39 of the Restatement Second of Judgments, a nonparty controls litigation whenever it has " ' "the

opportunity to present proofs and argument." ' " But comment a uses the quoted language in setting forth the "Rationale" for the control theory of preclusion. (Rest.2d Judgments, § 39, com. a, p. 382.) Assuming but not deciding that the theory of nonparty control applies at all to claim preclusion—comment b suggests that it applies only to issue preclusion (see Rest.2d Judgments, § 39, com. b, pp. 383–384)—comment c states the test for control (see Rest.2d Judgments, § 39, com. c, p. 384 ["Elements of control"]), and on this record Ford Canada does not meet the test. According to comment c, to have control a nonparty must have "effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action" (although the choices can be in the hands of counsel and shared with others) and "must also have control over the opportunity to obtain review." (*Ibid.*) Control is a "question of fact" (*ibid.*), and we reject Ford Canada's assertion it was "conclusively" established here. We are not persuaded the evidence of coordination among counsel establishes the California plaintiffs had effective choice as to the legal theories and proofs to be advanced in the federal proceeding. And Ford Canada does not contend the California plaintiffs had control over whether the federal plaintiffs sought appellate review of the federal court's summary judgment order.

2. Footnote 11 on page 20 shall be deleted.

The modifications effect no change in the judgment.

Respondent's petition for rehearing is denied.

(Streeter, Acting P.J., Tucher, J., and Brown, J. participated in the decision.)

Dated: October 23, 2019 Streeter, J. Acting P. J.

A152295

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING SPECIAL TITLE
(CAL. R. CT. 1550(B))

AUTOMOBILE ANTITRUST CASES I, II

THIS DOCUMENT RELATES TO:
ALL ACTIONS

J.C.C.P. No. 4298
CJC-03-004298

Filed: June 16, 2017

ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT

My Order Denying Summary Judgment entered May 16, 2017 provides background for the present motion to have me enter judgment[1] on the basis of

[1] The present motion is not titled one for judgment on the pleadings, for example, but no party has complained about the nature of the motion, or disputed that if Ford Canada is right on the merits of the arguments presented, it is entitled to judgment now. See e.g., *Bucur v. Ahmad*, 244 Cal. App. 4th 175 (2016) (motion for judgment on the pleadings permissible on res judicata grounds).

claim and issue preclusion, based on the related federal MDL action. *See In re New Motor Vehicles Canadian Export Antitrust Litigation*, 609 F. Supp. 2d 104 (D.Me. 2009). I heard argument June 15, 2017.

These coordinated cases were filed at roughly the same time as a related federal case, *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 632 F. Supp. 2d 42 (D.Me. 2009) (Hornby, J.). The federal case included indirect purchaser claims under various state laws, including California's Cartwright Act. *See* Kuntz Dec. Ex. 1 ¶¶ 93, 116. For years, commencing around 2004, the state and federal cases were litigated together, using the federal case as the lead case. In 2009, just before the federal court decided a summary judgment motion brought by defendants, but after the briefing and argument on it was complete—done by the lawyers here and on behalf of plaintiffs here—the California plaintiffs moved to voluntarily dismiss their California law claims under FRCP 41. *See In re New Motor Vehicles Canadian Export Antitrust Litigation*, 609 F. Supp. 2d 104 (D.Me. 2009). Judge Hornby ordered the requested dismissal (without prejudice). *Id.* at 107.

Judge Hornby then granted Ford Canada's motion for summary judgment on the remaining state law claims, finding that the plaintiffs were unable to prove causation. *In re New Motor Vehicles*, 632 F. Supp. 2d at 63. Ford Canada now brings this motion for entry of judgment to dismiss the coordinated California suits on res judicata and collateral estoppel grounds.

The motion is granted.

Waiver

Plaintiffs tell me Ford Canada has waived the defense of res judicata because it was not timely raised. The federal action was dismissed and became final in 2009; this motion some 8 years later is thus untimely, plaintiffs suggest. But there is no authority for this position. There is no argument actually related to the elements of waiver. Compare e.g., *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.,* 30 Cal. App. 4th 54, 59 (1994) ("Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only.").

Res Judicata

Although some opinions employ the term 'res judicata' to cover both claim and issue preclusion, e.g., *People v. Barragan*, 32 Cal. 4th 326, 252-53 (2004), it may be more useful to separate these doctrines. See generally, *Bucur v. Ahmad,* 244 Cal. App. 4th 175, 185 (2016); *Daniels v. Select Portfolio Servicing, Inc.,* 246 Cal. App. 4th 1150, 1163-64 (2016); *DKN Holdings LLC v. Faerber,* 61 Cal. 4th 813, 824 (2015).

> Under California law, " ' "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." ' " *(Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, 108 Cal.Rptr.3d 806, 230 P.3d 342.) "Res judicata precludes the relitigation of a cause of action only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action

> as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding." *(Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82, 70 Cal.Rptr.3d 817.) Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that *could have been litigated* in that proceeding. *(Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975, 104 Cal.Rptr. 42, 500 P.2d 1386.) "A predictable doctrine of *res judicata* benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*' " *(Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897, 123 Cal.Rptr.2d 432, 51 P.3d 297.)
>
> *Franceschi v. Franchise Tax Bd.,* 1 Cal. App. 5th 247, 257 (2016).

As *Franceschi* notes, where, as here, "an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine" the res judicata effect. *Id.* (One impact of this is that a federal judge's views of that effect are not conclusive, an issue I address below.)

Final judgment on the merits

The parties do not dispute that there is a final judgment on the merits in the federal matter. Compare *Boccardo v. Safeway Stores, Inc.*, 134 Cal.

App. 3d 1037, 1042 (1982). Summary judgment was granted on the basis that plaintiffs failed to establish violation of antitrust and consumer protection statutes. *In re Motor Vehicles,* 632 F. Supp. 2d at 45.

Same cause of action

"For the purposes of res judicata, California defines a cause of action according to the 'primary right, theory: the violation of a single primary right constitutes a single cause of action even though it may entitle the injured party to diverse forms of relief." *Boccardo v. Safeway Stores, Inc.*, 134 Cal. App. 3d 1037, 1043 (1982) (citing *Wulfjen v. Dolton*, 24 Cal. 2d 891, 89596 (1944)). "A 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant." *Id* (citing *Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1975)). See also *Franceschi*, 1 Cal. App. 5th at 257.

The state action and the federal action arise out of identical factual circumstances. *Compare, e.g.*, Consolidated Amended Class Action Complaint (CC) ¶¶ 63-89 *with* Kuntz Dec. Ex. 1 ¶¶ 42-68. The claims in the federal case were those based on 19 state antitrust and consumer protection statutes that allow indirect purchasers to recover relief. *In re New Motor Vehicles,* 632 F. Supp. 2d at 44. The claims in the state case are based on California's antitrust and consumer protection statutes, and the Cartwright Act (which serves as the predicate for violation of the Unfair Competition Law). CC ¶¶ 97-115. The harm alleged in both cases is that plaintiffs suffered damages when they had to pay more to purchase their vehicles than they would have absent defendant's illegal conduct. CC ¶ 96; Kuntz Dec. Ex.

1 ¶ 69. See e.g., *Boccardo* 134 Cal. App. 3d at 1043 ("The primary right alleged to have been violated in the instant case is appellants' right to be free from economic injury caused by an unlawful conspiracy to fix meat prices").

The federal and state cases involve the same cause of action.

Impact of Supplemental Jurisdiction

While plaintiffs' opposition does not directly take on the 'same cause of action' element of the res judicata test, they do make an argument that Judge Hornby's express exclusion of the California state cases from his order on summary judgment blocks what would otherwise be the effect of res judicata. Opposition at 5 et seq. This is based on the notion that when a federal court declines in its discretion to take a state claim under doctrines of pendant or supplemental jurisdiction,[2] claim preclusion does not apply. RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1)(b) & comm. *b* (1982); *Boccardo v. Safeway Stores, Inc.,* 134 Cal. App. 3d 1037, 1047 (1982).

Ford Canada correctly notes that plaintiffs' primary authority, *Louie v. BFS Retail & Commercial Operations, LLC,* 178 Cal. App. 4th 1544, 1553 (2009) does not help, because there the parties expressly reserved issues for the state court (here by contrast Ford Canada fought against the FRCP 41 dismissal without prejudice). Indeed, *Louie*

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[2] Charles Alan Wright, et al., FEDERAL PRACTICE & PROCEDURE, "Jurisdiction And Related Matters" § 3567.3 (3d ed. 2017) ("supplemental" jurisdiction doctrines developed separately in case law as "pendent" and "ancillary" jurisdiction).

patently *disclaimed* ruling on the res judicata issue. Id. ("we need not address all these points....").

Plaintiffs have two other cases, as well, but both have been distinguished:

> Appellant's reliance on *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294 [271 Cal.Rptr. 82], and *Merry v. Coast Community College Dist.* (1979) 97 Cal.App.3d 214 [158 Cal.Rptr. 603] is misplaced. In those cases the federal and state claims did not involve the same primary right. Moreover, the plaintiff in each case abandoned the federal lawsuit after the federal court declined to hear the state law claims.

Acuna v. Regents of Univ. of California, 56 Cal. App. 4th 639, 650 (1997). See *also City of Simi Valley v. Superior Court,* 111 Cal. App. 4th 1077, 1084 (2003) (where same primary right involved, res judicata applies). The relatively recent opinion in *Franceschi* phrases the legal test thusly:

> The rule in California is that " '[i]f ... the court in the first action would *clearly* not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would *clearly* have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.' " [Citations]

Franceschi v. Franchise Tax Bd., 1 Cal. App. 5th 247, 260 (2016), citing among things RESTATEMENT (SECOND) OF JUDGMENTS § 25. Here, the federal court

did the opposite—it *entertained* the state claims.[3] Thereafter, as in *Franceschi,* plaintiffs here "deliberately elected not to pursue" their state claims in the federal litigation. 1 Cal. App. 5th at 263.

The fundamental rule as discussed at some length in *Franceschi* is that when the doctrine of primary rights identifies a cause of action litigated in federal court with that proposed to be later litigated in state court, res judicata bars the latter claim. Plaintiffs can ask the federal judge to keep the state claims to ensure they are not later barred, 1 Cal. App. 5th at 263-64, but they cannot split the cause of action; that is, they cannot, through the expedient of having the federal court dismiss their claims at their behest, try the same cause of action again in another forum.[4]

I conclude that the federal court's actions on accepting the California state cases and later granting plaintiff's motion to dismiss them does not impact the 'same cause of action' analysis.

Same parties or parties in privity

The lawyers here were the lawyers in the federal case, for years, through the entire briefing of and argument on the ultimate summary judgment motion.[5] Every step in the federal litigation—up to

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[3] True, at plaintiffs' request it dismissed the California cases without prejudice, an issue I return to below.

[4] Charles Alan Wright, et al., 18 FEDERAL PRACTICE & PROCEDURE § 4412 "Claim Preclusion—Limitations of First Proceedings," (3d ed. 2017) (plaintiffs should invoke federal court's supplemental jurisdiction on pain of res judicata bar [after federal adjudication] if the state claims are brought in state court).

[5] Transcript of Argument of June 15, 2017 (rough) at 13. This is not contested by plaintiffs.

the moment, after argument on the summary judgment motion, that the California plaintiffs secured their dismissal—was taken on behalf of interests identical as between the plaintiffs in this case and those in the federal case.

Because "[p]rivity is not susceptible of a neat definition . . . the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Assn.*, 60 Cal. App. 4th 1053, 1070 (1998) (internal quotation marks and citations omitted). So we ask if (1) the nonparty had an identity or community of interest with, and adequate representation by, the party in the first action, and (2) the circumstances were such that the nonparty should reasonably have expected to be bound by the prior adjudication. *Id.*

a) Adequate representation or community of interest

The Supreme Court has held that for preclusion purposes, there is adequate representation by a party of a nonparty if, at a minimum, "(1) The interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor v. Sturgell* 553 U.S. 880, 990 (2008). Adequate representation may also require "(3) notice of the original suit to the persons alleged to have been represented." *Id.* Plaintiffs contend that there was no adequate representation because the non-California federal plaintiffs did not sue on behalf of any California consumers, made no claims

pertaining to California consumers, and asserted no claims under California law. Opposition at 10. Of course, if the federal plaintiffs *had* sued on behalf of California consumers, making claims on their behalf and asserting claims under California law—then we would have had the *identical parties in both cases*; obviating a privity enquiry. The fact that the parties are not identical cannot be held to show that the parties are not in privity.

After the federal summary judgment, other state courts found privity with the federal plaintiffs. Kuntz Dec. Ex. 10 at 3-6, and Ex. 11 at 2-6.

Aligned interests. The Arizona court found, for example, that the federal and state plaintiffs' interests were aligned, based on several factors: they made the same claims under the same state statute against the same defendants, based on the same legal theory and record, coordinated discovery[6], and shared costs and fees. Kuntz Dec. Ex. 11 at 4. Plaintiffs' counsel appeared in the federal action and were part of a joint prosecution agreement which was intended to protect the interests of all plaintiffs. *Id* at 5. Except for asserting claims under the same state statute, all of the other factors are present for the California plaintiffs. Although no California state law claim remained in the federal action, the elements for proving antitrust claims are the same across the states. *In re New Motor Vehicles,* 632 F. Supp. 2d at 46-47, 63.

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[6] As did all federal plaintiffs prior to the motion for summary judgment, in a Joint Coordination Order. *In re New Motor Vehicles,* 609 F. Supp. 2d at 106.

Representative capacity. The Arizona court found that the federal plaintiffs clearly understood themselves to be acting in a representative capacity, because plaintiffs' counsel appeared on plaintiffs' behalf in the federal action, and were part of a joint prosecution agreement intended to protect the interests of all plaintiffs. Kuntz Dec. Ex. 11 at 5. This shows that plaintiffs' counsel was involved in coordination with federal plaintiffs in how the federal action was conducted. *Id* Again, the same factors apply to the California plaintiffs. Their counsel was also part of the federal joint prosecution agreement—plaintiffs' counsel chaired the Executive Committee and led the federal prosecution. MPA at 17. As Ford Canada points out, this shows more than just passive knowledge or assurance that the California plaintiffs' interests would be protected. *Id.* For the same reasons, the California plaintiffs also had notice of the original suit.

Court protected interests. Finally, it is clear that Judge Hornby took care to protect the interests of nonparty state plaintiffs. He sent updates to state judges to keep them informed of developments in the federal action. MPA at 18.

b) Reasonable expectation to be bound

It is entirely clear, and after oral argument conceded, that at least up to April 2009 the California plaintiffs expected to be bound by the decisions of the federal court.[7] Indeed, had Judge Hornby refused their FRCP 41 motion to dismiss, they well knew they would have been bound by his rulings. The double twist here is that they *were*

[7] Transcript, above n.5, at 30, 32, 36, 40.

dismissed and Judge Hornby himself was under the impression that this would allow plaintiffs to proceed in California state court. Judge Hornby stated that any "judgment in the defendants' favor in this court on the California state law claims will not have collateral estoppel in the California lawsuit as to anyone other than these two individual plaintiffs[8] . . . . A judgment here will have no binding effect on whether to certify a class in California state court and no effect on summary judgment there as to other California indirect purchasers." *In re New Motor Vehicles*, 609 F. Supp. 2d at 106. This view is dicta, but plaintiffs tout it as pretty good evidence of what a "reasonable expectation" was at the time. But the issue is ultimately one of state law, and Judge Hornby may or may not be familiar with this state's peculiar primary rights doctrine[9] which girds its res judicata doctrine; and his views must give way to the views of our courts of appeal on what makes for a "reasonable expectation to be bound."

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[8] There were only two California plaintiffs named in the federal action.

[9] The doctrine is entirely notorious. Perhaps its first mention, probably of a concept distinct from that in play today, is *Leese v. Clark,* 18 Cal. 535, 559 (1861). Around the time it became fully embraced in California, one commentator wrote "primary right, which is apparently thought of as a simple and precise thing, turns out to be complex and indefinite. It means what the person using the term makes it mean" O. L. McCaskill, "Actions and Causes of Action," 34 Yale L.J. 614 (1925), quoting Clark, *The Code Cause of Action,* 33 Yale L.J. 817, 826 (1924). More recently our Supreme Court noted that "the primary right theory is notoriously uncertain in application. `Despite the flat acceptance of the ... theory ... by California decisions, the meaning of 'cause of action' remains elusive and subject to frequent dispute and misconception.'" *Baral v. Schnitt,* 1 Cal. 5th 376, 395 (2016) (citations omitted).

For example, a "'nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance,'" *Rodgers v. Sargent Controls & Aerospace,* 136 Cal. App. 4th 82, 92 (2006). Some plaintiffs here actually *did* contest the prior action: they filed an opposition brief, argued the summary judgment motion, and took part in each step in the federal case up to that. Plaintiffs' counsel here had a financial interest in and controlled the conduct of the federal litigation, suggesting their clients should have expected to be bound by the result there. *Aronow v. Lacroix*, 219 Cal. App. 3d 1039, 1050 (1990).

The issue is often phrased as one of due process, *Mooney v. Caspari*, 138 Cal. App. 4th 704, 718 (2006), and the questions is thusly posed, is it *fair* to deem present plaintiffs practically speaking represented in the prior action? In effect, were the "same legal rights" being litigated? *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1069 (1998).

At least through argument on summary judgment, the legal rights and interests were indisputably identical. The only means by which one could argue otherwise would be to shift to the moment after the FRCP 41 dismissal, and note that California law, as such, was not ultimately adjudicated by Judge Hornby; i.e., his summary judgment order did not address the California claims as such. This is the approach plaintiffs take. Opposition at 10 et seq.[10]

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[10] See also, Transcript, above n.5 at 40. This position with its focus on specific *aspects* of a cause of action, may be an artefact of conflating claim and issue preclusion; in the latter, under the

The pitch is that because as of the FRCP 41 withdrawal no federal plaintiffs cared about issues or legal theories unique to California state law claims, none of those federal plaintiffs could be relied on, thereafter, to protect the interests of the California plaintiffs.

But to rely on this to defeat res judicata would be an end run around the primary rights analysis set out above. True, Judge Hornby's orders did not determine aspects of California law (such as this state's apparent presumption regarding damages[11])—but these are irrelevant to the analysis of whether the same cause of action exists in two courts.[12] In short, the only way one would not reasonably expect to be bound would be because one had failed to employ the primary rights analysis in one's understanding of res judicata.

Privity is, in the end, a matter of the relationships between litigants. That relationship did not change as a result of the FRCP 41 order: as they had been through argument on the summary judgment

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doctrine of collateral estopple, actual litigation of the issue is required; but not, of course, under res judicata claim preclusion. *Daniels v. Select Portfolio Servicing, Inc.,* 246 Cal. App. 4th 1150, 1164 (2016); *Lucido v. Superior Court,* 51 Ca1.3d 335, 341 (1990).

[11] *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1350-51 (1987).

[12] That is, it doesn't matter what the *forms of relief* sought or *theories of liability* are. *Boeken v. Philip Morris USA, Inc.,* 48 Cal. 4th 788, 798 (2010); *Boccardo v. Safeway Stores, Inc.*, 134 Cal. App. 3d 1037, 1043 (1982). See generally, RESTATEMENT (SECOND) OF JUDGMENTS § 25 & comm. *a* (1982).

motion, the parties, and their lawyers, were pressing the same legal interests.

A final word on plaintiffs' use of Judge Hornby's FRCP 41 dismissal and his view that it did not preclude subsequent California suit. The 1982 Restatement does help plaintiffs' view, as it states that claim splitting is allowed if the "court in the first action has expressly reserved the plaintiffs right to maintain the second action...." RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1.982) (1)(b) & comm. *b.* But in the end, it is the second court—this state court, in this instance—that decides the preclusive effect of the first judgment. *Louie,* 178 Cal. App. 4th at 1560 ("the federal court conducting the class action "cannot predetermine the res judicata effect of the judgment. This effect can be tested only in a subsequent action." [Citations; internal quotes omitted]). There is non-California authority that the first court nevertheless has the power to limit (as opposed to expand) the preclusive effect of its judgment,[13] as signaled by e.g., a dismissal "without prejudice." But our courts have nevertheless found res judicata effect of a dismissal "without prejudice". E.g. *City of Simi Valley v. Superior Court,* 111 Cal. App. 4th 1077, 1079 (2003) (first court "dismissed the state causes of action (wrongful death and violation of state constitution) without prejudice."). The rationale behind these lines of authority appear to be a concern that litigants be afforded a meaningful opportunity to litigate the claims. E.g., *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d

[13] E.g., *In re Engle Cases*, No. 3:09-CV-10000-J-32, 2009 WL 9119991, at *12 (M.D. Fla. Nov. 27, 2009.

522, 525 (7th Cir. 1985). Here, they were afforded that opportunity: all the way though argument on the summary judgment motion in federal court; until they voluntarily decided to abandon that forum.

In the end, the main purpose of res judicata is to protect not just defendants subject to repeat litigation, [14] but also more generally to inhibit "multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*" [15] These purposes would be frustrated if courts were to allow plaintiffs, at their option, to leave a forum where they have a full opportunity to litigate all their claims, have that case go to final judgment, and yet have plaintiffs then engage in further suits on the same cause of action.

I conclude that res judicata bars litigation of this case.

Issue Preclusion

While I need not reach issue preclusion or collateral estopple, to assist full appellate review[16] I provide my views. Ford Canada argues that the causation issue is the subject of collateral estopple.

> Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action . . . . [I]ssue preclusion applies: (1)

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[14] RESTATEMENT (SECOND) OF JUDGMENTS § 26 comm. *a.*

[15] *Mycogen Corp. v. Monsanto Co.,* 28 Cal. 4th 888, 897 (2002) (emphases in original, citation and internal quotes omitted).

[16] This may inflate the significance of a trial judge's views, as appellate review is probably de novo. *Noble v. Draper*, 160 Cal. App. 4th 1, 10 (2008).

> after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.
>
> *DKN Holdings*, 61 Cal. 4th at 824 (2015) (internal citations omitted).

1. As noted above, we have a final adjudication.

2. The 'identical issues' factor looks at whether there are "identical factual allegations" in the two proceedings, and "not whether the ultimate issues or dispositions are the same." *Lucido v. Super. Ct.*, 51 Cal. 3d 335, 342 (1990). As noted, the factual allegations regarding causation are substantially the same.

3. Here, collateral estopple is asserted against a party in the first (federal) suit.

4. While causation was actually decided in the federal action, collateral estoppel is not permissible if the earlier findings were subject to a different standard of proof. *Wimsatt v. Beverly Hills Weight etc. International, Inc.*, 32 Cal. App. 4th 1511, 1523-24 (1995).

In the federal action, plaintiffs' evidence did not satisfy their burden of proving antitrust impact (specifically, that the alleged illegal agreements affected the price that each putative class member paid for a vehicle). *In re New Motor Vehicles*, 632 F. Supp. 2d at 63. The federal plaintiffs were required to overcome two hurdles to show causation. First, they had to show defendants' action resulted in an increase in dealer invoice prices and MSRPs in the United States. This in turn depended on (1) a showing that there was "a flood of significantly

lower-priced Canadian cars coming across the border for resale in the United States during times of arbitrage opportunities, enough cars to cause manufacturers to take steps to protect the American market from this competition by decreasing nationally set prices," and (2) distinguishing between "the effects of any permissible vertical restraints from the effects of the alleged, impermissible horizontal conspiracy." And second, plaintiffs had to show each member of the class was in fact injured. *Id.* at 51-52. The First Circuit expressly pointed out that any inference or intuition that any upward pressure on national pricing would raise prices paid by individual consumers was "not enough." *Id.* at 52. Based on this guidance, Judge Hornby found that the plaintiffs did not have enough evidence to show that every member of the putative class was injured by paying a higher transaction price—there was no independent evidence of common proof of impact on transaction prices, and plaintiff's expert Dr. Hall could only infer that changes in list price were passed on to car buyers. *Id.* at 56, 62-63.

California law follows a different standard. In granting summary judgment, Judge Hornby acknowledged the distinction, noting: "My reasoning and conclusion do not differentiate between the nineteen states. California, the easiest case for the plaintiffs' burden because of a shifting presumption (as I said in my certification order), is no longer in the mix . . . . Each of the other nineteen states requires affirmative proof of causation." *In re New Motor Vehicles*, 632 F. Supp. 2d at 63. In my Order denying Ford Canada's motion for summary judgment, I found California plaintiffs might prevail

on the issue of causation. Order (entered May 16, 2017) at 13. This is because California courts "have shown no hesitancy in ruling that when a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services, the jury can *infer* plaintiffs were damaged." *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1350-51 (emphasis in original); Order (entered May 16, 2017) at 9. "[I]mpact will be *presumed* once a plaintiff demonstrates the existence of an unlawful conspiracy that had the effect of stabilizing, maintaining or establishing product prices beyond competitive levels." *B.W.I.*, 191 Cal. App. 3d at 1351 (emphasis added).

Thus because the federal action decided the causation issue on a standard of proof different than what might apply in this state court, the specific issue of causation was not litigated and decided in the prior proceeding and collateral estopple does not apply.

Conclusion

The motion is granted. Ford Canada should now prepare a form of judgment and provide it to me with any plaintiff's comments as to form.

Dated: June 16, 2017 /s/

Curtis E.A. Karnow
Judge Of The Superior Court

APPENDIX D

SUPREME COURT OF CALIFORNIA

Results from the petition conference of 1/02/2020

The following list reflects cases on which the court acted at the most recent conference. Set out first are those on which the court (1) acted concerning a petition for rehearing and/or a request for modification of opinion (or elected to modify on its own motion); (2) acted on a petition for transfer; (3) granted a petition for review or a request to answer a question of state law; (4) issued an order to show cause or alternative writ in an original writ matter; (5) acted on a motion for publication or depublication (or elected to do so on its own motion); (6) dismissed a matter that had been "held" in light of a final "lead" case; (7) transferred for reconsideration a matter that had been held in light of a final lead case; (8) acted on the merits of a Commission on Judicial Performance disciplinary matter; (9) acted on a State Bar disciplinary matter; (10) referred to the State Bar a public accusation against any attorney; (11) acted on a clemency matter; and (12) acted on any matter as to which a dissenting justice wishes to be noted. After reporting the disposition of these matters, all matters that were denied by the court are listed in alphabetical order.

Notes: The "Results" column below shows only abbreviated descriptions of action taken. For the full and official result, review the matter on Supreme

Court's docket through the Appellate Courts Information page. Any person or entity also may register for a Supreme Court E-mail notification to receive prompt email alerts about any official action in any individual matter that is pending before the court.

Title	**Case #**	**CA #**	**Action Type**	**Result**
		* * *		
IN RE AUTO-MOBILE ANTITRUST CASES I AND II	S258963	A152295	Petition for Review	Denied
		* * *		

APPENDIX E

STATE OF WISCONSIN

CIRCUIT COURT
CIVIL DIVISION, BRANCH 3

MILWAUKEE COUNTY

DAVID RASMUSSEN, ET AL.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,

Defendants.

Case No. 03-CV-001828

Money Judgment - 30301

Filed: 03-19-2018

FINAL ORDER FOR ENTRY OF JUDGMENT

This matter came before the Court on December 5, 2017 on the Motion for Entry of Judgment on *res judicata* grounds filed by the remaining defendants, Ford Motor Company and Ford Motor Company of Canada, Limited ("Ford") and DaimlerChrysler Canada Inc. (now known as FCA Canada, Inc.) (collectively, the "defendants"). Being fully advised in the premises and having considered the Motion, the parties' briefing and submissions, and the arguments of counsel, and for the reasons stated on the record in the Court's Oral Ruling on March 2, 2018,

IT IS HERE BY ORDERED AND ADJUDGED THAT:

1. The defendants' Motion for Entry of Judgment in their favor and against the plaintiffs is GRANTED; and

2. This action is DISMISSED with prejudice and without costs or fees to any party.

This is a final order that disposes of the entire matter in litigation before the Court and is intended by the Court to be a final order for purposes of appeal within the meaning of Wisconsin Stat. § 808.03(1). However, the Court is informed that the plaintiffs have waived their right to appeal.

Dated this 19th day of March, 2018.

BY THE COURT:

Electronically signed by
Clare L. Fiorenza-03

Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
CIVIL DIVISION, BRANCH 3
MILWAUKEE COUNTY

DAVID RASMUSSEN, ET AL.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

Case No. 2003-CV-001828

Filed: 03-20-2018

ORAL RULING

Date: **March 2, 2018**
Time: 10:18 a.m. – 11:07 a.m.

Before the
Honorable Clare L. Fiorenza,
Circuit Judge, Branch 3,
Presiding

Jennifer L. Carter, RPR, CRR, RMR, Official Reporter

A P P E A R A N C E S :

BRENT W. JOHNSON appeared on behalf of the Plaintiffs.

KELLY J. NOYES appeared on behalf of the Defendant, General Motors Corporation.

WILLIAM SHERMAN appeared on behalf of the Defendant, Ford Motor Company.

DAVID KRIER appeared on behalf of the Defendant, Ford Motor Company.

SUSAN K. ALLEN appeared on behalf of the Defendant, FCA Canada, Inc., formerly known as DaimlerChrysler Canada, Inc.

E X H I B I T S

(No exhibits were offered or received into evidence.)

TRANSCRIPT OF PROCEEDINGS

THE COURT: Good morning. This is Judge Fiorenza. I'll call the case. David Rasmussen, et al, versus General Motors Corporation, et al; Case No. 03-CV-1828.

Appearances, please?

ATTORNEY JOHNSON: Good morning, Your Honor. This is Brent Johnson of Cohen Milstein for the plaintiffs.

THE COURT: Thank you. Is there anyone else on the phone?

ATTORNEY JOHNSON: There -- there were, Your Honor. There was a whole complement of Defense counsel. I'm not hearing them right now.

THE COURT: Did you initiate the call, sir?

ATTORNEY JOHNSON: Yes, I did, and we had all of the Defense counsel on the line and -- with your clerk. We were just waiting for you, and now they're not speaking, for some reason that I can't determine.

THE COURT: Okay. I'll tell you what. I'm here. Do you want to try to replace the call and call my court back?

ATTORNEY JOHNSON: Yes. Why don't I try to do that right away?

THE COURT: Yeah. Actually, my phone's -- Another line's ringing; so they might be on a different phone. I'm not quite sure, but -- I can stay on this line, or would it be easier to get everyone else on, then call me back?

ATTORNEY JOHNSON: Yeah. I think that would be best, Your Honor. Why don't I try to get everybody else on and call you back?

THE COURT: Very good. Okay. Talk to you shortly.

ATTORNEY JOHNSON: Bye-bye.

(The proceedings adjourned at 10:19 a.m. and reconvened at 10:24 a.m.)

THE COURT: Good morning. This is Judge Fiorenza. We'll recall the case again. I understand we have everyone on the phone. All right.

ATTORNEY JOHNSON: We do, Your Honor.

THE COURT: All right. David Rasmussen, et al, versus General Motors Corporation, et al; Case No. 03-CV-1828.

Appearances, please?

ATTORNEY JOHNSON: You have Brent Johnson of Cohen Milstein for the plaintiffs, Your Honor. Good morning.

THE COURT: Good morning.

ATTORNEY NOYES: Kelly Noyes of von Briesen & Roper for the plaintiff.

THE COURT: Good morning.

ATTORNEY SHERMAN: Good morning. Good morning, Your Honor. William Sherman, Latham & Watkins, for Ford.

THE COURT: Good morning.

ATTORNEY KRIER: Good morning, Your Honor. David Krier from Reinhart, Boerner, van Duren, also for Ford.

THE COURT: Good morning.

ATTORNEY ALLEN: Good morning, Judge. Susan Allen of Stafford Rosenbaum on behalf of FCA Canada, Inc., formerly DaimlerChrysler Canada, Inc.

THE COURT: Good morning to each of you. This case is before the Court today for a decision on the defendant -- defendants, Ford Motor Company, Ford Motor Company of Canada, Ltd., and DaimlerChrysler Canada, Inc., now known as FCA Canada, Inc., collectively referred to as defendants', motion for entry of judgment.

The defendants argue that the Court should grant judgment in their favor and dismiss this action because res judicata bars the plaintiffs' claims. The plaintiffs argue that dismissal is not warranted, as the defendants have not established an exception to the rule against nonparty preclusion.

This case was commenced on February 25th, 2003, long before it was transferred to me as a result of judicial rotation in 2016.

Plaintiffs commenced this action alleging that from at least 2001 to 2003, a difference in exchange rate between a stronger U.S. Dollar and a weaker Canadian Dollar created an opportunity to sell identical Canadian cars in the U.S. at a lower price.

The idea was that a car broker could buy a cheaper car in Canada and sell it to a dealer or a consumer in the U.S. at a lower price, thus driving down the price of new cars sold in the U.S.

The plaintiffs -- Excuse me. The plaintiffs assert that the defendants violated Wisconsin antitrust law by conspiring to prevent cross-border traffic of new cars, thus preventing cars from being sold in the U.S.

They argue that the defendants collectively created and enforced policies meant to keep lower-priced Canadian cars out of the United States.

Plaintiffs' theory of causation contains two parts: One, that but for the collusion, dealer invoice prices and manufacturer's suggested retail prices would have been lower; and, two, that but for the higher dealer invoice prices and MSRPs, consumers would have paid less.

Around the same time the plaintiffs filed this action, plaintiffs all over the country commenced virtually identical actions in state and federal forums. The federal plaintiffs asserted violations of Section 1 of the Sherman Act and sought certification of a national class of consumers, including those in Wisconsin. The federal cases were consolidated in the U.S. District Court for the District of Maine as a result of a multi-district litigation process.

The district court dismissed the federal plaintiffs' damages claims in 2004, leading to an amended complaint in the multi-district litigation process action that brought state law claims, including claims arising under Wisconsin Statute Section 133.01-133.18. The plaintiffs here are proceeding under the same statutes.

In order to prosecute the federal and state cases, plaintiffs' counsel in the federal and state cases all agreed to form a cooperative representation of the state and federal plaintiffs under a joint coordination order issued by the district court on April 28th, 2004. The goal was to promote efficiency and to cut down on expenses for all parties involved in the numerous actions.

The order provided for coordinated efforts between those in the multi-district litigation action and in all coordinated actions regarding the following: Discovery scheduling, pretrial scheduling, service of documents, participation in depositions, written discovery, discovery dispute resolution, and global use of discovery obtained.

The order listed the California action as the coordinated action and provided that any other state court could join by entering to the order. The California plaintiffs withdrew from the coordinated effort -- efforts and proceeded on their own, but every other state court, including this one, joined the order.

As part of the coordination effort, plaintiffs' counsel representing federal and state plaintiffs entered into a formalized joint prosecution agreement. Under the agreement, the coordinated action counsel committee was formed, which included some of the state and federal plaintiffs' counsels involved in their respective actions.

Throughout the action, the state and federal plaintiffs worked together regarding discovery efforts, settlement negotiations, and appearances before the district court in the multi-district litigation action.

Around 2003 and 2004, this Court, and many other state courts, also formally, or effectively, stayed their respective actions pending the outcome of the multi-district litigation action. The plaintiffs in the multi-district litigation action eventually attempted to certify a class which the district court granted on June 15th, 2007.

The First Circuit Court of Appeals reversed the district court on March 28th, 2008, denying class certification and remanding to the district court. The First Circuit Court found the classification was inappropriate because the novel and complex common method of proof the federal plaintiffs chose, which is also used by the plaintiffs here, was insufficient to fulfill the predominance requirement of Federal Rule of Civil Procedure 23.

The Court noted that there was intuitive appeal to the plaintiffs' theory of causation, but intuitive appeal is not enough. Even if they could show across-the-board upward pressure on dealer prices and MSRPs, they still needed to show how purchasers and lessors were actually paying more.

It is important to reiterate that the Court there was reviewing class certification, not a summary judgment decision. As the Court recognized, the inquiry on class certification standard is not one for hard factual proof, but whether the plaintiffs' representation of their case will be through means amenable to the class action mechanism.

Following remand, the federal defendants moved for summary judgment, seeking dismissal of the multi-district litigation action. The federal plaintiffs joined by those on the coordinated action counsel opposed the motion.

On July 2nd, 2009, the district court incorporated the First Circuit's opinion into its reasoning and granted the federal defendants' motion for summary judgment. Specifically, the district court held that the federal plaintiffs failed to sufficiently connect a nationwide increase in dealer invoice prices and MSRPs to a nationwide increase in consumer end

prices based upon the method of proof the federal plaintiffs chose.

The Court found that under any of the state's antitrust laws, the common proof required two large of an inference leap to conclude that nationwide consumers paid more even if dealer invoice prices and MSRPs increased. After some discussion -- discussions amongst the coordinated action counsel, the federal plaintiffs chose not to appeal the decision.

Over the ensuing years, defendants in various state courts began to move for dismissal, claiming that, as a result of the district court's decision in the -- excuse me -- the multi-district litigation, res judicata barred the state action from continuing. Three courts have since ruled on this issue.

On September 16th, 2010, the Minnesota District Court granted summary judgment dismissing the matter as barred by res judicata. On September 16th, 2010, the Minnesota District Court granted summary judgment dismissing the matter due to the application of res judicata. The Arizona Superior Court reached a similar holding on February 28th, 2007, and the chancellor court in Tennessee dismissed its corresponding state action on the same grounds on June 12th, 2017.

On September 27th, 2017, the defendants in this action filed a motion for entry of judgment in this court seeking dismissal on the grounds of res judicata. The plaintiffs responded on October 25th, 2017, and the defendants replied on November 8th, 2017. The Court held oral argument on December 5th, 2017.

Much of the discussion focused on whether the second element of res judicata, identity of cause of action, was satisfied. The parties also addressed whether the adequate representation and substantial control exceptions applied, which would allow the first element of res judicata to be fulfilled, despite plaintiffs not being party to the master -- to the multi-district litigation action.

The Court took the parties' arguments under advisement and adjourned the matter for oral argument. There are a lot of facts in this case. I acquired this case after many, many years of litigation; so I've tried to summarize how the case transpired. I, hopefully, have accurately set forth the facts.

The sole issue for this motion is whether res judicata warrants dismissal of this action. Both parties have heavily briefed and discussed res judicata, which I've reviewed, and both parties agree on the applicable legal standard.

Res judicata or claim preclusion, exists to prevent unnecessary expenses, to conserve judicial resources, and protect the interests of judicial finality, Taylor v. Sturgell, 553 U.S. 880 at 892, a 2008 case.

The elements of res judicata are as follows:

One, an identity between the parties or their privies in the prior and current actions; two, an identity between the causes of action in the two suits; and, three, a final judgment on the merits in the Court -- in a court of competent jurisdiction, Wickenhauser v. Lehtinen, L-E-H-T-I-N-E-N, 2007 WI 82 at paragraph 22.

Though res judicata generally does not bar nonparties from bringing similar or identical claims in a sub -- subsequent action, the United States Supreme Court has carved out six exceptions to this generaL rule allowing the first element of res judicata to be fulfilled where a nonparty to the first action brings a claim in a subsequent action.

Two of those exceptions are at issue in this case, which are: A, where a -- where, in certain limited circumstances, a nonparty was adequately represented by a party to the suit having the same interests in the previous action; and, B, where a nonparty assumed control over the previous action in which a judgment was rendered, Taylor at 894-95.

It is the defendant's burden to demonstrate res judicata in fact, applies. For reasons the Court will discuss in a moment, this Court grants the defendants' motion for entry of judgment, as all three elements of res judicata are satisfied in this case.

There is no dispute that the third element of res judicata is fulfilled, as the district court's decision was a final judgment on the merit -- on the merits in a court of competent jurisdiction litigation. The parties agree that element is present.

In looking at the first element of res judicata, although the plaintiffs were not parties to the multi-district litigation process, the Court finds that they were adequately represented in the multi-district litigation process action. This finding aligns with the holdings of the Minnesota, Arizona, and Tennessee courts.

The United States Supreme Court has held that a party's representation of a nonparty is adequate

where: One, the interest of the nonparty and her representative are aligned; and, two, either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the party, and, in some cases; three, the nonparty had notice of the original suit, Taylor at page 9 -- 900.

In claiming that the parties were not adequately represented in the multi-district litigation process, the plaintiff primarily argues that the adequate representation exception cannot apply because a properly-conducted class action never occurred. This Court disagrees.

The Taylor court's decision -- In the Taylor court decision, the recitation of the elements of adequate representation notably does not include a properly-conducted class action suit. See id., 900 to 901. The Wisconsin plaintiffs' attempt to inject another element into the standard for adequate representation is unpersuasive.

The Supreme Court has not applied this exception so narrowly and, in the Taylor case, discussed places where the exception could apply even in the absence of a properly-conducted class action. Taylor focused on the three elements of adequate representation, as previously stated; and, based upon those elements, there are clearly situations where adequate representation may be present absent a properly-conducted class action. This is one of them.

Now, turning to the elements of adequate representation, the Court finds that the interests of the plaintiffs in this case, and the plaintiffs in the multi-district litigation process, are aligned.

The plaintiffs here sued the same defendants as in the federal action based on the same alleged facts occurring during that same time period. They asserted the same claims, advanced the same theories of recovery, presented the same record evidence, and used the same expert witness.

There can be little doubt that, not only were the interests of the Wisconsin plaintiffs and the federal plaintiffs aligned, they were virtually identical. This Court agrees, as did the Minnesota, Arizona, and Tennessee courts, that the parties' interests are aligned.

Regarding the -- element two, either the federal plaintiffs understood themselves to be acting as a representative -- I'm sorry. Regarding element two, either the federal plaintiffs understood themselves to be acting in a representative capacity of the Wisconsin plaintiffs or the district court took care to protect the Wisconsin plaintiffs' interests.

The Court finds that both of the possible ways of meeting the requirements of element two are fulfilled in this case. First, the federal plaintiffs likely understood themselves to be acting in a representative capacity of the plaintiffs in this case.

Numerous facts indicate that the federal plaintiffs understood themselves to be acting in a representative -- representative capacity of the state plaintiffs, including the plaintiffs in this action.

This occurred largely through two of the firms representing the plaintiffs here, Cohen Milstein and Berger Montague. Both firms are part of the joint prosecution agreement and order and the coordinated action committee, and were named as

part of the coordinated action counsel group in the federal plaintiffs' unsuccessful opposition to summary judgment in the district court.

The Cohen Milstein firm and the Berger & Montague lawyers were also active participants in the multi-district litigation process action, including coordinated discovery, developing the theory of the case, hiring a joint expert that was to be used as part of all plaintiffs' common proof and dealing with settlement issues.

In December -- In a December 2010 declaration submitted to the district court, in support of Cohen Milstein's application for attorney's fees, Cohen Milstein -- a Cohen Milstein attorney described her firm's involvement in the federal action stating that Cohen Milstein had performed the following work regarding the -- the collective litigation:

Drafted and reviewed pleadings and other papers for filing, including complaints, motions regarding class certification, discovery, summary judgment, and settlement papers; investigated the claims asserted in the coordinated action, including discovery through document requests, interrogatories, and examination by deposition; corresponded with experts; corresponded with coordinated action counsel; engaged in settlement discussions with opposing counsel; reviewed and analyzed briefs filed by the defendants; traveled to and attended status conferences and hearings before the courts.

Cohen Milstein's counsel even made on-the-record arguments to the district court regarding whether the court should retain supplemental jurisdiction over the state law claims on behalf of the Arizona,

New Mexico, Minnesota, and Wisconsin plaintiffs. In all, the firm claimed that it expended 7,744.7 hours in the collective litigation totaling a lodestar of $2,887,554.25.

Similarly, Berger & Montague, P. C., also representatives of the plaintiff in this action, submitted a declaration to the district court where it stated that the firm had done the following with regards to collective litigation:

Investigated the factual basis for the actions; coordinated the state and federal cases; delegated responsibility to plaintiffs' counsel in those cases; drafted and responded to written discovery; reviewed documents produced by the defendants; prepared for and took deposition -- depositions common to the state and federal cases; conducted legal research and drafted related memoranda; reviewed defendants' privilege logs; and assisted in the settlement of claims against Toyota. Berger Montague claimed that they had expended 2,235.45 hours in the federal action, which came out to a lodestar of $800,758.25.

Both firms remain engaged in this action, and both signed off on the plaintiffs' brief in opposition to summary judgment. The two declarations just referred to are included in an affidavit of William Sherman filed on November 8th, 2017.

Like the Minnesota, Arizona, and Tennessee courts found, this Court finds that the federal plaintiffs understood that they were acting in a representative capacity of the Wisconsin plaintiffs through counsel that was heavily involved in both actions -- both actions. The uncontested facts lead to no other reasonable conclusion.

Even if that were not the case, the district court took care to protect the interests of all state plaintiffs, including to the Wisconsin plaintiffs. The joint prosecution agreement that counsel for the federal actions and many state actions, including this action, was intended to protect the interests of all plaintiffs.

The district court endorsed such coordinated action and issued a joint coordination order on April 28th, 2004. The joint coordinated order allowed other state courts to join in or to go forward on their own. This Court joined the order along with every other state court except that of California.

Further, the district court understood itself to be responsible for conducting the, in quote, lead case for discovery in discovery-related pretrial scheduling, end of quote. Indeed, the joint coordination order provided a plan for federal and state plaintiffs to participate in and have access to all phases of discovery and to allow them to participate in the multi-district litigation proceedings to protect their interests in the federal forum.

This Court also notes that Judge Hornby communicated with state court judges regarding the federal action. This Court, therefore, holds that the second element of adequate representation is satisfied.

Regarding the third element, to the extent it is necessary, the Court finds that the third element of adequate representation is satisfied. Neither party disputes that the Wisconsin plaintiffs received notice of the multi-district litigation process. Nor could they reasonably do so based on the record before the Court. As the Arizona Court noted, in quote, It is

difficult to imagine a more compelling case for preclusion based on adequate representation, end of quotes.

Accordingly, this Court finds that the Wisconsin plaintiffs were adequately represented in the multi-district litigation process action since this action applies.

Since this exception applies, the Court finds that there was an identity of parties or privies here, despite the fact that the Wisconsin plaintiffs were not parties to the multi-district litigation process action. As a result, the first element of res judicata is fully -- is fulfilled on the basis of adequate representation.

Though the Court's findings that the adequate representation exception applies disposes of whether the first element of res judicata is satisfied, which it does, I will briefly discuss the assumed control exception that was briefed and discussed in oral argument.

Whether the Wisconsin plaintiffs took sufficient control over the multi-district litigation action is not as clear-cut as the adequate representation exception, indeed, while the Tennessee Court found the plaintiffs there had assumed sufficient control of the multi-district litigation action, the Arizona Court found that identically situated plaintiffs in that case had not.

The Minnesota Court did not address this control exception. Though, not as clear-cut as the issue of being adequately represented -- represented, I do find that the control exception is met.

The Arizona court primarily based its conclusion on a finding that the state plaintiffs did not control whether or not the multi-district litigation summary judgment decision would be appealed. In doing so, it relied on Montana vs. United States, 440 U.S. 147, a 1979 case.

While Montana stands, in large part, for the proposition that controlling whether or not an appeal is filed and maintained is significant to the control exception, there is no case that holds whether controlling an appeal alone is dispositive. I believe it is not. By contrast, the Tennessee court held that the state plaintiffs sufficiently controlled the multi-district litigation for many of the same reasons they were adequately represented.

The Wisconsin plaintiffs attempt to minimize their involvement in the multi-district litigation action; but, as already discussed, they certainly exerted some level of control. While the Wisconsin plaintiffs claim they had no control over whether the district court's decision was ultimately appealed, they admitted at oral argument that they had input on case strategy, arguments presented to the federal court, and the decision not to appeal.

Certainly, the control exception should not be read to mean that a plaintiff in one action literally assumes complete control of another action and displaces those plaintiffs. The exception seems to get at the notion that where a nonparty has enough of a say in another action, it is essentially a party in that action. As the Wisconsin plaintiffs had seemingly significant strategic input and were part of the discussion regarding whether to appeal, they had sufficient control over the litigation.

If the Court finds that the first and third element of res judicata are fulfilled, the Court must finally determine whether there is an identity of causes of action. The Court notes that there is little to no Wisconsin law dealing with the specific issue plaintiff raised -- plaintiffs raise on the second element of res judicata.

Unlike federal law, Wisconsin does not allow for indirect purchasers to assert a pass-through theory of causation, as the plaintiffs advance here. However, the question of what level of pass-through effect indirect purchasers must show to survive summary judgment is not settled.

The defendants argue that the multi-district litigation process action and this action name the same group of defendants, allege the same conduct and series of events that occurred during the same time period, seek the same recovery, and involve the same antitrust claims under Wisconsin Statutes Section 133.01 and subsequent statutes. The defendants contend that, as a result, there was an identity of causes of action between the two lawsuits.

Plaintiffs counter by claiming that the district court applied the wrong antitrust causation standard when it dismissed the multi-district litigation process action on summary judgment. They claim that the Wisconsin courts would hold differently, meaning that there cannot be identity of causes of action here. However, the plaintiffs cite no case in Wisconsin holding that way, merely pointing to a number of federal classification decisions in support of their claim.

As was discussed heavily in briefing and in oral argument, the Court again reiterates that we're not

dealing with a class -- we are not dealing with class certification here. The plaintiffs are mainly relying on two U.S. Supreme Court cases, Smith v. Bayer Corp., 131 Supreme Court 2368, 2011, and Chick Kam Choo vs. Exxon Corp., 486 U.S. 140, 1988.

The Smith court considered a situation where that district court denied class certification to a group of plaintiffs, and the defendants then moved to enjoin a state court from considering class certification under Wisconsin -- under West Virginia law. The court held that the federal and state class certification statutes differed such that the state court may hold differently than the federal court, and the claim should not be precluded.

In Chick Kam Choo, the federal district court applied the doctrine of forum nonconvenience to dismiss an action bringing federal, Singapore, and Texas law claims. It then instructed the case to be brought in Singapore courts. The suit was, nevertheless, brought in a Texas court with only Texas and Singapore law claims eventually remaining.

The defendants moved to enjoin the Texas court from seeking to relitigate in any state forum the issues finally decided in the federal court's 2000 -- federal courts 1980 dismissal. The Supreme Court reached two separate holdings:

First, it held that the procedural claims for nonconvenience could not be barred under res judicata principles because the Texas constitution could not open the door for a Texas Court's -- because the Texas constitution could open the door for the Texas courts to hold differently than federal courts. Second, it held that the Texas state law claims were

barred by res judicata principles, as a district court considered the merits of the claim and held that the Singapore law controlled instead of Texas law.

Both cases are instructive of the general idea that res judicata should not apply where there are competing laws at issue or one court may hold differently than another, but neither supports the plaintiffs' position. Smith lacks persuasive force, as the Court there was considering competing federal and state class action rules.

Additionally, Chick Kam Choo may provide more support for the defendants' position than the plaintiffs. The plaintiffs ignore that Chick Kam Choo is second holding where it actually barred the Texas state law claim at issue on res judicata principles because a district Court had considered it.

Based on examination of the district court's ruling and the record in this action, the Court concludes that there was an identity of causes of action. The plaintiffs in this action asserted the same claims against the same defendants as the federal action based on the same set of facts. They advanced the same theories and utilized the same evidence and experts in the federal -- Wait. They advanced the same theories and utilized the same evidence and experts as the federal plaintiffs in support of their claims.

The district court considered the law of each of the nineteen states, including Wisconsin, and it stated that the federal plaintiffs could not meet their burden to show antitrust impact as to any of the states.

Lastly, as discussed previously, no party disputes that the district court's decision was a final judgment on the merits in a court of competent jurisdiction. Accordingly, the Court finds the third element of res judicata is also satisfied here.

In conclusion, the Court holds that, as a matter of law, due to the U.S. District Court July 2nd, 2009, decision granting summary judgment for the defendants in that action, res judicata bars the plaintiffs' antitrust claims here for the following reasons:

One, though the plaintiffs were not parties to the federal action, there was identity of parties or privies between the two actions, as the adequate representation exception applies in this case; two, there was identity of causes of action between the two thoughts; and, three, the district court issued a final judgment on the merits and was a court of competent jurisdiction in that action.

As a result, the Court grants the defendant's motion for judgment under the doctrine of res judicata and dismisses the plaintiffs' claims with prejudice. This case is dismissed with prejudice.

I request that one of the Defense counsel kindly prepare a proposed written order and submit it to the Court under the local five-day rule. Who would like to submit that?

ATTORNEY JOHNSON: Dave, do you want to do that?

ATTORNEY KRIER: Yes. Reinhart will take care of that.

THE COURT: Okay. I will look for a proposed order then. Is there anything else that needs to be put on record?

ATTORNEY JOHNSON: Thank you, Your Honor.

ATTORNEY KRIER: Thank you, Your Honor.

THE COURT: Okay.

ATTORNEY NOYES: Thank you, Your Honor.

THE COURT: This decision was much longer than I anticipated. You know, it's -- The case just, you know, was -- was in litigation for such a long period of time. And I -- I apologize for the length of the decision, but I thought it was necessary to put the facts in as I did; so have a good day.

ATTORNEY JOHNSON: You too, Your Honor.

ATTORNEY ALLEN: Yes, Judge. Thank you.

ATTORNEY KRIER: Thank you, Your Honor.

(The proceedings concluded at 11:07 a.m.)

* * *

APPENDIX F

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

EMANUELE CORSO, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

D-101-CV-2003-00668

Filed: 1/19/2018

Decision on Ford's Motion for Judgment Based on Res Judicata

The motion under consideration requests judgment in Ford's favor on the grounds of res judicata based on a decision in an MDL case that concerns the same alleged violations of the antitrust laws and the consumer protection laws. Numerous cases were filed challenging an alleged conspiracy to limit the importation of new or almost new cars from Canada during years when the exchange rate allegedly would have allowed buyers to arbitrage United States prices based on the lower-priced Canadian cars if such imports had not been restricted. A number of

federal cases alleging both federal antitrust law violations and eventually, under supplemental jurisdiction, state antitrust and consumer protection act violations were consolidated into an MDL case assigned to Judge Hornby in Maine. *See In re New Motor Vehicles Canadian Export Antitrust Litigation*, 632 F.Supp. 2d 42 ("the MDL case"). Meanwhile similar cases alleging the same violations of the state statutes were brought in a number of states which were also the subject of the MDL action under supplemental jurisdiction. Of most relevance to this decision are this case in New Mexico and cases brought in Minnesota, *Lerfald v. GMC*, Ex. A to Ford's Motion, p. 4; Arizona, *Maxwell v. GMC*, Ex. B to Ford's Motion, p. 4; and Tennessee, *Johnson v. GMC*, Ex. 1 to Ford's Response to Plaintiff's Supplemental Opposition.

In the MDL case, Judge Hornby initially certified a class, but that decision was reversed by the First Circuit. *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008). Following remand, Judge Hornby ruled on a defense motion for summary judgment. On the critical issue regarding evidence of antitrust impact the ruling was largely informed by the First Circuit decision on class certification. 632 F.Supp. 2d at 51. Judge Hornby granted summary judgment. The judges in the three state cases cited above, then applied res judicata to dismiss the cases pending in their respective states. Ford has now requested that this Court do the same.

In general, "claim preclusion or res judicata bars relitigation of the same claim between the same parties or their privies when the first litigation

resulted in a final judgment on the merits." *Deflon v. Sawyers,* 2006–NMSC–025, ¶ 2, 139 N.M. 637, 137 P.3d 577 (internal quotation marks and citation omitted). *See also Alba v. Hayden*, 2010-NMCA-037, ¶ 6, 148 N.M. 465, 467, 237 P.3d 767, 769. There is a fundamental rule, however, that a litigant is not bound by a judgment to which he or she was not a party. *Ideal v. Burlington Resources* 2010-NMSC-022, ¶ 12, 148 N.M. 228, 233 P.3d 362; *Taylor v. Sturgell*, 553 U.S. 880 (2008). This fundamental rule is premised on the "deep-rooted historic tradition that everyone should have his own day in court." *Taylor*, 553 U.S. at 892-93. Under *Ideal* pre-class certification decisions are not binding on class members. Therefore, Corso could not be bound by summary judgment in the MDL case on account of his role as a putative class member because the class was never properly certified.

This does not end the inquiry, however, because *Taylor* recognized other exceptions to the fundamental rule. Since *Taylor* has been cited by the NM Supreme Court, it is safe to assume those exceptions apply in New Mexico also.

Taylor grouped those exceptions into six categories. Two of those categories are relevant: the third and fourth exceptions. The third exception provides that "in certain limited circumstances a nonparty may be bound because she was adequately represented by someone with the same interests who was a party to the [prior] suit." 553 U.S. at 894. Under this category the Court listed the following examples: properly conducted class actions and suits brought by trustees, guardians, and other fiduciaries. The other exception that is arguably applicable to this case –

the fourth provides: "a nonparty is bound by a judgment if she 'assumed control' over the litigation in which that judgment was rendered." *Id.* at 895. These exceptions will be discussed in reverse order.

A. **Control**

As to the control element, the Arizona Court that decided this same issue in the comparable Arizona case found that the Arizona plaintiff did not assume control of the MDL case because the Arizona plaintiff did not have the ability to control whether an appeal was taken. *Maxwell v. GMC*, Exhibit B, p. 4. However, the Minnesota Court which ruled on the issue found that the state plaintiffs controlled the MDL litigation. *Lerfald v. GMC*, Ex. A, p. 4. The Tennessee court also found that sufficient control was present for the MDL summary judgment to bind the state plaintiffs. Johnson v. GMC, Ex. 1, p. 2; Exhibit A thereto at pp. 7-8.

This Court is bound by New Mexico law regarding res judicata. In particular, this Court must look to New Mexico law to determine what constitutes sufficient indicia of control for a non-party to be bound by a prior judgment. In this regard, the New Mexico Court of Appeals has established that "the sufficiency of a non-party's control and participation is a question of fact." *Poorbaugh v. Mullen*, 1981-NMCA-009, ¶ 8, 96 N.M. 598, 600–02, 633 P.2d 706, 709–10 (citations omitted). Further, "[t]he burden of affirmatively proving sufficient control rests upon the party seeking to invoke the conclusive force of the judgment." *Id.*

On the substance of the issue, the Court of Appeals cited 1B Moore's Federal Practice P 0.411(6) at 1552 (2d ed. 1980):

> Generally speaking, the rule as to participating non-parties requires that the non-party have control, or at least joint control of the prosecution or defense of the suit. And he must be able to *control the decision to appeal or not to appeal*.

(Emphasis supplied.) The requirement that the non-party have control over the decision to obtain review is consistent with the Restatement (Second) of Judgments which provides in part:

> *c. Elements of control.* To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review.

Restatement (Second) of Judgments § 39 (1982).

In the present case there is no indication that Corso, a non-party to the MDL case, or his counsel, had the ability to control whether an appeal would be taken from the summary judgment ruling. In fact, what evidence there is suggests Corso and his counsel had no such control. For this reason, I agree with the Arizona court that control was not shown and that the control exception to the rule that a non-party is not bound by a judgment to which he or she was not a party cannot be the basis for binding Corso in this case.

B. **Participation**

The participation exception presents a more difficult issue. *Taylor* stated the requirement:

> A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a

> minimum: (1) the interests of the nonparty and her representative were aligned, *see Hansberry [v. Lee],* 311 U.S. [32,] 43 [(1940)]; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the non-party, *see Richards [v. Jefferson County],* 517 U.S. [793,] 801– 802 [(1996)].... In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, *see Richards,* 517 U.S. at 801.

553 U.S. at 900.

1. Were the Interests Aligned?

It is clear that the interests of the plaintiffs in the MDL litigation were the same as the interest of Corso. Both cases sought the same relief from the same defendants under the same theories for violations of the same New Mexico statutes. *Lerfald v. GMC*, Ex. A, p. 4; *Maxwell v. GMC*, Ex. B, pp. 4-5; *Johnson v. GMC*, Ex. 1, p. 2, Ex. A. p. 5 .

2. Did the MDL Plaintiffs Understand They Were Acting in a Representative Capacity?

The second criterion is whether the MDL plaintiffs understood they were acting in a representative capacity. In looking at this requirement, the Arizona, Minnesota, and Tennessee judges appear to conflate the concept of control with the concept of acting in a representative capacity. To my mind, these concepts are not interchangeable. I see little evidence that shows that the MDL plaintiffs thought they were acting in a representative capacity. To be sure the MDL plaintiffs filed their suit as a class action, but

the class was never properly certified. Thus, the MDL plaintiffs could not have thought their actions were as class representatives. *See Ideal*, 2010-NMSC-022, ¶ 13. Counsel, including Corso's counsel, entered into a joint prosecution agreement with the MDL plaintiffs' counsel. The terms of this agreement have not been revealed to the Court. In one declaration an MDL plaintiffs' counsel stated: "The joint prosecution agreement is intended to protect the interests of all plaintiffs." Ford Motion, Ex. D, ¶ 2. While this is some indication that the interests of the state court plaintiffs were to be protected, in the Court's experience with joint prosecution or defense agreements, however, one party to the agreement does not stand in a representative capacity to the other parties to the agreement.[1] *See Universal Engraving, Inc. v. Metal Magic, Inc.*, 2010 WL 4922703, at *18 (D. Ariz. filed November 29, 2010) (stating no court has found the existence of a joint defense agreement sufficient to establish privity). If anything, the joint prosecution agreement shows that the interests of the MDL plaintiffs and Corso were aligned. This relates to the first criteria, which the Court has already determined has been met.

In one of the partial transcripts submitted by Ford, Motion Ex. G, federal plaintiffs' counsel addressed why the MDL court should exercise its supplemental jurisdiction to hear the state claims to avoid having

[1] For example, if Ford and the other auto manufacturer defendants had a joint defense agreement in this case (which they apparently do), the Court would not assume that meant that Toyota, for instance, was representing Ford in this case, nor would Ford's counsel make such an assumption.

the aggrieved plaintiffs bring suit in 50 different states. He described his intent to cooperate with the state court counsel. Intent to cooperation, however, is not sufficient to justify a bar against non-parties. *See* Wright & Miller, 18A Fed. Prac. & Proc. Juris. § 4449 (2d ed.) listing some actions that are insufficient to show participation, including participation in consolidated pretrial proceedings; undertaking some limited presentations to the court; or otherwise participated in a limited way. The real issue is "[t]he character and extent of the participation in litigation" because "no single fact is determinative but all the circumstances must be considered from which one may infer whether or not there was participation amounting to a sharing in control of the litigation." *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 265 N.E.2d 739, 743–44 (1970), *cited with approval by Poorbaugh*, 1981-NMCA-009, ¶ 8.

Perhaps more telling are the statements of Mr. Corbitt, who was liaison counsel for the California state court claims,[2] in which he stated: "[W]e are in discussions weekly in California with other state court plaintiffs, working together in discussions about a way to cooperatively work together and move these cases forward for the benefit of all plaintiffs in the various jurisdictions. We are hopeful we will be able to reach a resolution on that satisfactory to everyone's concern." Ford Motion, Ex. G, p. 40.

[2] It is interesting to note that the California plaintiffs asked to have their cases dismissed from the MDL action in favor of bringing them in the California courts. This request was granted. Ex. P to Ford's Motion. No similar request was made by the New Mexico plaintiffs.

Similarly in Ford Motion, Ex. E. the MDL plaintiffs' counsel states: "[W]e have been working actively with the law firms running the state court cases. We have not quite nailed down all the logistics [re discovery mechanisms]. It's an ongoing discussion we are having. We have heard the dialogue and I think it will not be a difficult matter to at least come up with a framework as best we can." Motion, Ex. E, p. 8. These comments do not indicate that the federal plaintiffs were acting in a representative capacity.

3. Did the MDL Court Take Care to Protect the Non-Party's Interests?

In the MDL action Judge Hornby took care to give the nonparty state plaintiffs the opportunity to participate in joint discovery. He entered a Joint Coordination Order which allowed plaintiffs from the parallel state actions to enter comparable orders and thereafter participate in coordinated discovery. In this case such an order was entered without objection from Corso's counsel. *See* Plaintiffs' . . . Non-opposition to Motion for Entry of a Coordination and Protective Order filed July 30, 2003; Joint Coordination Order filed October 29, 2004. Such joint cooperation is not enough to show sufficient participation to justify binding a nonparty litigant, even one who participates in joint discovery. See Wright & Miller, *supra* at § 4449.

Judge Hornby also allowed the firms of counsel in this case to participate in some MDL hearings. Based on the transcripts and exhibits provided by Ford,[3]

[3] Some of the transcripts excerpts were so abbreviated that it was impossible to tell what was under discussion. See, e.g., Motion, Ex. H.

those appearances seemed to be limited primarily to providing the MDL judge with information about the status of the state cases. See Motion, Ex. I, Motion Ex. F, pp. 25-29. This too is insufficient. *Id.* As previously mention, however, the declaration of federal plaintiffs' counsel that the Joint Prosecution Agreement was intended to protect all plaintiffs' interests.

One area in which the state plaintiffs' counsel were actively involved was in a settlement was reached with two defendants: Toyota Motor Sales U.S.A., Inc. and Canadian Automobile Dealers' Association. See Motion, Ex. J. State plaintiffs' counsel, including firms involved in this case, actively participated in settlement negotiations and in obtaining approval of the settlement class and the settlement. Motion Exs. J, M, N.

A critical issue to determining whether there was sufficient participation is Corso's counsel's involvement in the Plaintiffs' Opposition to Defendants' Motions for Summary Judgment with Incorporated Memorandum of Law. Motion, Ex. Q. While the Court has not been provided with a complete copy of this memorandum, it has been provided with the signature pages. A review of these pages shows that the brief was signed, i.e., a signature affixed to the document, only by the Chair of the Plaintiffs' Executive Committee. Thereafter appears a list of the Plaintiffs' Executive Committee. None of Corso's counsel appears in this list. Then there appears another list entitled "Additional Plaintiffs' Counsel." Corso's counsel do not appear on this list. (The Court assumes these are other federal plaintiff's counsel who were not on the executive

committee.) Finally, there is a list entitled Plaintiffs' Coordinated Action Counsel. The phrase "Coordinated Action" was previously defined in the Joint Coordination Order as the California cases before Judge Kramer and "any other state court lawsuit that subsequently enters this order[,]" which this Court did. It is on this list that Corso's counsel appear. Motion Ex. Q, p. 92.

Because of the formatting and placement of the signature line, this Court disagrees with the conclusion of the Minnesota and Tennessee courts that state plaintiffs' counsel "signed" the memorandum. *See generally* Rule 1-011(A), NMRA defining signature as "an original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law." This conclusion, however, does not end the inquiry. The Court must also look to the fact that counsel representing Corso were listed as Plaintiffs' Coordinated Action Counsel, because the bedrock issue is whether Corso had the opportunity to present his arguments in the MDL case. If he did, he has had his day in court. *See Taylor*, 553 U.S. at 895.

Based on the listing of state court counsel as described above the Arizona Court determined:

> Plaintiffs' counsel litigated the MDL summary judgment motion as Plaintiffs' Coordinated Action Counsel.[8]
>
> [8] The Court agrees with the Defendants that placement and formatting of the signature blocks indicate that Plaintiffs' Coordination Action Counsel endorsed the argument made on behalf of these Plaintiffs, as did the

> Executive Committee and Additional Plaintiffs' Counsel on behalf of others.

Maxwell v. GMC, Motion Ex. B, p 5. At argument, Corso's counsel admitted they were involved in drafting the response.

The Arizona court's conclusion is supported by the Declaration of Cohen Milstein Sellers & Toll PLLC in Support of Application for Award of Attorneys' Fees, Reimbursement of Expenses, and Provision of Incentive Awards ("Cohen Milstein Declaration"). Ford's Reply, Ex. U. This Declaration was filed in support of an award of fees and costs in conjunction with the settlements mentioned above. In the Cohen Milstein Declaration an attorney who is of counsel with the firm declared that her firm was involved in various aspects of the activities on behalf of the plaintiffs, previously defined as Plaintiffs in several state court actions coordinated with the MDL action. The declarant then listed numerous activities including: "drafting and reviewing pleadings and other papers for filing including complaints, motions regarding . . . summary judgment, and settlement papers[.]" The long list of activities shows not only substantial involvement in the summary judgment proceedings, but also it shows significant involvement in the MDL litigation from complaint through settlement. Indeed, Cohen Milstein declared it expended over 7,744 hours on the litigation as of November 10, 2010.[4]

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[4] At the conclusion of the hearing Plaintiffs' counsel provided the Exhibit to the declaration. This exhibit does not provide a breakdown of tasks performed; it merely gives cumulative hours worked by various law office personnel.

A similar declaration filed on behalf of another of Corso's counsel included a statement that time had been spent on "coordinating state and federal cases, delegating responsibility to plaintiffs' counsel in those cases; . . . legal research and drafting memoranda." This firm claimed over 2,235 hours were expended on this litigation. Berger & Montague Declaration, Ford Reply, Ex. V.[5]

The declarations by Corso's counsel are damning to their claim in this case that they were not involved in the MDL litigation. They were involved as counsel for various state court plaintiffs, including Corso. They were involved, not just in coordinated discovery, but also they were involved in the summary judgment proceedings. Unlike California counsel, they made a tactical decision to have the New Mexico claims remain in the MDL litigation. Having so elected and having had the opportunity to litigate their position, they are now bound by that decision under the third exception listed in *Taylor*.

Corso raises one other argument in his Supplemental Memorandum which has not been addressed. This argument is based on *Smith v. Bayer*, 564 U.S. 299 (2011). The Court has serious reservations about whether such argument should be addressed. The parties were given leave to file supplemental memoranda "limited to changes in law or fact since the 2011 briefs were filed." Order Lifting Stay filed Nov. 8, 2017. Corso's brief almost entirely ignores this limitation. With one exception, a portion of the discussion of antitrust causation on pages 5-6, the Plaintiffs' Supplemental Memorandum rehashes

[5] *Ibid.*

or recasts arguments previously made with citation to authorities that predated the 2011 briefs. This in itself is sufficient grounds to ignore these arguments. Out of an abundance of caution, however, the Court will address the *Smith* argument.

Smith involved consideration of an exception to the Anti-Injunction Act. A federal district court enjoined a state court from considering a motion to certify a class because the federal district court had earlier denied a motion to certify a class in a related case brought by a different plaintiff against the same defendant alleging similar claims. 564 U.S. at 302. The United States Supreme Court decided that the issuance of an injunction exceeded the district court's authority under the "relitigation exception" to the Anti-injunction Act. *Id.* The Supreme Court reasoned that the relitigation exception, which allows a court to enjoin a state action when necessary to protect a federal judgment, did not apply because the issue presented in the state court was different. The Court also held that the state plaintiff did not have the requisite connection to the federal suit to be bound.[6]

The first ground determined that the federal criteria for class certification were different from the state criteria, and therefore, the two issues presented were not the same. This was decided in the context of statutory construction of the Anti-Injunction Act. This is also different than what is happening in the instant case. In the MDL case the judge was deciding whether the plaintiff's type of proof was sufficient to

[6] The Court has already addressed the reasons why plaintiff in this case did have the requisite connection to the federal suit to be bound. It is unnecessary to repeat those arguments.

meet the requirements of the New Mexico antitrust statutes and the Unfair Practices Act. This is the very same issue that this Court would decide. Moreover, the decision turned not on the quality or quantity of the evidence but on whether the legal criteria under the New Mexico statutes were met. Thus, the differences in summary judgment standards between New Mexico and the federal courts did not come into play. The MDL judge did not rely on *Ashcroft v. Iqbal* , 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which are the cases rejected by New Mexico.

Further, *Smith* was dealing with an attempt by the original court to dictate to the subsequent court the impact of the original court's order. As the Court recognized, "a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment.'" 564 U.S. at 307 (citation omitted).[7]

It appears to the Court that Plaintiff is really arguing that the MDL court was wrong in its application of New Mexico law. Assuming this to be the case,[8] that fact is irrelevant. As has been noted: "One of the foundational principles of res judicata is that neither errors in the prior proceeding, nor the merits of the present case, have any relevance to a

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[7] This admonition demonstrates that in this case, Judge Hornby's limitation of his decision to the named plaintiffs in the MDL case does not establish that his decision cannot be used as a basis to bar non-parties in subsequent litigation.

[8] Despite Ford's arguments to the contrary, this Court has grave concerns about whether the summary judgment motion was decided correctly under New Mexico law. For the reasons discussed above, however, these concerns do not defeat a claim of bar.

court considering a motion to preclude." Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 918 (1992). *See Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981) ("[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."). Thus, even if the MDL court was wrong in its decision, that does not prevent the decision from acting as a bar to relitigating in this Court that which has already been litigated.

For the reasons, given above, Ford's Motion for Judgment is granted.[9] Counsel for Ford is directed to draft and circulate a proposed Order that memorializes this decision. Such draft should be circulated no later than February 2, 2018. Counsel for Corso should discuss with Ford's counsel any objections they have with the proposed order. Ford's counsel should submit the proposed order to the undersigned in Word format no later than February 9, 2018, via email to sfedsms@nmcourts.gov. If Corso's counsel are unable to approve the proposed order as to form, they are to file and submit objections to the form of order to the undersigned via email by February 9, 2018.

/s/ Sarah M. Singleton

Sarah M. Singleton
Judge Pro Tem, Sitting by Designation

[9] The portion of the motion that requested that the stay be lifted was already granted.

APPENDIX G

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-003925

02/28/2011

ROBERT D MAXWELL JR., ET AL.,

v.

GENERAL MOTORS CORPORATION ET AL.,

Filed: 03/02/2011

MINUTE ENTRY

The Court received and considered Non-Settling, Non-Bankrupt Defendants' ("Defendants") Motion for Entry of Judgment, the responsive memorandum in opposition thereto and the reply. Oral arguments were held on February 11, 2011 and the matter was thereafter taken under advisement.

Procedural Background

On July 2, 2009, U.S. District Court Judge Hornby issued his Decision and Order granting Defendants' Motion for Summary Judgment in the federal MDL action. *In Re New Motor Vehicles Canadian Export Antitrust Litigation,* 632 F. Supp. 2d 42 (D. Me. 2009). In this action, Defendants now move for entry

of judgment, arguing that res judicata bars these Arizona Plaintiffs' ("Plaintiffs") claims. The Court will not set forth a lengthy recitation of the facts beyond this very brief procedural history, but rather will discuss relevant facts as necessary to resolution of the issues presented.

Analysis

The preclusive effect of a judgment is defined by claim and issue preclusion, collectively referred to as res judicata. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). These two doctrines protect against the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing inconsistent decisions. *Id., citing Montana v. U.S.,* 440 U.S. 147, 153-54 (1979); *see also Hall v. Lalli,* 194 Ariz. 54, 57, 977 P.2d 776, 779 (1999).

"Due process, on the other hand, dictates that a party has the right to be heard." *Hall, id*. Thus, application of claim and issue preclusion to non-parties juxtaposes against the "deep-rooted historic tradition that everyone should have his own day in court." *Taylor, id*. at 892-93, *quoting Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Hall, id.*

I.

There are six categories of exceptions to the general rule against non-party preclusion, as recognized in *Taylor*. Two of them are at issue here: (1) a non-party is bound by a judgment if he "assumed control" over the litigation in which the judgment was rendered; and (2) a non-party may be bound by a

judgment because he was "adequately represented" by a party to the suit. 553 U.S. at 894-95.[1]

Assumption of Control Over the Litigation.

In setting forth the assumption of control exception, *Taylor* specifically relied on that Court's decision in *Montana*. *Taylor,* 553 U.S. at 895. After acknowledging the fundamental precepts embodied in the doctrine of preclusion, *Montana* noted that these same interests apply when non-parties "assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." 440 U.S. at 154. That the non-party in *Montana* (the United States) exercised control over the prior litigation was not in dispute: the U.S. required the first suit to be filed; reviewed and approved the complaint; paid the attorneys' fees and costs; directed the appeal to the State Supreme Court, and appeared and submitted an *amicus* brief; and directed the filing of a notice of appeal to the Supreme Court and effectuated abandonment of that appeal. *Id*. at 155. "Thus, although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.*

[1] "Privity" sometimes collectively refers to the "substantive legal relationships justifying preclusion." *Taylor,* 553 U.S. at 894 n.8. "Privity" has come to be more broadly used "as a way to express the conclusion that nonparty preclusion is appropriate on any ground." *Id.* "Privity...is not a result of parties having similar objectives in an action but of the *relationship* of the parties to the action and the *commonality* of their interests." *Hall,* 194 Ariz. at 58, 977 P.2d at 780 (emphasis in original).

In support of its analysis, *Montana* cited § 83 of the Restatement (Second) of Judgments (Tent. Draft No. 2, 1975) ("Restatement"), which provided:[2]

A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.

440 U.S. at 154-55. *Taylor* cited this section as well, noting that a non-party who has had the opportunity to present proofs and argument has had his day in court, even though he was not a formal party to the litigation. 553 U.S. at 895, *quoting* Restatement cmt. a.[3]

This Restatement section was also support for the holding in *Indus. Park Corp. v. U.S.I.F. Palo Verde Corp.,* 26 Ariz. App. 204, 547 P.2d 56 (1976). At issue in *Indus. Park* was whether the claims of the principal shareholder of a corporation were barred by the judgment entered in the prior litigation against the corporation. The Court of Appeals concluded that they were not because the record did not show that the shareholder in fact controlled the prior litigation. *Id*. at 209, 547 P.2d at 61 (shareholder "could not attack the validity or enforcement of the judgment" against the corporation). Of relevance here, the court specifically cited to comment c to the Restatement, which provides:

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[2] *Montana* noted that the term "privies" denoting non-parties who control litigation had been abandoned in this section of the Second Restatement. 440 U.S. at 154 n.5.

[3] *Taylor* actually cited to Restatement (Second) of Judgments § 39 (1980), which corresponds to § 83 of the tentative draft.

Elements of control. To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain appellate review.[4]...It is sufficient that the choices were in the hands of counsel responsible to the controlling person; moreover, the requisite opportunity may exist even when it is shared with other persons. It is not sufficient, however, that the person merely contributed funds or advice in support of the party....

Indus. Park, id. at 209 n.4, 547 P.2d at 61 n.4.

Adequate Representation.

Taylor held that representation is "adequate" for purposes of non-party preclusion if (1) the interests of the party and the non-party are aligned, and (2) *either* the party understood himself to be acting in a representative capacity *or* the original court took care to protect the non-party's interests. 553 U.S. at 900, *citing Richards,* 517 U.S. at 801-02; *Hansberry v. Lee,* 311 U.S. 32, 43 (1940).[5] In *Taylor,* the Court found nothing in the record to indicate that the party understood himself to be suing on the non-party's behalf, that the non-party even knew of the suit, or that the original court took special care to protect the non-party's interests; thus, preclusion was not justified on the theory that the non-party had been adequately represented in the original suit. 553 U.S. at 905.

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[4] In this sentence in comment c to Restatement (Second) of Judgments § 39 (1980), the word "appellate" is omitted.

[5] In some cases, notice of the original suit to the non-party is required. *Taylor,* 553 U.S. at 900.

II.

Initially, the Court does not find that Plaintiffs "assumed control" of the MDL action for the purposes of preclusion. Of particular relevance in both *Montana* and *Indus. Park* was that the non-party's "control" extend to appeal from or review of the judgment in the first action. *Montana,* 440 U.S. at 155; *Indus. Park,* 26 Ariz. App. at 209, 547 P.2d at 61. Both *Montana* and *Indus. Park* relied on the Restatement, the comment to which indicates that the requisite control must include control over the opportunity for appellate review. *Montana, id.; Indus. Park, id*. Plaintiffs argue that any such control they might have had over the MDL action did not extend to control over the decision whether to appeal Judge Hornby's Order; indeed, at oral argument on this Motion, Plaintiffs' counsel asserted that Plaintiffs would have appealed that order had they been able to do so. Defendants do not argue to the contrary.[6]

However, the Court does find that Plaintiffs were adequately represented in the MDL action.

First, the interests of the federal plaintiffs and Plaintiffs here are aligned. *Taylor,* 553 U.S. at 900. Plaintiffs make the same claims under the same

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[6] To this extent, the Court disagrees with Judge McShane, who concluded that the Minnesota plaintiffs controlled the MDL action. *Lerfald v. Gen'l Motors Corp.,* Case No. 27-CV-03-3327 (Minn. Dis. Ct. Sept. 16, 2010) (Order at 4). Judge McShane relied on *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.,* 200 N.W.2d 45, 48-49 (Minn. 1972). In that case, with facts more akin to *Montana*, the non-party directed the plaintiffs' motion for new trial and itself moved for new trial as a victorious third-party defendant in the first action. *Id.*

Arizona statute against the same defendants, based on the same legal theory and record, as the plaintiffs in the MDL action. Plaintiffs coordinated discovery with the federal plaintiffs, including sharing of costs and fees. Even Plaintiffs do not seriously contend that the relationship of all plaintiffs to the actions and the commonality of their interests do not demonstrate alignment of interests. *See Hall,* 194 Ariz. at 58, 977 P.2d at 780.

Second, the federal Plaintiffs clearly understood themselves to be acting in a representative capacity *and* Judge Hornby took care to protect Plaintiffs interests. *Taylor,* 553 U.S. at 900. It is in this regard that Plaintiffs' counsel's "control" in the MDL action is more directly relevant. Plaintiffs' counsel appeared on Plaintiffs' behalf in the MDL action and were part of a joint prosecution agreement, which was intended to protect the interests of all plaintiffs. This agreement evidences Plaintiffs' counsel's involvement, in coordination with the federal plaintiffs, in how the MDL action was conducted, which involvement was endorsed by Judge Hornby. Plaintiffs chose to litigate their claims in the MDL action rather than moving to dismiss without prejudice as the California plaintiffs did; that Judge Hornby granted the California plaintiffs' motion further indicates his care in protecting the interests of the state plaintiffs.[7] Plaintiffs' counsel litigated the MDL summary judgment motion as Plaintiffs'

[7] That Plaintiffs may have opposed Judge Hornby's exercise of supplemental jurisdiction is not dispositive. Plaintiffs did not move to withdraw their claims. Had Judge Hornby denied such a motion, Plaintiffs' position would have more merit.

Coordinated Action Counsel.[8] After Judge Hornby granted the motion for summary judgment, Plaintiffs' counsel averred they had been involved not only on summary judgment, but also regarding class action, discovery, and settlement issues.[9] In sum, not only were the federal plaintiffs and Judge Hornby aware of their obligations to Plaintiffs, but Plaintiffs' own counsel could ensure Plaintiffs' interests were protected. The Court agrees that it is difficult to imagine a more compelling case for preclusion based on adequate representation.

Plaintiffs argue that, absent class certification in the MDL action, Judge Hornby's Order only disposed of the claims of the named plaintiffs in the MDL action. 632 F. Supp. 2d at 51 n.13. However, Defendants do not argue Plaintiffs are bound by Judge Hornby's Order based on their status as absent class members. As *Taylor* recognized, a properly conducted class action is only one "certain limited circumstance" by which a non-party may be precluded based on adequate representation. 553 U.S. at 894, 900-01. Further, Plaintiffs' argument that preclusion should not apply for equitable reasons because Judge Hornby's Order was based on a dubious First Circuit decision on class certification

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[8] The Court agrees with Defendants that placement and formatting of the signature blocks indicates that Plaintiffs' Coordination Action Counsel endorsed the argument made on behalf of these Plaintiffs, as did the Executive Committee and Additional Plaintiffs Counsel on behalf of theirs.

[9] At oral argument, Defendants read into the record statements to this effect filed by Plaintiffs' counsel in the MDL action, including a statement from Kathleen Konopka from the Cohen, Milstein law firm. Plaintiffs did not dispute the truth of these statements or argue their irrelevance on this issue.

is nothing more than a plea for a second bite at the apple.

Because Plaintiffs were adequately represented in the MDL action, res judicata bars Plaintiffs from relitigating their claims in this Court. Defendants are entitled to entry of judgment in their favor. Accordingly,

IT IS ORDERED granting Non-Settling, Non-Bankrupt Defendants' Motion For Entry of Judgment.

IT IS FURTHER ORDERED that Plaintiff shall submit a proposed form of judgment in conformity with this Court's order and in conformity with A.R.C.P., Rule 58.

Dated: March 1, 2011

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT