Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13354

AMY DOUCET & ANOTHER,
PLAINTIFF/APPELLANT,

v.

FCA US, LLC & ANOTHER,
DEFENDANT/APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

AMICUS CURIAE BRIEF FOR
THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS and
THE AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF AND REVERSAL

Peter J. Ainsworth, Esq.
President
Massachusetts Academy of Trial Attorneys
Meehan, Boyle, Black & Bogdanow, P.C.
100 Cambridge Street
Boston, MA 02114
(617) 523--8300
painsworth@meehanboyle.com
BBO No. 658704

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– Additional Counsel Listed on the Following Page –

Thomas R. Murphy, Esq.
Chair, Amicus Committee
Massachusetts Academy of Trial Attorneys
Law Offices of Thomas R. Murphy, LLC
133 Washington Street
Salem, MA 01970
(978) 740-5575
trmurphy@trmlaw.net
BBO No. 546759

Kevin J. Powers, Esq.
Vice Chair, Amicus Committee
Massachusetts Academy of Trial Attorneys
Law Offices of Kevin J. Powers
P.O. Box 1212
Mansfield, MA 02048
(508) 216-0268
kpowers@kevinpowerslaw.com
BBO No. 666323

Jeffrey R. White, Esq.
Senior Associate General Counsel
American Association for Justice
777 Sixth St. NW, Suite 200
Washington, DC 20001
(202) 617-5620
Jeffrey.white@justice.org

Robert S. Peck, Esq.
Center for Constitutional Litigation, P.C.
1901 Connecticut Avenue, NW, Suite 1008
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

Kyle A. Camilleri, Esq.
Sweeney Merrigan Law, LLP
268 Summer Street, LL
Boston, MA 02210
(617) 391-9001
kyle@sweeneymerrigan.com
BBO No. 709012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

ISSUES PRESENTED AND POSITION OF *AMICI*

The Massachusetts Academy of Trial Attorneys (Academy) and the American Association for Justice (Association) offer this brief in response to the three questions posed in the Court's solicitation in this case:

1. Personal jurisdiction over out-of-state successor in interest:

Amici submit that the usual long-arm jurisdiction rules apply and support jurisdiction in this case and that FCA's successor-in-interest status has no bearing on that question. See RAI/81-84.[1] In fact, by virtue of the position FCA took when the case was pending in New Hampshire, FCA consented to or should be judicially estopped from denying personal jurisdiction in Massachusetts.

2. Personal jurisdiction under the long-arm statute and federal due process:

Amici submit that longstanding Massachusetts precedent—including the but-for causation test in *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 770-771 (1994)—supports personal jurisdiction over FCA in the Commonwealth's courts. It is irrelevant that the plaintiff was "injured in another state." *Id.* at

[1] Citations to the Record Appendix are "RA[Volume]/[Page(s)]. "

770-771. And federal due-process standards, both before and after *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), pose no bar to exercising such jurisdiction over FCA. *Ford* holds that but-for causation is not *necessary* for personal jurisdiction. *Id*. at 1026 ("None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."). But that holding does not abrogate precedent holding that but-for causation arising from an in-state sale *suffices* to establish the necessary relationship. See *Choi* v. *Gen. Motors LLC*, 2021 WL 4133735, at *7 (C.D. Cal. 2021) (unpublished) (attached).

3. Jurisdictional discovery:

Amici submit that, should this Court find specific jurisdiction lacking because of an insufficient factual basis in the record, Plaintiffs-Appellants are entitled to conduct jurisdictional discovery.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Massachusetts Academy of Trial Attorneys

The Academy is a voluntary, non-profit, Commonwealth-wide professional association of lawyers. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth

of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; ardently to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The American Association for Justice

The American Association for Justice is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than seventy-five years, the Association has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

RULE 17(c)(5) DECLARATION

Amici state that some of Plaintiffs' counsel are members of both *amici*;

No party or party's counsel authored this brief, in whole or part;

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;

No person or entity—other than *amici*, their members, or their counsel—contributed money that was intended to fund the preparation of filing of this brief; and

Neither *Amici* nor its counsel represent or have represented any of these parties in any other proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction at issue here.

STATEMENT OF CASE

Amici accept the Statement of the Case of Plaintiffs-Appellants.

SUMMARY OF ARGUMENT

Both the text of the Massachusetts long-arm statute and the precedents applying it confirm that our courts have personal jurisdiction over the defendant in this products liability case. (pp. 15-18). Applying our standard but-for analysis, it is clear that the sale of the subject vehicle in

Massachusetts set off the train of events that resulted in the plaintiff's injuries, even though the plaintiff was injured in another state. (pp. 15-16).

That FCA is a successor in interest does not affect the operation of the long-arm statute. (pp. 19-21). As federal courts have repeatedly held, FCA agreed to the liabilities of Old Chrysler as part of its bankruptcy proceedings. (pp. 19-21). Thus, FCA is but an alter ego of Old Chrysler, which does not require a separate or different analysis of its status for purposes of long-arm jurisdiction. (pp. 20-21).

There is another reason why FCA is subject to personal jurisdiction in our courts, which makes it unnecessary to conduct a further due-process analysis. (pp. 21-26). Throughout the early stages of this litigation, which began in New Hampshire, FCA denied that it was subject to personal jurisdiction in that state by pointing to the sale of the vehicle in Massachusetts. (pp. 21-23). Even though the Supreme Court of the United States subsequently rejected that argument, FCA succeeded in convincing a New Hampshire district court that it was right. Its action in pointing to Massachusetts, rather than New Hampshire, should be deemed consent to the jurisdiction of our courts and FCA should be judicially estopped from arguing otherwise. (pp. 22-23).

Personal jurisdiction over FCA does not offend due process. (pp. 27-35). Cases before and after the Supreme Court's latest decisions confirm that the sale of the vehicle in Massachusetts provides a sufficient basis for the exercise of judicial authority over FCA. (pp. 27-29). That sale unquestionably provides a causal relationship between the jurisdiction, the defendant, and the subject of the litigation. Nothing in the Court's latest pronouncement on personal jurisdiction undermines that analysis. (pp. 29-35).

Finally, should this Court hold that additional facts are necessary to determine the specific-jurisdiction question in this case, Plaintiffs-Appellants are entitled to conduct jurisdictional discovery. (pp. 36-40).

ARGUMENT

I. THE LONG-ARM STATUTE AUTHORIZES PERSONAL JURISDICTION IN THIS CASE.

A. Both text and precedent support personal jurisdiction.

This Court has long recognized that our long-arm statute reaches a manufacturer that sells its vehicles in the Commonwealth, even when the injury it causes occurs beyond our borders. In *Tatro* v. *Manor Care, Inc*., 416 Mass. 763, 770-771 (1994), this Court made clear that a transaction, such as a sale, in Massachusetts that comprises "the first step in a train of events

that results in the personal injury" satisfies the but-for causal test under the long-arm statute. *Id.* at 771. Where that connection exists, "it is apparent that the plaintiff's claim 'arose from' the defendant's transaction of business in the Commonwealth." *Id.* As the *Tatro* Court explained, and as applied to the facts of this dispute, "[b]ut for the defendant's solicitation of business in Massachusetts, ... the plaintiff would not have been injured [by the allegedly defective automobile]." *Id.* at 771-772.

Under *Tatro*, that causal connection does not dissolve simply because a plaintiff is "injured in another state." *Id.* at 770-771 (finding personal jurisdiction where defendant's transaction in Massachusetts set in motion events that led to plaintiff's injury in California). Thus, what matters for purposes of personal jurisdiction is that the vehicle at issue was first sold by Chrysler in Massachusetts and that was "the first step in a train of events that results in the personal injury." *Id.* That the plaintiff was ultimately "injured in another state," in this case New Hampshire, is irrelevant.

By contrast, the First Circuit held that a motor scooter purchased by a Pennsylvania resident in Italy that caused an injury in Florida did not qualify for personal jurisdiction in this Commonwealth because the

"evidence [did] not warrant a finding that the scooter purchased by the plaintiff was ever in Massachusetts," and could not "have 'arisen from' any Massachusetts transaction," because "[e]very relevant event of any importance— the alleged negligence, the sale, the injury— occurred in some other jurisdiction." *Singer* v. *Piaggio & C. (s. p. a.)*, 420 F.2d 679, 681 (1st Cir. 1970).

Establishing applicability of the long-arm statute is the first consideration when determining personal jurisdiction. *SCVNGR, Inc*. v. *Punchh, Inc*., 478 Mass. 324, 325 (2017). As *Tatro* establishes and *Singer* suggests, the reach of the long-arm statute is sufficient to grasp FCA in these circumstances. It provides that "[a] court may exercise personal jurisdiction over a person ... as to a cause of action in law or equity arising from the person's" one or more specific acts or omissions itemized in the statute. Among the relevant enumerated circumstances giving rise to personal jurisdiction, the first three clearly apply to this action:

> (a) transacting any business in this commonwealth;
> (b) contracting to supply services or things in this commonwealth; [or]
> (c) causing tortious injury by an act or omission in this commonwealth....

G. L. c. 223A, § 3.

The first circumstance, transacting business, is "construed broadly," and is satisfied where the defendant purposefully and successfully solicits "business from residents of the Commonwealth." *Tatro*, 416 Mass. at 767-768. There is no question that FCA, through its dealerships, does just that on a regular basis and did so with respect to the vehicle in question.

As to the second, contractual circumstance, "[t]here can be no doubt that physically signing a contract in Massachusetts is, in literal terms, transacting business in Massachusetts, if the cause of action arises from that contract." *Carlson Corp*. v. *Univ. of Vermont*, 380 Mass. 102, 105 (1980). The cause of action arises from the sale which was "the first step" in the series of events leading to the injury. *Tatro*, 416 Mass. at 771. Without that sale, itself a warranty of merchantability under G.L. c. 106, § 2-314, the decedent would not have acquired the car nor suffered the alleged injury.

Third, Doucet's injury was the result of "an act or omission" — the initial sale — in the Commonwealth. G. L. c. 223A, § 3. Without the sale in Massachusetts of a car whose passenger side A-pillar was defective Doucet would not have been injured.

B. FCA's status as successor in interest has no effect on the applicable personal-jurisdiction standards.

Successor liability and its relationship to personal jurisdiction ought not be an issue here. See RAI/81-84. That question was thoroughly ventilated in the Federal District of South Carolina, in a case arising out of a 2015 fatal car crash in which the decedent's estate claimed that a 2009 vehicle's airbag failed to deploy during a rollover and caused a fatality. *Daniels* v. *FCA US, LLC*, U.S. Dist. Ct., No. CV 4:17-02300-AMQ, 2018 WL 3587004, at *2 (D.S.C. July 26, 2018) (unpublished) (attached). As *Daniels* explains, Chrysler filed for voluntary bankruptcy on April 30, 2009. *Id*. On the same day, it entered into a Master Transaction Agreement (MTA) in which FCA purchased substantially all of Chrysler's assets and assumed some of Chrysler's liabilities. *Id*. The MTA initially provided that FCA assumed liability for "all Product Liability Claims arising from the sale *after the Closing* of Products or Inventory manufactured by Sellers or their Subsidiaries in whole or in part prior to the Closing" (emphasis in original; citation omitted). *Id*. at *1.

But the MTA was amended months later, on November 19, 2009, such that FCA agreed to assume "*all* Product Liability Claims arising from

the sale *on or prior to the Closing* of motor vehicles or component parts, in each case manufactured by Sellers or their Subsidiaries and distributed and sold as a Chrysler, Jeep, or Dodge brand vehicle...." (emphasis added; citation omitted). *Id*. at *1. The bankruptcy court approved the amendment that day. *Id*. at *2. As another federal court examining the same language crisply put it: "All claims means 'all claims.'" *White* v. *FCA US, LLC*, 579 B.R. 804, 814 (E.D. Mich. 2017).

These terms qualify FCA (sometimes referred to as "New Chrysler") as a continuation of Old Chrysler, which triggers successor liability under Massachusetts law. *Smith* v. *Kelley*, 484 Mass. 111, 120 (2020) ("[i]f the entity remains essentially the same, despite a formalistic change of name or of corporate form, successor liability may be imposed"). Transferring liability to the successor entity "reinforces the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor." *Id*. The terms of the court-approved sale, which include assumption of *all* product liability claims, qualify FCA as a successor in interest subject to liability — however disputed — here. As such, simply because FCA, rather

than the Old Chrysler, is the named defendant is of no moment in the personal jurisdiction analysis.

The Federal District of Massachusetts in this case correctly rejected FCA's argument that it had no successor liability to Old Chrysler, concluding that "FCA's argument fails." RAI/83. The court recognized that the "case arises from liabilities of Old Chrysler that were expressly assumed by FCA, ... which subjects FCA to the same jurisdictional contacts that would have applied to Old Chrysler in the absence of the bankruptcy proceedings" (citations omitted). *Id*. This Court should adopt that court's persuasive analysis.

II. FCA CONSTRUCTIVELY CONSENTED TO PERSONAL JURISDICTION IN THIS CASE.

The tortuous history of this case begins with a civil action filed in a New Hampshire state court and removed to the federal court in that district. See RAI/366. FCA successfully moved to dismiss for lack of personal jurisdiction, arguing that "Doucet's claims do not arise from and are not related to either FCA's or Chrysler, LLC's conduct in New Hampshire." RAI/372. In doing so, FCA emphasized that, because "the subject vehicle was sold to a *Massachusetts* dealer and leased to a

Massachusetts resident," the company "has engaged in no activities in New Hampshire that gave rise to the liabilities sued on" (emphasis in original). FCA Mem. in Support of Motion to Dismiss in *Doucet*, No. 18-CV-627-JL (D.N.H.), ECF No. 4, at 11 [hereinafter FCA NH Mem.] (attached). See *id*. at 2 ("there were no contacts or conduct related to the facts and matters that gave rise to this action that were directed to New Hampshire by Old Chrysler. The subject vehicle, a 2004 Chrysler Sebring Convertible, was initially sold by Old Chrysler to a *Massachusetts* dealer." [emphasis in original; citation omitted]); *id*. at 11 ("At the time FCA agreed to assume certain product-liability liabilities of Old Chrysler, the subject vehicle had spent its entire life owned by Massachusetts residents." [citation omitted]); *id*. at 12 ("The only connection between New Hampshire and plaintiff's claim is attenuated, and insufficient to confer jurisdiction. . . . Plaintiff cannot establish . . . that it would be fair and reasonable to require Old Chrysler to defend this action in New Hampshire, if that entity was in existence today.").

Accepting FCA's argument, the District of New Hampshire criticized the complaint for failing to "allege or offer evidence to the effect that FCA had any contact with, or took any action with respect to, [Doucet's] 2004

Sebring in New Hampshire." RAI/374. The court's analysis, again reflecting FCA's arguments, indicated that because none of FCA's activities took place in New Hampshire, with the sale occurring in Massachusetts, personal jurisdiction did not lie in New Hampshire but could lie in Massachusetts, where in-forum activities occurred. RAI/380-381. In fact, FCA conceded as much in its brief. FCA NH Mem. at 4, 12. Given *Ford*, we now know that the court's ruling and FCA's argument were incorrect about personal jurisdiction in New Hampshire, in state or federal court.

But FCA cannot have it both ways, and its position throughout this litigation has been inconsistent. Quite simply, FCA cannot say on the one hand there is no personal jurisdiction in New Hampshire because Massachusetts is a proper venue, and on the other hand represent to this Court that the case could instead be heard in New Hampshire. That's pretzel logic. Indeed, it is axiomatic that one who induces "'some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.'" *Box Pond Ass'n* v. *Energy Facilities Siting Bd.*, 435 Mass. 408, 422 n.14 (2001), quoting *Deland* v. *Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336 (9th Cir. 1985). First, FCA denied personal jurisdiction in New Hampshire courts, holding out that

Massachusetts, rather than the Granite State, might exercise personal jurisdiction over it — and convinced a federal judge to accept that. But now, FCA comes into this Court crying foul, saying that jurisdiction lies in New Hampshire not in the Commonwealth. Given the statute of limitations and principles of *res judicata*, the net effect of FCA's conflicting positions at this late stage of the litigation would be to avoid any potential liability on these allegations anywhere. That is gaming the courts, à la Three-card Monte.

What's more, the doctrine of judicial estoppel obtains here. It applies when a party takes directly inconsistent positions and "succeeded in convincing the court to accept its prior position." *Otis* v. *Arbella Mut. Ins. Co.*, 443 Mass. 634, 641 (2005). If the new position is now accepted under this equitable doctrine, it would "create 'the perception that either the first or the second court was misled.'" *Id.*, quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). That acceptance of an opposing position also has the inherent consequence of giving the party who changes positions an "'unfair advantage or impose[s] an unfair detriment on the opposing party if not estopped.'" *Otis*, 443 Mass. at 641, quoting *New Hampshire*, 532 U.S. at 751.

The better, fairer way to look at FCA's new position is to consider its finger-pointing to Massachusetts when pleading in New Hampshire as implicit consent to personal jurisdiction in the Commonwealth. Although a party cannot consent to or waive subject-matter jurisdiction, *MacDougall* v. *Acres*, 427 Mass. 363, 371 (1998), one can certainly consent to personal jurisdiction, either directly or implicitly. See *Ins. Corp. of Ireland, Ltd*. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (holding personal jurisdiction is waivable right and "variety of legal arrangements" exist by which litigant may give "express or implied consent to the personal jurisdiction of the court"). Indeed, this Court has recognized that even at the time the long-arm statute was enacted, there were multiple "statutes conferring personal jurisdiction through implied consent." *Roch* v. *Mollica*, 481 Mass. 164, 169 n.10 (2019).

In essence, by denying personal jurisdiction in New Hampshire and pointing to Massachusetts as the locus of in-forum activities giving rise to this dispute, FCA adopted Massachusetts as the proper forum for this case every bit as much as if it had a forum-selection clause in a contract designating the Commonwealth as the place to bring this action. See *Burger King Corp*. v. *Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (recognizing forum-

selection clauses as form of express or implied consent that do not offend due process).

Indeed, imputing consent to FCA would obviate the need for this Court to undertake a due-process analysis. The "personal jurisdiction requirement recognizes and protects an individual liberty interest." *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702. As "an individual right, it can, like other such rights, be waived." *Id*. at 703. Such waiver could be the product of the party's intent, "or for various reasons a defendant may be estopped from raising the issue." *Id*. at 704.

Here, FCA is estopped from denying personal jurisdiction in the Massachusetts courts by virtue of its representation to the New Hampshire courts that it was subject to jurisdiction by the in-forum activity of the vehicle's sale in Massachusetts, as well as its lack of purposeful in-forum activities with respect to the vehicle in New Hampshire.

III. DUE PROCESS POSES NO OBSTACLE TO EXERCISING PERSONAL JURISDICTION OVER FCA.

A. Neither *Ford* nor any other authority suggests this Court ought to abandon its precedent supporting personal jurisdiction over an entity selling a product in Massachusetts that causes injury in another state.

In *Ford Motor Co*. v. *Montana Eighth Jud. Dist. Ct*., 141 S. Ct. 1017 (2021), a unanimous Supreme Court clarified that due process poses no bar to personal jurisdiction over the manufacturer of a vehicle when the first sale did not take place in the forum state. *Id*. at 1022. While the place of injury distinguishes this case from the two under review in *Ford*, that is a distinction without a difference; it has no bearing on whether due process is satisfied. Even if consent or equitable estoppel does not provide a basis for personal jurisdiction, due process does not prevent extending the Massachusetts long-arm statute over FCA on these facts.

In reaching its unanimous holding, the *Ford* Court did not put the brakes on any other bases for exercising state court jurisdiction. In fact, Ford had argued that "a causal test would put jurisdiction in only the States of first sale, manufacture, and design." *Id*. at 1026. This Court, too, recognized the propriety of exercising personal jurisdiction in the place of first sale in *Tatro*. The unassailable rationale for doing so is that by putting

the defective product into the Massachusetts stream of commerce, the actions of the manufacturer and its agent in testing and readying the car for sale, together with their representing it as fit for its purpose, constituted a "but for" cause of Doucet's injuries. See *Tatro*, 416 Mass. at 771-772. And just because Doucet was "injured in another state" does not undo that but-for causal connection between the in-state sale and her injury years later. *Id.* at 770-771.

Ford does not alter that proposition. *Ford* held that a causal relationship between in-state conduct and the plaintiff's claim is not *necessary* for specific jurisdiction to exist. Still *Ford* did nothing to reverse the prevailing understanding—or binding Massachusetts precedent—holding that a but-for causal relationship of the kind present here *suffices* to support specific jurisdiction.

Instead of limiting specific jurisdiction, *Ford* reaffirmed that the "canonical decision in this area remains *International Shoe Co*. v. *Washington*." *Ford*, 141 S. Ct. at 1024. It held that a tribunal's authority depends on the defendant's having sufficient minimum "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional

notions of fair play and substantial justice." *Int'l Shoe Co*. v. *Washington*, 326 U.S. 310, 316-317 (1945) (quotation and citation omitted).

The *Ford* Court held that, under *Int'l Shoe*, the applicable due process rule "demands that the suit 'arise out of or *relate to* the defendant's contacts with the forum.' The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing" (emphasis in original; citation omitted). *Ford*, 141 S. Ct. at 1026.

To satisfy this standard, a defendant must take some act of purposeful availment in the forum State. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). In other words, the related acts must demonstrate that the defendant "purposefully reach[ed] out beyond" its home such as by "deliberately exploi[ting] a market in the forum State" (quotation and citation omitted). *Walden* v. *Fiore*, 571 U.S. 277, 285 (2014). At bottom, an "'affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State" (citation and alteration omitted) must exist in order to exercise specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A*. v. *Brown*, 564 U.S. 915, 919 (2011).

Here, it is indisputable that the relatedness prong is satisfied. Old Chrysler dotted Massachusetts with dealerships that sold its cars, including the subject Sebring convertible. Massachusetts has an undeniable interest in ensuring that cars sold within the state operate properly and safely. For example, Massachusetts requires that all vehicles must be "fit to be driven safely on the roads" before they leave the dealership and, if they cannot pass inspection, must be repaired by the dealership or any payment refunded. 940 Code Mass. Regs. § 5.04 (2023). See G.L. c. 90, § 7N 1/2(2). Plaintiffs have alleged that the subject vehicle was either defectively designed or manufactured, meaning that it left FCA's Massachusetts dealership in a defective condition, and that defect was undiscoverable before the crash. RAI/351-355. That alone leaves no doubt that this claim relates to or arises out of the original sale in Massachusetts.

And that makes perfect sense. After all, when a manufacturer "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson*, 357 U.S. at 253, no doubt it is thereby on notice of liability claims within the courts of that state "and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection

with the State." *World-Wide Volkswagen Corp*. v. *Woodson*, 444 U.S. 286, 297 (1980).

The sale of this vehicle was "not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in [Massachusetts]." *Id*. Therefore, a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id*.

FCA, like Ford before the Supreme Court with respect to both states at issue there, "does not contest that it does substantial business" in Massachusetts or "that it actively seeks to serve the market for automobiles and related products in [Massachusetts]. " *Ford*, 141 S. Ct. at 1026. Due process concerns, therefore, provide no basis for avoiding trial here. FCA systematically served this market with this specific, allegedly defective, vehicle and others of the same model, creating the necessary "strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction" (citation omitted). *Ford*, 141 S. Ct. at 1028.

This matter thus has what was missing in other cases: "a connection between the forum and the specific claims at issue." *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773, 1781 (2017). See *Walden*, 571 U.S. at 289 (defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the forum—petitioner formed no jurisdictionally relevant contacts with Nevada" [emphasis added]).

B. *Ford* does not undercut place-of-sale as a basis for asserting personal jurisdiction.

The Superior Court misapplied a phrase in *Ford* that recognized that the purchase of the vehicle by "a former owner once (many years earlier)," constitutes a "less significant 'relationship among the defendant, the forum, and the litigation.'" *Ford*, 141 S. Ct. at 1030, quoting *Walden*, 571 U.S. at 284. Yet it is by no means clear that the Supreme Court pronounced anything by that statement, let alone intended to abrogate longstanding precedent supporting jurisdiction based on garden-variety causation.

Even if that phrase in *Ford* were read to say more, the Supreme Court reserves to itself "the prerogative of overruling its own decisions" and

advised other courts to continue to follow even a seemingly impaired precedent. *Rodriguez de Quijas* v. *Shearson/American Express, Inc*., 490 U.S. 477, 484 (1989). At the same time, one could hardly say that *Ford*'s discussion suggests that *this* Court abandon its own rule in *Tatro* that the but-for causal connection is not vitiated simply because a plaintiff is "injured in another state." *Tatro*, 416 Mass. at 770-771.

It would also be error to read the statement in *Ford* as questioning the necessary relationship when the vehicle is purchased in one state, but the injury occurs in another. Instead, a fair and balanced reading of *Ford* is that the *Ford* Court merely compared the strength of the relationship, given that Ford advocated that the connection existed at the place of first purchase and not at the place of injury. In countering that argument, the Court merely noted that the relationship was even stronger where Ford denied it existed. Thus, the Court recognized that "some relationships will support jurisdiction without a causal showing," such as when the manufacturer "systematically served a market in [the States in which suit was brought] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States" (quotation and citation omitted). *Ford*, 141 S. Ct. at

1026, 1028. Others require what Massachusetts calls a "but-for" relationship, which is plainly met here.

Ford does not change *Tatro*. As the latter explained, the sale was "the first step in a train of events that results in the personal injury." *Tatro*, 416 Mass. at 770. The injury still "'arose from' the defendant's transaction of business in the Commonwealth," and but for its sale of a defective vehicle "the plaintiff would not have been injured." *Id*. at 771-772.

Moreover, as Justice Gorsuch explained in his concurrence in *Ford*, there is no reason to suggest that the first sale of a used car, however many years earlier, does not constitute a sufficient connection. *Ford*, 141 S. Ct. at 1035 (Gorsuch, J., concurring). He recognized that the state in which the original sale occurred has a "strong interest in ensuring they don't become marketplaces for unreasonably dangerous products." *Id*. (Gorsuch, J., concurring). He also explained that the "plaintiffs' injuries, at least arguably, 'arose from' (or were caused by) the sale of defective cars in those places." *Id*. (Gorsuch, J., concurring). *Amici* submit that Justice Gorsuch addressed the issue correctly.

This position is even buttressed by a post-*Ford* decision of a federal district court. Calling reliance on that phrase to undercut place-of-sale as a

basis for personal jurisdiction "misplaced," a California federal judge held that "the Supreme Court merely held 'that jurisdiction may also be proper in the State where the incident occurred.'" *Choi* v. *Gen. Motors LLC*, U.S. Dist. Ct., No. CV 21-5925-GW-MRWx, 2021 WL 4133735, at *7 (C.D. Cal. Sept. 9, 2021) (holding specific jurisdiction in California proper in products case over vehicle sold by General Motors in California, even though car crash occurred in Colorado, plaintiffs all residents of Colorado, and vehicle licensed and titled in Colorado). That Court further noted that the Supreme Court's rejection of Ford's argument (*i.e.*, that personal jurisdiction existed only where the car was sold, designed, or manufactured) was because its argument was too narrow in formulation. As *Choi* explained, "the Supreme Court's rejection of that argument meant only that personal jurisdiction could not be had *only* in a State that met one of those conditions; it did not reject the proposition that personal jurisdiction could be had in at least those States meeting one or more of those conditions" (emphasis added). *Id*. at *6.

Accordingly, this Court should reject FCA's proposition that personal jurisdiction is lacking in a state that set the chain of events in motion through its sale of the vehicle which caused Doucet's injuries.

IV. IF PERSONAL JURISDICTION IS LACKING THEN JURISDICTIONAL DISCOVERY IS IN ORDER.

A. The request for jurisdictional discovery was proper and timely.

Plaintiffs first moved for jurisdictional discovery after FCA removed the case to federal court. RAI/99. But the judge denied the motion as moot, deciding that jurisdiction was proper. RAI/76. On remand, Plaintiffs repeated their request in the Suffolk Superior Court. RAI/99.

After the matter was transferred to Essex County, Plaintiffs again filed a request to conduct jurisdictional discovery. RAI/5. So, their request for jurisdictional discovery was properly and timely made in the trial courts, and not raised for the first time on appeal. RAI/5.

B. Plaintiffs are entitled to jurisdictional discovery.

When faced with a motion to dismiss an action for lack of personal jurisdiction, a plaintiff bears the "burden of proving facts sufficient to establish" that the court may exercise jurisdiction over the defendant. *Bulldog Investos Gen. Partnership* v. *Sec'y of the Commonwealth*, 457 Mass. 210, 219 (2010). See *Am. Int'l Ins. Co*. v. *Robert Seuffer GMBH & Co. KG*, 468 Mass. 109, 119 n.12 (2014) (plaintiff "bears the burden of demonstrating the existence of minimum contacts"). Only if the defendant

does not dispute jurisdictional facts as alleged in the complaint will the court accept those allegations, leaving the plaintiff only with the burden of production. *Cepeda* v. *Kass*, 62 Mass. App. Ct. 732, 737–738 (2004).

However, where the defendant presents competent evidence to contradict the jurisdictional facts alleged in the complaint, the plaintiff has the burden to prove the existence of personal jurisdiction "by a preponderance of the evidence at an evidentiary hearing or at trial." *Callahan* v. *First Congregational Church of Haverhill*, 441 Mass. 699, 738 (2004). In such circumstances, jurisdictional discovery is appropriate. Guidance on the issue comes from federal jurisprudence. A diligent plaintiff with a colorable claim of jurisdiction may be permitted limited jurisdictional discovery to establish necessary facts. See, *e.g.*, *Negrón-Torres* v. *Verizon Communications, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007); *United States* v. *Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625-626 (1st Cir. 2001).

The standard for allowing jurisdictional discovery is low: one must identify a non-frivolous dispute about facts that may yield a sufficient predicate for *in personam* jurisdiction. *Motus, LLC* v. *CarData Consultants, Inc.*, 23 F.4th 115, 128 (1st Cir. 2022). See *Blair* v. *City of Worcester*, 522 F.3d 105, 111 (1st Cir. 2008). And the request for jurisdictional discovery should

(as it did here) include a description of the information sought and an explanation of why it would be relevant to the court's decision. *Motus, LLC*, 23 F.4th at 128. "[I]f a plaintiff presents factual allegations that suggest, with reasonable particularity, the *possible* existence of the requisite contacts [for the exercise of personal jurisdiction over a defendant], the plaintiff's right to conduct jurisdictional discovery should be sustained" (emphasis in original). *Univ. of Massachusetts* v. *L'Oréal S.A.*, 36 F.4th 1374, 1384 (Fed. Cir. 2022), quoting *Eurofins Pharma US Holdings* v. *BioAlliance Pharma SA*, 623 F.3d 147, 157 (3d Cir. 2010). See *Compagnie Des Bauxites de Guinee* v. *L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983).

In *L'Oréal*, the court reversed the district court's denial of a request for jurisdictional discovery because the evidence introduced raised the possibility that discovery might have uncovered the requisite contacts giving rise to jurisdiction. *L'Oréal*, 36 F.4th at 1385. The court found that the University had made more than "frivolous, bare allegations" that the defendant was subject to personal jurisdiction. *Id*.

Here, in their motions to take such discovery in state and federal courts, Plaintiffs sought specific evidence, namely:

- the continuous flow of FCA's products into Massachusetts;
- details of FCA's marketing activities in Massachusetts;
- its data collected and analyzed in Massachusetts;
- FCA's participation in Massachusetts Lemon Law cases; and
- agreements regarding the subject vehicle.

RAI/99.

C. Under *Ford*, Plaintiffs are entitled to broad jurisdictional discovery.

Doucet's injury arises out of or relates to FCA's transacting business or contracting to supply services or causing tortious injury in Massachusetts — or any combination of those three. See Argument III.A, *supra*. But if not, post-*Ford* surely jurisdictional discovery is warranted to a greater extent where, as here, Plaintiffs have made more than frivolous, bare jurisdictional allegations.

The discovery would reveal: FCA's ongoing and continuing relationship with Massachusetts dealerships; how it advertises and sells its vehicles; FCA's continued activity after assuming Old Chrysler's liabilities; the extent to which Old Chrysler's employees remained with FCA after its acquisition by FCA; the specific information and contracts regarding the

subject vehicle; and the same kind of contacts and conduct present in the *Ford* decision that gave rise to personal jurisdiction in that case.

CONCLUSION

For the foregoing reasons, the Massachusetts Academy of Trial Attorneys and the American Association for Justice urge this Court to reverse the decision below and hold that the Commonwealth has personal jurisdiction over FCA US LLC consistent with federal due process.

Failing that, the Court should vacate the judgment below and remand the case for jurisdictional discovery.

Respectfully submitted,

/s/ Peter J. Ainsworth

Peter J. Ainsworth, Esq.
President
Massachusetts Academy of Trial Attorneys
Meehan, Boyle, Black & Bogdanow, P.C.
100 Cambridge Street
Boston, MA 02114
(617) 523--8300
painsworth@meehanboyle.com
BBO No. 658704

Thomas R. Murphy, Esq.
Chair, Amicus Committee
Massachusetts Academy of Trial Attorneys
Law Offices of Thomas R. Murphy, LLC
133 Washington Street
Salem, MA 01970
(978) 740-5575
trmurphy@trmlaw.net
BBO No. 546759

Kevin J. Powers, Esq.
Vice Chair, Amicus Committee
Massachusetts Academy of Trial Attorneys
Law Offices of Kevin J. Powers
P.O. Box 1212
Mansfield, MA 02048
(508) 216-0268
kpowers@kevinpowerslaw.com
BBO No. 666323

Jeffrey R. White, Esq.
Senior Associate General Counsel
American Association for Justice
777 Sixth St. NW, Suite 200
Washington, DC 20001
(202) 617-5620
Jeffrey.white@justice.org

Robert S. Peck, Esq.
Center for Constitutional Litigation, P.C.
1901 Connecticut Avenue, NW, Suite 1008
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

Kyle A. Camilleri, Esq.
Sweeney Merrigan Law, LLP
268 Summer Street, LL
Boston, MA 02210
(617) 391-9001
kyle@sweeneymerrigan.com
BBO No. 709012

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE

I, Kevin J. Powers, hereby certify that the forgoing brief complies with the rules of court, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 17 (brief of an amicus curiae);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Book Antiqua, at size 14 point, and contains 6,046 words in Microsoft Word 2007.

/s/ Kevin J. Powers

Kevin J. Powers, BBO No. 666323

Date: January 18, 2023

CERTIFICATE OF SERVICE

I certify that on the 18th day of January, 2023, I served the foregoing brief on the parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via e-mail. The attorneys served are:

For Plaintiff/Appellant
Andrew D. Nebenzahl
Aimee Marie Goulding
Carly J LaCrosse
Smith Lee Nebenzahl
One Post Office Square
Sharon, MA 02067
781-784-2000

For Defendant/Appellee
Peter M. Durney
Christopher J. Hurst
Cornell & Gollub
88 Broad Street
6th Floor
Boston, MA 02110
617-482-8100

/s/ Kevin J. Powers
Kevin J. Powers, BBO No. 666323