

AMENDED THIS February 4/19 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A

RULE/LA RÈGLE 26.02 (_____)

THE ORDER OF Justice G. Luston
L'ORDONNANCE DU

DATED / FAIT LE January 30, 2019

REGISTRAR SUPERIOR COURT OF JUSTICE
GREFFIER COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-17-576146-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN :

STEPHEN MARCINKIEWICZ and ROBIN SURCESS

Plaintiffs

- and -

**GENERAL MOTORS OF CANADA COMPANY, GENERAL MOTORS COMPANY,
GENERAL MOTORS LLC, GREG GARDNER MOTORS LTD., ROBERT BOSCH
GMBH, ROBERT BOSCH LLC, and ROBERT BOSCH INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: MAY 30, 2017
~~October _____, 2018~~ #

Issued by "A. FAJARDO"
Local Registrar

Address of court office: Superior Court of Justice
393 University Avenue, 10th Floor
Toronto, ON M5G 1E6

A. DEFINED TERMS

1. In this Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) **“Auxiliary Emissions Control Device”** or **“AECD”** means any element of design in a vehicle that senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of an emissions control system;
- (b) **“Bosch Defendants”** means collectively **Bosch GmbH, Bosch LLC and Bosch Inc.**;
- (c) **“Bosch GmbH”** means Robert Bosch GmbH;
- (d) **“Bosch Inc.”** means Robert Bosch Inc.;
- (e) **“Bosch LLC”** means Robert Bosch LLC;
- (f) **“Bosch Representations”** means the representations and omissions described at paragraphs 50, 56-60;
- (g) **“CEPA”** means the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, as amended;
- (h) **“CFR”** means the Code of Federal Regulations of the United States, as amended;
- (i) **“CJA”** means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
- (j) **“Class”** or **“Class Members”** means all persons in Canada, except for **Excluded Persons** who own, owned, lease or leased one of the **Vehicles**;
- (k) **“Competition Act”** means the *Competition Act*, RSC 1985, c C-34;

- (l) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A;
- (m) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (n) “**Defeat Device**” means an **AECD** that reduces the effectiveness of the emissions control system under conditions that may reasonably be expected to be encountered in normal vehicle operation and use, unless:
 - (i) those conditions are substantially included in the emissions test procedures of the United States or Canadian governments;
 - (ii) it is needed to protect the vehicle against damage or accident; and
 - (iii) its use does not go beyond the requirements of engine starting;
- (o) “**Defendant Class**” means the proposed defendant class of **GM Dealers**;
- (p) “**Defendants**” means collectively **GM Canada, GM Company, GM LLC, Bosch GmbH, Bosch LLC, Bosch Inc., and GGM**, and the **Defendant Class**;
- (q) “**Duramax**” means the diesel engine that is contained in the Sierra and Silverado;
- (r) “**Emissions Standards**” means the regulations on vehicle and engine emissions set out in Title 40, chapter I, subchapter C, part 86, of the **CFR** and made under **CEPA** in the *On-Road Vehicle and Engine Emission Regulations, SOR/2003-2*, as amended;
- (s) “**EPA**” means the United States Environmental Protection Agency;
- (t) “**EP Act**” means the *Environmental Protection Act*, RSO 1990, c E.19, as amended, including ON Reg 361/98;
- (u) “**EPA Certificate**” means a certificate of conformity to US federal standards issued by the **EPA** under Title 40, chapter I, subchapter C, part 86, of the **CFR**;
- (v) “**Equivalent Consumer Protection Statutes**” means the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, the *Fair Trading Act*, RSA 2000, c F-2,

the *Consumer Protection Act*, SS 1996, c C-30.1, the *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, the *Business Practices Act*, CCSM, c B120, the *Consumer Protection Act*, CQLR, c P-40.1, the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, the *Consumer Protection Act*, RSNS 1989, c 92 and the *Business Practices Act*, RSPEI 1988, c B-7, all as amended;

- (w) “**Equivalent Sale of Goods Statutes**” means all legislation enacted in Canadian provinces and territories other than Ontario that creates rights and obligations similar to *SGA*, including but not limited to: *Sale of Goods Act*, RSS 1978, c S-1; *Sale of Goods Act*, RSBC 1996, c 410; *Sale of Goods Act*, RSA 2000, c S-2; *Sale of Goods Act*, RSNS 1989, c 408; *Sale of Goods Act*, RSNB 2016, c 110; *Sale of Goods Act*, RSNL 1990, c S-6; *Sale of Goods Act*, RSPEI 1988, c S-1; *Sale of Goods Act*, RSY 2002, c 198; *Sale of Goods Act*, RSNWT 1988, c S-2; and *The Sale of Goods Act*, CCSM c S10, all as amended;
- (x) “**Excluded Persons**” means:
 - (i) the **Defendants** and their officers and directors; and
 - (ii) the heirs, successors and assigns of the persons described in subparagraph (i);
- (y) “**GGM**” means Greg Gardner Motors Ltd.;
- (z) “**GM Canada**” means General Motors of Canada Company;
- (aa) “**GM Dealers**” means all the authorized motor vehicle dealers of **GM Canada** who sold or leased one of the **Vehicles** to **Plaintiff Class Members**;
- (bb) “**GM Defendants**” means collectively **GM Canada**, **GM Company** and **GM LLC**;
- (cc) “**GM Company**” means General Motors Company;
- (dd) “**GM LLC**” means General Motors LLC;

- (ee) “**GM Representations**” means the representations and omissions described at paragraphs 50-55;
- (ff) “**NO_x**” means nitrogen oxides;
- (gg) “**Plaintiffs**” means Stephen Marcinkiewicz and Robin Surcess;
- (hh) “**Plaintiff Class**” or “**Plaintiff Class Members**” means all persons who owned or own, leased or lease one of the **Vehicles** in Canada except for **Excluded Persons**;
- (ii) “**Representations**” means collectively the **GM Representations** and the **Bosch Representations**;
- (jj) “**SGA**” means the *Sale of Goods Act*, RSO 1990, c S.1;
- (kk) “**Software**” means the collection of **Defeat Devices** contained in the **Vehicles** that was designed, manufactured and installed to reduce the effectiveness of the **Vehicles**’ emissions control systems under ordinary driving conditions;
- (ll) “**Turbo**” means the “Cruze Clean Turbo Diesel” 2.0 litre engine contained in the Cruze; and
- (mm) “**Vehicles**” means the following vehicles: GMC Sierra 2500HD and 3500HD equipped with the Duramax engine model years 2011 – 2016 (“**Sierra**”), Chevrolet Silverado 2500HD and 3500HD equipped with the Duramax engine model years 2011 - 2016 (“**Silverado**”), and Chevrolet Cruze equipped with the Turbo engine model years 2014 - 2015 (“**Cruze**”).

B. RELIEF SOUGHT

2. The Plaintiffs, on their own behalf and on behalf of all Plaintiff Class Members, seek as against the Defendants, or any of them:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as the representative plaintiffs;

- (b) an order certifying this action as a defendant class proceeding and appointing GGM as the representative defendant;
- (c) a declaration that the Vehicles emit NOx at levels exceeding the Emissions Standards and higher than advertised;
- (d) a declaration that the Vehicles contained Defeat Devices;
- (e) a declaration that the GM Defendants and the Bosch Defendants conspired, agreed and/or arranged with each other to engineer, design, develop, research, and manufacture Vehicles that contained Defeat Devices;
- (f) a declaration that the Defendants violated *CEPA*;
- (g) a declaration that the GM Defendants and the Bosch Defendants were negligent in the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles;
- (h) a declaration that the Defendants made certain representations regarding the Vehicles that were false, and that these representations were made negligently;
- (i) a declaration that the GM Defendants and the Defendant Class breached the express and implied warranties in relation to the Vehicles;
- (j) a declaration that the GM Defendants and the Defendant Class engaged in conduct contrary to Part VI of the *Competition Act*;
- (k) a declaration that the GM Defendants and the Defendant Class engaged in unfair practices contrary to Part III of the *Consumer Protection Act* and the equivalent provisions in the Equivalent Consumer Protection Statutes;
- (l) a declaration that it is not in the interests of justice to require notice be given pursuant to section 18(15) of the *Consumer Protection Act* (and pursuant to any parallel provisions of the Equivalent Consumer Protection Statutes) and waiving any such notice requirements;

- (m) an order rescinding the purchases of the Vehicles and any financing, lease or other agreements related to the Vehicles;
- (n) general and statutory damages for negligence, negligent misrepresentation, breach of warranty, conduct that is contrary to the *Consumer Protection Act* and Equivalent Consumer Protection Statutes, and conduct that is contrary to the *Civil Code of Québec*, *CEPA*, and Part VI of the *Competition Act* in an amount to be determined by this Honourable Court;
- (o) restitution for unjust enrichment in an amount equivalent to the purchase price of the Vehicles;
- (p) damages for civil conspiracy in an amount to be determined by this Honourable Court;
- (q) punitive damages and/or aggravated damages in the amount of \$100,000,000;
- (r) a reference to decide any issues not decided at the trial of the common issues;
- (s) investigative costs pursuant to section 40 of *CEPA* and section 36 of the *Competition Act*;
- (t) the full costs of any investigation and of the proceeding or in the alternative on a full or substantial indemnity basis, plus the cost of administration and notice pursuant to section 26(9) of the *CPA*, plus applicable taxes;
- (u) pre-judgment interest compounded and post-judgment interest pursuant to the *CJA*; and
- (v) such further and other relief as this Honourable Court may deem just.

C. NATURE OF THE ACTION

3. The GM Defendants and the Bosch Defendants intentionally or negligently designed and were involved in the manufacturing process of Vehicles that emit illegal levels of pollutants, including NOx emissions, under ordinary driving conditions.

4. The Vehicles distributed by the GM Defendants and the Defendant Class contain certain AECs that constitute a Defeat Device. The Bosch Defendants conspired with the GM Defendants to manufacture, install, test, modify and supply the illegal AECs in the Vehicles.

5. The purpose of including these AECs, which were undisclosed to regulators, was to evade Emissions Standards and other US and Canadian Federal, Provincial and Territorial laws, regulations and policies about emissions standards, and to mislead regulators and consumers about the performance, efficiency and environmental friendliness of the Vehicles.

6. The Defendants promoted the Vehicles' trademarked "Duramax" and "Turbo" diesel engines and/or diesel technology, which they misleadingly marketed as fuel-efficient and powerful, "Clean Diesel", delivering "low emissions" or having "reduced NOx emissions" that were a "whopping reduction" compared to the prior model. They further promoted that these benefits would be combined with a vehicle having "great power." The Defendants further claimed they had accomplished a remarkable reduction of diesel emissions. The Defendants knew that these attributes enhanced the value of the Vehicles in the minds of reasonable persons, consumers and customers. As a result, the Vehicles were sold at significant markups to Plaintiff Class Members.

7. These Representations were untrue.

8. As a result of the Defendants' conduct, the Plaintiffs and Plaintiff Class Members have suffered loss, for which the Defendants are liable.

D. THE PLAINTIFFS AND THE PLAINTIFF CLASS

9. Stephen Marcinkiewicz is an individual residing in St. Thomas, Ontario. He owns a 2015 Chevy Silverado 2500HD Duramax Diesel LTZ, one of the Vehicles.

10. Robin Surcess is an individual residing in North Vancouver, British Columbia, who owns a 2012 GMC Sierra Duramax Diesel, one of the Vehicles.

11. The Plaintiffs seek to represent the Plaintiff Class, which is comprised of all persons in Canada, except for Excluded Persons, who own, owned, lease or leased one of the Vehicles, or such other definition that the court finds favourable.

E. THE DEFENDANTS AND THE DEFENDANT CLASS

GM DEFENDANTS

12. GM Canada is a corporation incorporated under the laws of Canada with its head office in Oshawa, Ontario. GM Canada is, directly or indirectly, a wholly-owned subsidiary of GM Company.

13. At all material times, GM Canada was the sole distributor of the Vehicles in Canada. It sold the Vehicles through the Defendant Class, which were controlled by the GM Defendants and were their agents.

14. GM Company is a Delaware limited company with its head office in Detroit, Michigan. GM Company, either directly or through its subsidiaries, including GM Canada and GM LLC, engaged in the engineering, design, development, research, manufacture, regulatory compliance, marketing, and distribution of the Vehicles.

15. GM LLC is a Delaware limited company with its head office in Detroit, Michigan. GM LLC is, directly or indirectly, a wholly-owned subsidiary of GM Company. GM LLC engaged in the engineering, design, development, research, manufacture, regulatory compliance, marketing, and distribution of the Vehicles.

16. GM Company, GM LLC, and the Bosch Defendants facilitated the emissions testing of the Vehicles in the United States and such testing was submitted and promoted by GM Canada and relied upon by Canadian regulatory authorities, Plaintiff Class Members and the general public.

17. The business of each of GM Canada, GM Company and GM LLC are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, market, sale and/or distribution of Vehicles and for the purposes of the claims described herein.

GM DEALER DEFENDANT CLASS

18. GGM is a British Columbia corporation that owns and operates a GM Dealer in Squamish, BC. It sold one of the Vehicles to Robin Surcess on February 29, 2012, and sold or leased one or more of the Vehicles to other Plaintiff Class Members.

19. The Plaintiffs seek an order appointing GGM as representative defendant of the Defendant Class.

BOSCH DEFENDANTS

20. Bosch GmbH is a company incorporated pursuant to the laws of Germany with its head office in Gerlingen, Germany. Bosch GmbH is the parent company of Bosch LLC and Bosch Inc.

21. Bosch LLC is a Delaware limited company with its head office in Farmington Hills, Michigan. Bosch LLC is a subsidiary of Bosch GmbH.

22. Bosch Inc. is a Canadian corporation with its head office in Mississauga, Ontario. Bosch Inc. is a subsidiary of Bosch GmbH.

23. Bosch GmbH, directly and/or through its North American subsidiaries Bosch LLC and Bosch Inc., at all material times, designed, manufactured, and supplied elements of the AECDS which contained the Defeat Device to the GM Defendants for use in the Vehicles.

24. The business of each of Bosch GmbH, Bosch LLC and Bosch Inc. are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of AECDS and for the purposes of the claims described herein.

F. DIESEL EMISSIONS

25. Over the past several decades, consumer preferences and tightening regulations have created a strong demand in the consumer automotive market for vehicles that offer superior performance and fuel-efficiency, and are better for the environment.

26. Responding to these changing economic and regulatory trends, some automakers, including the GM Defendants, sought to compete by developing automobiles with purportedly “clean” and fuel-efficient diesel engines.

27. Diesel-powered engines differ from gasoline-powered engines in that they use highly compressed hot air to ignite the fuel rather than a spark plug. As a result of a different combustion process, diesel exhaust is materially different from the exhaust produced by gasoline engines.

28. Among other things, the diesel combustion process results in vastly increased levels of NO_x and other pollutants, as compared to the levels in gasoline engine exhaust. NO_x emissions are dangerous air pollutants that are harmful to humans and the environment. The release of NO_x emissions contributes to, among other things, the formation of acid rain and ground level ozone. Exposure to NO_x causes or contributes to, among other health issues, serious forms of respiratory illness, and poses a particular threat to the elderly, children, and people with asthma.

29. Due to the potentially significant impacts to human health and the environment posed by diesel emissions, there are strict Emissions Standards in place that automakers are required to comply with, as further set out herein. In order to comply with these regulatory standards, manufacturers of diesel vehicles employ a number of systems (including engine control software and emissions hardware systems) in order to reduce NO_x emissions.

30. While these emissions control systems are essential to keeping emissions at compliant levels, when operative they can have the corresponding effect of limiting acceleration and torque and reducing fuel efficiency.

G. CANADIAN EMISSION LAWS AND REGULATIONS

31. The purpose of *CEPA* is to contribute to sustainable development through pollution prevention. To further this objective, Canada enacted the Emissions Standards pursuant to section 160 of *CEPA*.

32. The Vehicles and their engines are required to meet the Emissions Standards in order to be sold, used or licensed in Canada. The Emissions Standards are closely aligned with those of the United States to ensure that common, safe environmental outcomes are achieved. To these ends, the Emissions Standards prescribe exhaust and evaporative emission standards for the Vehicles, specifying that the Vehicles must conform to standards prescribed by the US CFR.

33. An important aspect of the harmonization of Canadian and US standards is the recognition of EPA Certificates issued by the EPA. Under *CEPA* and the Emissions Standards, vehicles and engines that are granted an EPA Certificate by the EPA and sold concurrently in Canada and the US do not require further approvals under Canadian law.

34. The EPA granted EPA Certificates in relation to the Vehicles which indicated that the Vehicles complied with emissions legislation in the US, and therefore Canada under the harmonized regime, and enabled GM Canada to sell or lease the Vehicles to Plaintiff Class Members.

35. Canadian and US emissions regulations prohibit equipping a vehicle or engine with a Defeat Device subject to limited exceptions that are not applicable to this proceeding. Additionally, as part of the certification process, automakers are required to disclose and explain any AECDs that can alter how a vehicle emits air pollution.

36. At all material times, the Defendants were required to comply with Canadian law, the Vehicles were required to comply with Canadian law and the Defendants knew or should have known that the Vehicles were required to comply with Canadian law, regulations and policy in respect of Emissions Standards, including those imposed pursuant to *CEPA* and the regulations thereto, and to Provincial and Territorial emissions legislation and regulations. All persons, including the Defendants, are prohibited from assembling, manufacturing, importing and/or selling into Canada vehicles, engines or equipment unless the Emissions Standards are met.

H. GM DEFENDANTS AND BOSCH DEFENDANTS CONSPIRED TO CREATE DEFEAT DEVICE

37. The diesel engine control unit for the Sierra and Silverado is the Electronic Diesel Control Unit 17 (“**Bosch EDC17**”), created by the Bosch Defendants. The Bosch EDC17 enables the GM Defendants to employ Defeat Devices which detects conditions outside of the emissions test cycle through the Software.

38. For the implementation of the Bosch EDC17 system into the Sierra and Silverado, the Bosch Defendants worked with the GM Defendants to create a unique set of specifications and software code to manage the Sierra and Silverado’s engine operation. The Bosch Defendants and the GM Defendants designed and manufactured the Bosch EDC17 Software to secretly evade emissions regulations. The Bosch Defendants and the GM Defendants worked together to develop and implement a specific set of algorithms for the Software for implementation into the Bosch EDC17 within the Sierra and Silverado, which enabled those Vehicles to perform differently and emit less NOx when the Software detected it was undergoing emissions testing.

39. Similarly, the Bosch Defendants provided the fuel injection system, ceramic glow plugs, engine control module, exhaust gas treatment technology and sensors for the Cruze. The Bosch Defendants provided the engine control unit “New Bosch ECU Generation E47B” (“**ECU E47B**”) for the Cruze. The ECU E47B enabled the GM Defendants to employ Defeat Devices which detects conditions outside of the emissions test cycle through the Software.

40. For the implementation of the ECU E47B system into the Cruze, the Bosch Defendants worked with the GM Defendants to create a unique set of specifications and software code to manage the Cruze’s engine operation. The Bosch Defendants and the GM Defendants designed and manufactured the ECU E47B Software to secretly evade emissions regulations. The Bosch Defendants and the GM Defendants worked together to develop and implement a specific set of algorithms for the Software for implementation into the Cruze, which enabled the Cruze to perform differently and emit less NOx when the Software detected it was undergoing emissions testing.

41. The GM Defendants and the Bosch Defendants knowingly, intentionally or negligently incorporated into the Vehicles certain AECs that were, or amounted to, Defeat Devices. The Defeat Device allowed the Vehicles to appear to meet the Emissions Standards during emissions tests, while permitting far higher emissions during the normal operation of the Vehicles.

42. The GM Defendants and the Bosch Defendants knew or should have known that a principal effect of one or more of the AECs was to bypass, defeat, or render inoperative one or more elements of design installed in order to comply with emissions standards.

43. The GM Defendants failed to disclose the existence of at least three AECs that constitute Defeat Devices in the Sierra and Silverado and failed to disclose a number of Defeat Devices in the Cruze to the regulators. The undisclosed AECs, either alone or in combination with each other, reduce the effectiveness of the Vehicles' emissions control systems, resulting in increased levels of NOx emissions.

44. In addition, the GM Defendants sold and distributed the Vehicles when they knew or should have known of the Defeat Devices in the Vehicles. The purpose of including these undisclosed AECs was to evade Emissions Standards and other US, Canadian Federal, Provincial and Territorial laws, regulations, and policies about emissions standards and to mislead regulators and consumers about the performance of the Vehicles.

45. The failure to disclose AECs made it possible to obtain EPA Certificates so that the Vehicles could be sold.

46. In addition to, and separate from, the Defeat Device, the Vehicles generally emit pollutants, including NOx, in amounts that exceed the limits set out in the Emissions Standards during real-world operation in many circumstances.

47. As a result of the acts of the Defendants, each owner or lessee of a Vehicle is or may be in violation of Federal, Provincial and Territorial environmental laws, regulations and policies, including the *CEPA* and its regulations and the *EP Act*.

48. The emissions from the Vehicles during normal driving conditions exceed Canadian and American laws and regulations and allow emissions (including NOx) and pollution at dangerous

levels, which affect the health and safety of Canadians. Among other failures, the GM Defendants and the Bosch Defendants failed to warn the Plaintiff Class Members of the foregoing notwithstanding that they knew or ought to have known that the Vehicles and their emissions systems did not comply with the Emissions Standards and defeated the common, safe environmental outcomes contemplated by Federal, Provincial and Territorial laws and regulations.

49. The fact that the Vehicles do not satisfy the Emissions Standards subjects the Plaintiff Class Members to potential penalties, sanctions and the denial of the right to use the Vehicles.

I. REPRESENTATIONS

50. The Defendants' marketing efforts focused on highlighting the Vehicles' purported fuel efficiency and clean emissions benefits. The GM Defendants trademarked and branded the Sierra and Silverado's engine as "Duramax" and the Cruze's engine as "Cruze Clean Turbo Diesel" or "Ecotec".

51. The GM Defendants and the Defendant Class made, approved or authorized a number of consistent, common and uniform Representations in, among other things, their written warranties, vehicle manuals, television and radio, media releases, internet, social media and print media advertising, website(s), sales brochures, posters, dealership displays and other marketing materials in relation to the Vehicles. The GM Defendants and the Defendant Class represented, among other things, that:

- (a) the Vehicles met or exceeded all relevant Federal, Provincial and Territorial emissions regulations;
- (b) the Vehicles met certain specified fuel economy ratings and that those ratings had been accurately reported to regulators;
- (c) the Vehicles produced a certain specified amount of NOx and those NOx ratings had been accurately reported to regulators;

- (d) the Vehicles were environmentally friendly, environmentally compliant and/or “green”;
- (e) the Vehicles provided a superior driving experience, including by virtue of their fuel economy and emissions; and
- (f) the Vehicles would live up to high performance standards and specifications and a particular level of fuel economy, while emitting a low level of pollutants and emissions.

52. In addition, the GM Defendants and the Defendant Class consistently failed to state any or all of the following facts:

- (a) the Vehicles were not free from defects;
- (b) the Defeat Device in the Vehicles created inaccurate emissions testing results;
- (c) the Defeat Device in the Vehicles was designed to create false emissions testing results; and
- (d) the Defeat Device in the Vehicles did mislead those persons who tested emissions in the Vehicles.

53. In addition to, and separate from, factual omissions regarding the Defeat Device, the GM Defendants and the Defendant Class failed to state any or all of the following facts:

- (a) the Vehicles emitted more pollutants than the testing of the Vehicles indicated;
- (b) the Vehicles emitted more pollutants than the GM Defendants and the Defendant Class had publicly stated; and
- (c) the fuel consumption and fuel economy represented by the GM Defendants and the Defendant Class was not in fact accurate.

54. The GM Representations, which include the omissions, were made by the GM Defendants and the Defendant Class to the Plaintiffs and the Plaintiff Class Members directly or through their agents.

55. The GM Representations were false.

56. Similar to the GM Defendants and the Defendant Class, the Bosch Defendants' marketing efforts focused on highlighting the purported fuel efficiency and clean emissions benefits of the Vehicles' diesel technology.

57. The Bosch Defendants made, approved or authorized a number of consistent, common and uniform representations in television and radio, media releases, internet, social media and print media advertising, website(s), sales brochures, posters and other marketing materials in relation to their diesel technology. The Bosch Defendants represented, among other things, that:

- (a) vehicles equipped with the Bosch Defendants' diesel technology met or exceeded the "strictest emission standards of the future";
- (b) vehicles equipped with the Bosch Defendants' diesel technology had "low fuel consumption" and "[c]lean and even more efficient fuel combustion";
- (c) "[i]n comparison to a typical diesel made in 1990, the particulate output [of vehicles equipped with the Bosch Defendants' diesel technology] today is around 98 percent lower. In the case of nitrogen-oxide, the reduction quota of 96 percent is at a similarly high level";

- (d) vehicles equipped with the Bosch Defendants' diesel technology were environmentally friendly, environmentally compliant, "clean", "conserve our natural resources and thus contribute toward saving the planet"; and
- (e) the Vehicles provided a superior driving experience, including by virtue of their fuel economy, torque and low emissions.

58. For example, when the GM Defendants were introducing the Cruze, the Bosch Defendants publicly announced that "[Bosch's] clean diesel technology is featured on the 2014 Chevrolet Cruze Clean Turbo Diesel" and that the "launch of the 2014 Chevrolet Cruze Clean Turbo Diesel solidifies the growing perception and market demand for clean diesel technology".

59. In addition, the Bosch Defendants failed to state that the components that they supplied in the Vehicles were not free from defects, failed to comply with Emissions Standards, contained one or more Defeat Devices and were not as clean as the Bosch Defendants represented.

60. The Bosch Defendants made these representations and omissions to the Plaintiffs, the Plaintiff Class Members, and the public directly or through their co-conspirators and/or agents including the GM Defendants and the Defendant Class. The Bosch Representations were false.

J. BREACH OF EXPRESS AND IMPLIED WARRANTIES

61. The GM Defendants and Defendant Class expressly or impliedly warranted to the Plaintiffs and the Plaintiff Class Members that the Vehicles would be reasonably fit for the purposes of driving on roads in Canada, that the Vehicles were of merchantable quality, that the Vehicles were free from defects and/or that the Vehicles were of acceptable quality, when in fact the Vehicles were not.

62. Without limiting the generality of the foregoing, GM Canada provided the Plaintiff Class Members with a uniform written warranty that, among other things:

- (a) covered any repair connected to a manufacturer's defect in material or workmanship;
- (b) specifically warranted that the Vehicles' emission control systems were designed, built and equipped to conform with all relevant Federal, Provincial and Territorial regulatory emissions requirements;
- (c) warranted that the Vehicles' emission control systems were free from defects in materials and workmanship that would cause the Vehicles to fail to conform with relevant emissions requirements or otherwise;
- (d) specifically noted that any failure of a warranted regulated emission part could cause a Vehicle to fail to conform with Federal emissions requirements; and
- (e) warranted (to original purchasers and lessees as well as subsequent purchasers) that GM Canada would remedy any "non-conformity" that resulted in a Vehicle failing a Federal, Provincial, or Territorial emissions control test.

63. Despite and contrary to the foregoing warranties and representations, the Vehicles were sold or leased when they were manufactured, designed, tested, assembled, built and equipped not to comply with Federal, Provincial, and Territorial regulatory requirements, and the GM Defendants and the Defendant Class concealed from or failed to disclose that non-compliance to Plaintiff Class Members and regulators.

64. The Vehicles' engine, emissions system, Software and Defeat Device are warranted parts under the warranty. The Vehicles are defective under the terms of the warranty and any similar or related extended warranties.

65. As a result of the installation of the Defeat Device and the high NOx emissions and other pollutants from the Vehicles, they are not reasonably fit, of a merchantable quality or of a reasonably acceptable quality for the purposes of driving on roads in Canada and contain defects.

66. The GM Defendants and the Defendant Class have breached their warranties to the Plaintiffs and Plaintiff Class Members, and as a result the Plaintiffs and Plaintiff Class Members have suffered damages.

67. Furthermore, the Plaintiff Class Members were “buyers” as defined in the *SGA* and Equivalent Sale of Goods Statutes who entered into “contracts of sale” for the Vehicles with the sellers, the Defendant Class, under the *SGA* or as defined in Equivalent Sale of Goods Statutes. The contracts of sale were subject to a “warranty” and/or “warranty of quality” as defined in the *SGA* and Equivalent Sale of Goods Statutes. As particularized herein, and the Defendant Class breached the warranties contrary to section 51 of the *SGA* and similar provisions in Equivalent Sale of Goods Statutes, causing the Plaintiff Class harm. The Plaintiff Class Members are therefore entitled to damages for breach of warranty and breach of warranty as to quality.

K. NEGLIGENCE MISREPRESENTATION

68. The Defendants were in a proximate and special relationship with the Plaintiffs and the Plaintiff Class Members by virtue of, among other things:

- (a) their design and manufacture of the Vehicles and the engines contained in the Vehicles;
- (b) their skill, experience and expertise in the design and manufacturing of automotive diesel engines and vehicles generally;
- (c) the fact that Plaintiff Class Members had no means of knowing or investigating the existence or use of the Defeat Device;
- (d) the Defendants’ complete control of the promotion and marketing of the Vehicles, and the need for Plaintiff Class Members to rely on the Representations in respect of the Vehicles and their attributes; and/or

- (e) the Defendant Class's direct contact with the Plaintiff Class Members at the point of sale or lease.

69. The Defendants owed a duty of care to the Plaintiffs and the Plaintiff Class Members. It was intended by the Defendants and reasonably foreseeable that the Plaintiff Class Members would reasonably rely, to their detriment, upon the Representations when purchasing or leasing the Vehicles and would suffer the damages described below as a result.

70. The Plaintiffs and Plaintiff Class Members reasonably relied on the Representations in deciding whether to purchase or lease the Vehicles. Their reliance can be inferred on a class-wide basis from the purchase or lease of the Vehicles. Had the Representations not been made, the Vehicles would not have been permitted for sale in Canada, the Plaintiff Class Members could not have made the purchase or lease and would not have paid the higher price for the Vehicles as set out above.

71. The Representations were false and were made negligently.

72. The Plaintiffs and the Plaintiff Class Members suffered damages as a result of relying on the Representations. The Defendants are liable to pay damages to the Plaintiff Class Members.

L. NEGLIGENCE

73. The GM Defendants and the Bosch Defendants owed a duty of care to the Plaintiffs and the Plaintiff Class Members to ensure that the Vehicles were engineered, designed, developed, tested and manufactured free of defects, without a Defeat Device, that the Vehicles were in compliance with Emissions Standards, and that the Vehicles were lawfully imported into Canada. Moreover, the Defendants owed the Plaintiff Class Members a duty to warn that the Vehicles incorporated and used a Defeat Device, and, independent of the Defeat Device, that the Vehicles contained defects.

74. The GM Defendants and the Bosch Defendants knew and it was reasonably foreseeable that the Plaintiff Class Members would trust and rely in purchasing or leasing the Vehicles on the

GM Defendants' and the Bosch Defendants' skill and integrity. The GM Defendants and the Bosch Defendants also knew and it was reasonably foreseeable that, if the Vehicles contained defects or were not compliant with the Emissions Standards, the value of the Vehicles would diminish and the Vehicles could be subject to recalls, which would cause the Plaintiff Class Members to suffer damages.

75. The standard of care reasonably expected in the circumstances required the GM Defendants and the Bosch Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of researching, designing, developing, engineering, testing and manufacturing the Vehicles and having them certified, imported, distributed, marketed and sold or leased. The GM Defendants and the Bosch Defendants, through their employees, officers, directors and agents, failed to meet the reasonable standard of care.

76. The negligence of the GM Defendants and the Bosch Defendants proximately caused damage to the Plaintiffs and the other Plaintiff Class Members. Had the GM Defendants complied with the required standard of care, the Vehicles would have been sold without defects and without the Defeat Device or would not have been imported into Canada at all, or, alternatively, they would have been offered and/or acquired at reduced prices that represented their true value.

77. As a result of the GM Defendants' failure to disclose the true specifications of the Vehicles, the Plaintiffs and Plaintiff Class Members suffered damages.

M. UNJUST ENRICHMENT

78. The Defendants caused the Plaintiff Class Members to pay money for an illegal product that they should not have paid for or, in the alternative, for which they should have paid less than they did.

79. As a result of their conduct, the Defendants were enriched by the payment or overpayment.

80. The Plaintiff Class Members suffered a deprivation corresponding to the enrichment of the Defendants.

81. There is no juristic reason for the enrichment of the Defendants, and the Plaintiff Class Members' corresponding deprivation. The Plaintiff Class Members are entitled to restitution and/or a disgorgement of profits as a result of the unjust enrichment of the Defendants.

N. STATUTORY RIGHTS OF ACTION

CEPA

82. The Defendants' conduct violated *CEPA* and Emissions Standards. Had the Defendants not violated *CEPA* and the Emissions Standards, the Plaintiff Class Members either would not have bought the Vehicles or the Vehicles would have been free from defects that caused a diminution of their value. The Plaintiff Class Members have therefore suffered loss or damage as a result of the GM Defendants' contravention of *CEPA* and the Emissions Standards.

83. Pursuant to section 40 of *CEPA*, the Defendants are liable to pay the Plaintiff Class Members an amount equal to their loss or damage arising from the Defendants' contraventions of *CEPA* and the Emissions Standards plus investigative costs.

COMPETITION ACT

84. The Defendants knowingly or recklessly made the Representations to the public for the purpose of promoting, directly or indirectly, the Defendants' business interests. The Representations were false and misleading in a material respect.

85. The Defendants' breach of section 52 of the *Competition Act* caused the loss and damage to the Plaintiffs and the Plaintiff Class Members pleaded in this claim. Pursuant to section 36 of the *Competition Act*, the Defendants are liable to pay the damages and the full cost of any investigation.

**CONSUMER PROTECTION ACT AND EQUIVALENT CONSUMER
PROTECTION STATUTES**

86. The GM Defendants, the Bosch Defendants and a number of Defendant Class members are located in Ontario for the purposes of the *Consumer Protection Act*.

87. The Plaintiff Class Members in Ontario who purchased or leased the Vehicles for personal, family or household purposes are consumers for the purposes of the *Consumer Protection Act*.

88. The Plaintiff Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island and Newfoundland and Labrador, who purchased or leased the Vehicles for personal, family or household purposes and/or not for resale or for the purpose of carrying on business (as those concepts apply in the various Provinces), are consumers located in those provinces for the purposes of the Equivalent Consumer Protection Statutes. The GM Defendants and a number of the Defendant Class members carried on business in those Provinces and were, among other things, suppliers for the purposes of the Equivalent Consumer Protection Statutes.

89. The Representations constituted unfair, unconscionable and/or otherwise prohibited practices under the *Consumer Protection Act* and Equivalent Consumer Protection Statutes:

- (a) the Representations were false, misleading and deceptive;
- (b) the Vehicles do not have the performance characteristics, uses, benefits or qualities as set out in the Representations;
- (c) the Vehicles are not of the particular standard, quality or grade as set out in the Representations;
- (d) the Vehicles did not provide the specific price advantage as set out in the Representations;
- (e) the Representations used exaggeration, innuendo and/or ambiguity as to a material fact and failed to state a material fact in respect of the Vehicles;

- (f) the price for the Vehicles grossly exceeded the price at which similar goods or services were readily available to like consumers;
- (g) the Plaintiff Class Members were unable to receive all expected benefits from the Vehicles;
- (h) the consumer transactions were excessively one-sided in favour of the GM Defendants and the Defendant Class;
- (i) the terms of the consumer transactions were so adverse to the Plaintiff Class Members as to be inequitable; and/or
- (j) because of such further conduct concealed by the GM Defendants and the Defendant Class, and unknown to the Plaintiffs.

90. The Representations were made on or before the Plaintiffs and other Plaintiff Class Members entered into the agreements to purchase the Vehicles.

91. The Plaintiffs and other Plaintiff Class Members are entitled to rescission of the purchase, lease or other related agreements as well as damages pursuant to section 18 of the *Consumer Protection Act* and equivalent provisions of the Equivalent Consumer Protection Statutes.

92. The Plaintiff Class Members are entitled, to the extent necessary, to a waiver of any notice requirements under the *Consumer Protection Act* or of the Equivalent Consumer Protection Statutes, particularly as the Defendants have concealed or did not disclose the actual state of affairs from the Plaintiff Class Members.

O. CIVIL CONSPIRACY

93. By agreeing and conspiring to carry out the overt actions described herein, and acting in furtherance of such actions, each of the GM Defendants and the Bosch Defendants entered into an unlawful and tortious conspiracy to use unlawful means directed at the Plaintiffs and Plaintiff Class Members, knowing fully that their actions would cause injury to the Plaintiffs and Plaintiff Class Members, which injury has in fact resulted to the Plaintiffs and the Plaintiff Class. Each of

the GM Defendants and the Bosch Defendants is liable to the Plaintiffs and Plaintiff Class Members under the tort of civil conspiracy.

P. DAMAGES

94. As a result of the conduct as pleaded above, the Plaintiffs and Plaintiff Class Members have suffered damages corresponding to the reduced value of the Vehicles, increased fuel consumption, and possible repair or replacement of their engine.

95. For those Plaintiff Class Members who purchased Vehicles, new or used, for resale, they have suffered damages corresponding to the reduction in the sale or resale value of the Vehicles. In addition, some or all of the Vehicles are not or may not be saleable in the circumstances outlined above. In order for the Vehicles to be brought in line with Provincial and Federal emissions rules, regulations and laws, the Vehicles' performance standards will have to be lowered and reduced. The Vehicles will suffer a decrease in performance and efficiency and increased wear and tear on their cars' engines. As a result, the value of each of the Vehicles will be irreparably diminished.

96. Each Plaintiff Class Member paid a premium of at least \$10,000 on the Sierra and Silverado and/or a premium of at least \$3,000 on the Cruze, as GM Canada charged more for its diesel cars than a comparable gas car. As a result of the Defendants' unfair and deceptive business practices, and their failure to disclose that under normal operating conditions the Vehicles are not "clean" diesels, Plaintiff Class Members have suffered losses.

97. Each Plaintiff Class Member must expend the time to have their Vehicles repaired, and be without their Vehicles. The Plaintiff Class Members cannot have their Vehicles repaired immediately. The Defeat Device will impact Plaintiff Class Members' ability to get a renewal of their license plate for each of the Vehicles and will need to have a complete replacement of their engines.

98. If GM Canada recalls the Vehicles and degrades their engine performance and fuel efficiency in order to make the Vehicles compliant with EPA standards, Plaintiff Class Members

will be required to spend additional sums on fuel and will not obtain the performance characteristics of their vehicles when purchased.

99. The Plaintiff Class Members' damages were sustained in Ontario and in the rest of Canada.

100. Due to the egregious nature of the Defendants' conduct, including, without limiting the generality of the foregoing, deceiving the marketplace as to the environmental friendliness of the Defendants and their Vehicles, manipulating environmentally-conscious consumers into purchasing Vehicles that emit a higher volume of pollutants than comparable vehicles, manipulating price-conscious consumers into purchasing Vehicles that consume more fuel than comparable vehicles, designing, developing and equipping the Vehicles with defective engines for the illegal purpose of circumventing emissions tests purely for economic gain at the sacrifice of consumers and the environment, the Plaintiffs and the Plaintiff Class are entitled to recover aggravated, punitive and exemplary damages. The Defendants' conduct offends the moral standards of the community and warrants the condemnation of this Court.

Q. WAIVER OF TORT

101. In the alternative to damages, the Plaintiffs claim waiver of tort and thereby an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendants as a result of their unlawful conduct.

102. The Plaintiffs claim that this remedy is appropriate for the following reasons, among others:

- (a) revenue was acquired in such a manner that the Defendants cannot in good conscience retain it;
- (b) the integrity of the marketplace would be undermined if an accounting was not required; and

- (c) absent the Defendants' tortious conduct the Vehicles could not have been marketed nor would the Defendants have received any revenue in Canada for them.

R. RELEVANT STATUTES

103. The Plaintiffs plead and rely upon the following statutes:

- (a) *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (b) *Competition Act*, RSC 1985, c C-34, as amended, and the regulations thereto, sections 36(1) and 52(1);
- (c) *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A, as amended, and the regulations thereto, sections 2, 5, 9(1), 9(2), 14, 15, 16, 17, 18, and 19;
- (d) *Fair Trading Act*, RSA 2000, c F-2, as amended, and the regulations thereto, sections 5, 6, 7, 7.2, 7.3, and 13;
- (e) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, as amended, and the regulations thereto, sections 4, 5, 8, 9, 10, 171, and 172;
- (f) *Business Practices Act*, CCSM c B120, as amended, and the regulations thereto, sections 2, 3, 4, 5, 6, 8, and 23;
- (g) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, and the regulations thereto, sections 7, 8, 9, and 10;
- (h) *Consumer Protection Act*, CQLR c P-40.1, as amended, and the regulations thereto, sections 215, 218, 219, 220, 221, 222, 228, 239, 252, 253, 271, and 272;
- (i) *Consumer Protection Act*, SS 1996, c C-30.1, as amended, and the regulations thereto, sections 5, 6, 7, 8, 14, and 16;

- (j) *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, as amended, and the regulations thereto, sections 2, 4, 6-16, 19-22, 24-33, 36, 37, 39, 91 and 93;
- (k) *Business Practices Act*, RSPEI 1988, c B-7, as amended, and the regulations thereto, sections 1, 2, 3 and 4;
- (l) *Consumer Protection Act*, RSNS 1989, c 92, as amended, and the regulations thereto, section 28;
- (m) *Civil Code of Québec*, CQLR c CCQ-1991, as amended, and the regulations thereto;
- (n) *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, as amended, and the regulations thereto;
- (o) *Environmental Protection Act*, RSO 1990, c E.19, as amended, and the regulations thereto, sections 21, 22, and 23;
- (p) *Climate Change and Emissions Management Act*, SA 2003, c C-16.7, as amended, and the regulations thereto, section 60;
- (q) *Motor Vehicle Act*, RSBC 1996, c 318, as amended, and the regulations thereto, sections 47, 48, 49, and 50;
- (r) *The Climate Change and Emissions Reductions Act*, CCSM, c C135, as amended, and the regulations thereto, sections 13 and 14;
- (s) *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, as amended, and the regulations thereto, sections 51, 52, 53, and 54;
- (t) *Environmental Quality Act*, CQLR c Q-2, as amended, and the regulations thereto, sections 51, 52, and 53;
- (u) *Clean Air Act*, SNB 1997, c C-5.2, as amended, and the regulations thereto, section 46;

- (v) *Environment Act*, SNS 1994-95, c 1, as amended, and the regulations thereto, sections 111 and 112;
- (w) *Environmental Protection Act*, RSPEI 1988, c E-9, as amended, and the regulations thereto, section 25;
- (x) *Environmental Protection Act*, SNL 2002, c E-14.2, as amended, and the regulations thereto, section 22;
- (y) *Environmental Protection Act*, RSNWT (Nu) 1988, c E-7, as amended, and the regulations thereto, section 34;
- (z) *Environment Act*, RSY 2002, c 76, as amended, and the regulations thereto, section 145;
- (aa) *Negligence Act*, RSO 1990, c N.1, as amended and the equivalent Provincial and Territorial legislation;
- (bb) *Sale of Goods Act*, RSO 1990, c S.1;
- (cc) *Sale of Goods Act*, RSS 1978, c S-1;
- (dd) *Sale of Goods Act*, RSBC 1996, c 410;
- (ee) *Sale of Goods Act*, RSA 2000, c S-2;
- (ff) *Sale of Goods Act*, RSNS 1989, c 408;
- (gg) *Sale of Goods Act*, RSNB 2016, c 110;
- (hh) *Sale of Goods Act*, RSNL 1990, c S-6;
- (ii) *Sale of Goods Act*, RSPEI 1988, c S-1;
- (jj) *Sale of Goods Act*, RSY 2002, c 198;
- (kk) *Sale of Goods Act*, RSNWT 1988, c S-2; and

- (ll) The Sale of Goods Act, CCSM c S10.

S. SERVICE

104. This originating process may be served without court order outside Ontario in that the claim is:

- (a) in respect of real or personal property in Ontario (Rule 17.02(a));
- (b) in respect of the interpretation or enforcement of a deed, will, contract or other instrument in respect of real or personal property in Ontario (Rule 17.02(c));
- (c) in respect of a contract where the contract was made in Ontario, the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario, and a breach of contract has been committed in Ontario (Rule 17.02(f));
- (d) in respect of a tort committed in Ontario (Rule 17.02(g));
- (e) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario (Rule 17.02(n)); and
- (f) brought against a person ordinarily resident or carrying on business in Ontario (Rule 17.02 (p)).

Amended January ___, 2019

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STEPHEN MARCINKIEWICZ and ROBIN
SURCESS and
Plaintiffs

GENERAL MOTORS OF
CANADA COMPANY et al
Defendants

Court File No.: CV-17-576146-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

FRESH AS AMENDED STATEMENT OF CLAIM

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