

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

■ MCHENRY

Plaintiff

- and -

**FORD MOTOR COMPANY OF CANADA, LTD. AND  
FORD MOTOR COMPANY**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**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.**

Date: September 21, 2012

Issued by

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**Local Registrar**

Address of court office: 161 Elgin Street  
2<sup>nd</sup> Floor  
Ottawa, ON K2P 2K1

**TO: Ford Motor Company of Canada Ltd.**  
1 The Canadian Road  
P.O.Box 2000  
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L6J 5E4

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**AND TO: Ford Motor Company**  
15031 South Commerce Drive  
Dearborn, MI 48120  
USA

Tel: 313-322-3000  
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## DEFINED TERMS

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

- (a) “**6.0L Engine**” or “**6.0L**” means the 6.0 Litre diesel engine (commonly referred to as the Power Stroke® V8 Turbo diesel engine) that the **Defendants’ Vehicles** are equipped with;
- (b) “**Vehicles**” means any and/or all Ford vehicles equipped with Navistar’s **6.0L Engine** for the model years 2003-2007;
- (c) “**Design Deficiencies**” means the issues with the **6.0L Engine**, specifically including the turbo charger systems, fuel injection systems, head gaskets, EGR valves, and coolers plugging, leading to a loss of engine power, blown head gaskets, warped or disfigured head bolts, oil cooler failure, Engine Gas Recirculation (EGR) cooler failure and coolant entering the engine ventilation system;
- (d) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c C-43, as amended;
- (e) “**Class**” or “**Class Members**” means all people in Canada excluding Quebec who currently own or lease or have previously owned or leased the **Defendants’ Vehicles**;
- (f) “*Class Proceedings Act*” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;

- (g) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, as amended;
- (h) “**Competition Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (i) “**Negligence Act**” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (j) “**Sale of Goods Act**” means the *Sale of Goods Act*, R.S.O. 1990, c S.1, as amended;
- (k) “**Consumer Protection Legislation**” means:
- (i) *Fair Trading Act*, RSA 2000, c F-2, as amended;
  - (ii) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, as amended;
  - (iii) *The Business Practices Act*, CCSM, c B120, as amended;
  - (iv) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, and *Trade Practices Act*, RSNL 1990, c T-7, as amended;
  - (v) *Business Practices Act*, RSPEI 1988, c B-7, as amended; and
  - (vi) *Consumer Protection Act*, SS 1996, c C-30.1, as amended;
- (l) “**Defendants**” means Ford Motor Company and Ford Canada;
- (m) “**Plaintiff**” means ■ McHenry;
- (n) “**Ford**” means the **Defendants**; i.e. Ford Motor Company and Ford Canada; and

- (o) “**Representation**” means the **Defendants’** false, misleading or deceptive representations that the 6.0L Engine had performance characteristics which it did not have and that the 6.0L Engine was of a superior standard and quality, which it was not.

## CLAIM

2. The proposed Representative Plaintiff, ■ McHenry, claims on his own behalf and on behalf of the members of the class of persons as defined in defined in paragraph 4 below (the “Class”) as against Ford Motor Company of Canada, Ltd. and as against Ford Motor Company (collectively the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding against Ford and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that the Defendants committed unfair business practices contrary to sections 14, 15 and 17 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation<sup>1</sup>;
- (c) Damages on an aggregate basis or otherwise for the breach of sections 14, 15, and 17 of the *Consumer Protection Act*;
- (d) A declaration that the Defendants breached section 52 of the *Competition Act*;

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<sup>1</sup> Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss. 4 & 8; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, ss. 7 & 8; *Trade Practices Act*, RSNL 1990, c T-7, ss. 5 & 6; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

- (e) A declaration that the benefits which accrued to the Defendants as a result of their negligence, failure to disclose and unfair business practices unjustly enriched the Defendants and consisted of the taking of inequitable gains by unlawful conduct;
- (f) A declaration that any funds received by the Defendants through the sale of its Vehicles equipped with the defective 6.0L Engine as a result of their negligence, failure to disclose and/or unfair business practices, are held in trust for the benefit of the Plaintiff and Class Members, which sum is presently estimated to be \$1,200,000,000;
- (g) Further, or in the alternative, an accounting and disgorgement of the benefits which accrued to the Defendants as a result of their wrongful conduct;
- (h) Further or alternatively;
  - (i) Damages equivalent to the sums that the Class Members have paid out of their pockets (including future costs of repair) in attempts to identify and to repair/service the Vehicles (including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered);
  - (ii) Damages in the amount of fair replacement value of the defective parts and/or the costs of rectifying the defects;
  - (iii) In the alternative to (ii), damages for diminution in the value of their Vehicles and overpayment for the Vehicles;

- (iv) Damages pursuant to s.36 of the *Competition Act*, to s.18(2) of the *Consumer Protection Act*, and to the parallel provisions of the Consumer Protection Legislation<sup>2</sup>;
- (i) Exemplary, punitive and aggravated damages in the amount of \$10,000,000;
- (j) An order compelling the creation of a plan of distribution pursuant to ss.23, 24, 25 and 26 of the *Class Proceedings Act*;
- (k) A permanent injunction restraining the Defendants from continuing any actions taken by it in contravention of the Consumer Protection Legislation, the *Consumer Protection Act*, and the *Competition Act*;
- (l) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (m) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (n) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s.26 (9) of the *Class Proceedings Act*;

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<sup>2</sup> Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 7(3); *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 171; *The Business Practices Act*, CCSM, c B120, s. 23(2); *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s. 10(2); *Trade Practices Act*, RSNL 1990, c T-7, s. 14(2); *Business Practices Act*, RSPEI 1988, c B-7, s. 4(1); and *Consumer Protection Act*, SS 1996, c C-30.1, ns 16(1).

- (o) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act*;
- (p) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (q) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

## **THE PARTIES**

### **The Representative Plaintiff**

3. The Plaintiff, ■ McHenry, is an individual residing in the City of Mississauga, in the Province of Ontario. In 2002, ■ McHenry purchased a Ford F-350 Super Duty Truck model year 2003.

### **The Class**

4. The Plaintiff seeks to represent the following class of which he is a member (the “Proposed Class”):

All persons resident in Canada who currently own or lease or have previously owned or leased a Ford vehicle equipped with Navistar’s 6.0 Litre diesel engine (commonly referred to as the Power Stroke® V8 Turbo diesel engine) for the model years 2003 through 2007, but excluding all natural persons residing in the Province of Quebec.



## **The Defendants**

5. The Defendant Ford Motor Company (“Ford USA”) is an automotive company based in the United States of America with its principal place of business in Dearborn, Michigan.

6. The Defendant Ford Motor Company of Canada, Ltd. (“Ford Canada”) is a wholly-owned subsidiary of Ford USA and is carrying on business throughout Canada including within the Province of Ontario.

7. Ford markets, manufactures, distributes, sells, leases and services its Ford Vehicles that are equipped with the defective 6.0L Engine throughout Canada, including within the Province of Ontario.

8. The Defendants are residents in Ontario for the purpose of s 2 of the *Consumer Protection Act*.

9. The Defendants (“Ford”) are jointly and severally liable for the acts and omissions of each other.

## **THE NATURE OF THE CLAIM**

10. The Defendants are and, have been at all relevant times, engaged in the business of developing, designing, manufacturing, testing, assembling, inspecting, marketing, distributing, and selling Ford Vehicles and/or vehicle chassis equipped with Ford's 6.0L Engines.

11. This class action concerns the numerous quality, design, manufacturing and reliability defects with the 6.0L Engine present in Ford Vehicles that render them unreasonably dangerous

to consumers by contributing to the risk of accidents, injury and death. The defects include, but are not limited to, loss of engine power, blown head gaskets, warped or disfigured head bolts, oil cooler failure, Engine Gas Recirculation (EGR) cooler failure and coolant entering the engine ventilation system.

12. The Defendants were negligent as they were aware of these defects prior to the 6.0L Engine's launch and, despite this knowledge, introduced an unmerchantable and unsafe vehicle without a "definitive repair action" to resolve these issues.

13. The Defendants engaged in unfair business practices, through false, misleading or deceptive Representations about the 6.0L Engine's performance characteristics and through the false, misleading or deceptive Representations concerning its superior standard and quality. In addition, they failed to disclose the material facts which comprise the Representation and failed to disclose the Design Deficiencies.

14. The Representations were made for the purposes of promoting, directly or indirectly, the purchase of a product or for the purpose of promoting, directly or indirectly, business interests of the Defendants. The Representations were made knowingly or recklessly. The Representations were made to the public. The Representations were false or misleading in a material respect, namely as to the performance characteristics and standard and quality of the Defendants' vehicles.

15. The Class Members suffered loss or damage as a result of the Defendants' conduct.

16. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendants' Vehicles in reliance upon the Representation.

**THE DESIGN AND MANUFACTURING DEFICIENCIES AND PRIOR KNOWLEDGE THEREOF**

17. Ford Vehicles are equipped with 6.0L Engines that are supplied by the automotive parts company, Navistar Inc., pursuant to a contractual agreement commonly known as the "Next Generation Diesel Engine Supply Agreement Job #1, 2003 model Year Through Job Last 2012 Model Year" ("the Agreement").

18. While Ford's Super Duty truck with the 6.0L Engine provided Ford the "best [gross profit] margin of any vehicle" that Ford sold during the 6.0L Engine's sales history, as early as 2002, numerous serious issues were identified with the 6.0L Engine, specifically including turbo charger systems, fuel injection systems, head gaskets, EGR valves, and coolers plugging. These problems rendered the Vehicles themselves unmerchantable and unsuitable for use. The defects include, but are not limited to, loss of engine power, blown head gaskets, warped or disfigured head bolts, oil cooler failure, engine gas recirculation (EGR) cooler failure and coolant entering the engine ventilation system.

19. Ford documents reflect that (1) Ford knew about issues regarding the 6.0L Engine even before the engine's launch, (2) the same core concerns persisted throughout Ford's production and sale of the 6.0L Engine, (3) Ford never had a "definitive repair action" for these issues, (4) most, if not all, of these concerns had a "common cause", and (4) Ford ultimately adopted a

band-aid approach to reduce its “warranty spend”, without addressing the “common causes” of these problems.

**A. Ford Identified Critical Defects Prior to Selling Vehicles Equipped with the 6.0L Engine, Failed to Resolve the Defects, and Sold the Vehicles with Known Defects**

20. Ford knew about the 6.0L Engine's critical defects in the months leading up to the engine's launch and delayed the launch in an effort to understand and correct the engine's multiple design flaws. Ultimately unwilling to further postpone the launch, Ford decided to launch the engine despite the fact that the engine contained known defects that Ford did not know how to repair and thus, was unable to instruct its dealers how to repair.

21. For a significant period of time, Ford scheduled August 1, 2002, as the date of first production (“Job #1”) of vehicles with the newly designed 6.0L Engine. However, Navistar's plan was to get the base engine reliability up to only 84% by the time of Job #1. Throughout 2002, it was clear that the engine had serious problems.

22. On May 15, 2002, Charlie Freese, Ford's Chief Engineer of Diesel Engines, wrote: “We face multiple high risk items, which will influence a decision to delay J[ob] #1”. Freese mentioned open issues that were “of particularly great concern”, including ICP failures, piston failures, and injector failures. The issue was considered so serious that Ford considered extending its production of the predecessor 7.3-liter engine due to concern that the 6.0L Engine would not be ready for production.

23. On May 29, 2002, Freese emailed a large team of Ford and Navistar personnel regarding protecting the planned timing of Job #1. The launch team had given up the plan for an August 1,

2002 launch and assessed the risk as “manageable” for a November 4, 2002 launch. Freese's email noted that the team “must still address a significant number of details” and also noted that “[s]everal recent failures surfaced new concerns, which also require immediate attention.” The email informed the team that only four days remained to close out nine separate “key open issues” in order to meet the June 3, 2002 delayed engine build kick-off. Some of the nine key open issues listed were: No. 2, “Injector Failures Persist”; No. 4, dealing with the design of the ICP sensor which still needed durability validated; No. 5, dealing with testing of head gaskets; No. 7, dealing with a new turbocharger which Ford and Navistar had not even begun to analyze; No. 8, a new rough engine idle problem; and No. 9, a failure of the IDM (injector driver module) during cold operation experienced by multiple vehicles, with no root cause identified.

24. Ford held a New Model Launch Meeting on July 30, 2002. At that meeting, Job #1 was still slated for the Kentucky Plant on November 4, 2002. The 6.0L Engine was still considered to have “Major Issues” that Ford did not understand. The problem of injector plunger scoring (which causes fuel leakage, incomplete combustion and excess soot) was still listed as “Root cause undetermined.” Intermittent engine stall was likewise characterized as a “Major Issue.” There was discussion that some problems would have to be resolved after Job #1, on March 3, 2003, when the vehicles were already being produced and sold.

25. In reviewing the readiness of suppliers, 21 suppliers of 29 parts were selected as High Impact. Fifteen suppliers with 23 parts were rated green, but 4 suppliers with 4 parts were rated red, and Ford knew that 2 suppliers with 2 parts had no chance of being ready and were “moved to post Job #1 running changes” meaning that these updates would not be included in the first engines sold. Significantly, Navistar was specifically singled out and rated “High Risk” due to

lack of durability testing and late design changes. The recommendation was to “Proceed with International [i.e., Navistar] deep-dive review to confirm root cause and containment of critical issues.”

26. Pursuant to Charlie Freese's email, as of August 23, 2002, Ford was still addressing injector defects causing idle problems, cold start problems, engine stall problems, and injector failures. Navistar began a new process for injectors and planned to ship the first three engines with these new process injectors to Ford on August 28-30, with additional injectors supplied the week of September 2. Ford's durability tests for these engines were scheduled for completion the week of October 9, 2002, less than a month before Job #1.

27. Finally, Ford decided it could not continue delaying the launch, and instead began producing and selling a vehicle with a known defective engine. On November 12, 2002, Steven Henderson wrote:

As you noted, we're in the middle of 6.OL launch, and as you may have heard, things are not going well. J1 [Job #1] for the 6.OL was delayed a full week for International to work on these issues, but they are not fully resolved yet. The entire International team is either down at the plant or working full time on this issue.

**B. The 6.OL Engine's Defects Caused the Same Primary Components to Malfunction: Injectors, EGR Valves, EGR Coolers, Turbochargers, Oil Coolers, and Rear Seals**

28. Ford's inability to resolve the multiple major defects in the engine pre-launch had the expected result. That is, with defective engines being put in vehicles despite the inability to repair the defects, an unprecedented number of malfunctions began to occur. Moreover, the consistency with which the same components on the 6.OL failed was striking. John Koszewnik,

Ford's Director, North American Diesel, identified the primary components that were having problems in 2003 as the "injectors, turbo chargers, EGR valves, [and] EGR coolers."

29. Bob Fascetti, Mr. Koszewnik's successor, similarly explained that the "early '03, '04 issues with the 6.0L were the turbo charger systems, fuel injection systems, head gaskets, EGR valves, coolers plugging." Despite the fact that –according to Mr. Fascetti– "Ford assigned 70 engineers to assist Navistar on a full-time basis in identifying and resolving problems with the 6.0-liter engine," in January 2007, after the 6.0L was no longer in widespread production, a joint Ford-Navistar meeting involving the 6.0L Engine included an "update" on the same issues that had plagued the engine since its introduction: "Injector Induction Heat, Turbo, EGR Valve, Rear Seal, and EGR Coolers. Ford's Quarterback Department Manager, Colin Horbal, present at the meeting, admitted that Ford was still having "quality issues" with these items. Similarly, in July 2007 a Ford Product Development Quality Review ("PDQR") meeting discussed "diesel warranty spend" and noted that: "Causal parts were the usual suspects: Cylinder Head/Head Gaskets, Engine Assembly, EGR Cooler, EGR Valve."

30. A Ford engineer acknowledged that the problems with the 6.0L Engine –at least the "usual suspects": injectors, turbo charger, EGR components, fuel system components, and engine components– had the same root causes. In January 2006 (the last year of mass production of the 6.0L and after more than 75% of the 6.0L Engines had been placed in service), Mark Freeland, a Ford engineer under the direction of John Koszewnik, Director, North American Diesel, conducted an analysis of 6.0L warranty claims to determine the root causes of the problems that continued to plague the engine. He made the following observations:

- “It is likely that these symptoms are all the result of the same root causes.”
- “Further I would hypothesize . . . that the same root cause or causes are responsible for the majority of all claims.”
- “There had been many changes made to ‘fix the Injector’ warranty issue, but none seem to be effective at reducing the base level of the warranty [spend].”
- “The probability of multiple injectors failing simultaneously on the same engine is quite remote, unless the failure is the result of another system issue.”
- “THE LIST GOES ON, MANY OTHER SEEMING UNRELATED FAILURES ARE CAUSED BY THE INJECTOR SEALING ISSUES.”

Based on his testing, observations and analysis, Mr. Freeland concluded the following:

**CONCLUSIONS:**

A very large portion, if not most of, the common cause of the Injector, Turbo Charger, EGR Components, Fuel System Components and Engine Components warranty [repairs/spend] is being caused by leaks between the Fuel Rail, the combustion chamber and the coolant jacket.

31. Ford likewise recognized some of these defects in Technical Service Bulletins (“TSB”) and Special Service Messages (“SSM”) issued pertinent to the 6.0L Engines. TSBs are documents Ford issues to its dealers to aid them in locating and repairing certain problems or defects. TSBs describe the symptoms of the problem or defect and either detail a method of diagnosing, mitigating or repairing it, or refer the technician to another Ford document that describes a repair procedure. Ford issued numerous TSBs related to the Root Cause Components of the 6.0L diesel engine system. Ford’s TSBs demonstrate the ongoing problems with Ford’s 6.0L Engine, the fact that Ford was aware of the problems with these engines, and Ford’s failure to adequately address the issues by failing to properly repair or replace these defective engines.

**C. Ford Admitted to Having No Definitive Repair Action**



32. Ford's inability to repair the 6.0L Engine and its core problems is exemplified by a September 7, 2004 memo from Frank Ligon, Ford's Director of Service Engineering Operations, addressing 6.0L "Buy-Backs":

This is very confidential!!!

... Bottom line is we are not "out of the woods" on this 6.0 .... At this point we do not have a definitive repair action or production parts to properly address the concern universe. The best course of action is to have the dealer contact the hotline. I strongly urge that this information NOT be shared at this time until the "official" action is announced.

33. Ford's CBG Manager for 2005-2007, Michael Berardi, admitted that –in the context of Ligon's September 2004 admission that Ford lacked a "definitive repair action or production parts to properly address the concern universe"– the same situation continued in 2005 and 2006.

34. As evidence of that, in June 2006 –after the 6.0L had been in production for over four years (and only six months before the end of widespread production)– Ford engineer Mike Frommann emailed regarding one of the "usual suspects," the head gasket:

We unfortunately exceeded our own cylinder pressure specs in normally performing engines. We don't want to have our cylinder pressure specs published or documented by having them subpoenaed or we might face a class action. When we have a defect, we have to honor our warranty.... I recommend we all delete these emails.

35. Regarding the head gasket, John Koszewnik wrote, on July 8, 2005, that the head gasket was failing due to factors including: (1) a less than robust engine design; (2) poor manufacturing, with a "waviness" in the cylinder head deck that prevented it from sealing properly; and (3) cooling systems that did not sufficiently cool the engine.

36. On July 22, 2005, Chris Bolen, Ford's Director of North America Powertrain Manufacturing, wrote, "in my 32 years at Ford I have not experienced such [negative] feedback regarding one of our products. It's clear that we still have a lot of work to do to improve Diesel quality levels, and that our current warranty performance is having disastrous effects on this customer and segment." Bob Fascetti, Director of V-Engine and Diesel Engineering for Ford, explained in 2008 that the core problems with the 6.0L "only got fixed to a certain point." Specifically, Mr. Fascetti stated that as to head gasket leaks, it "only got fixed to a certain point" and had "not been solved." As to the EGR valve, it was fixed only "to a degree" and Ford "still fail[s] EGR systems." Similarly, when asked if the EGR cooler was "fixed or not fixed," Mr. Fascetti responded "no" and testified that "neither the [Navistar] engineers nor the Ford engineers made it go to zero."

37. As late as June 22, 2007 –six months after Ford stopped mass production of the 6.0L– Ford's Vice President for Powertrain Product Development, Barb Samardzich, referred to the "continued poor performance of the 6.0L (i.e., worse than our WFA assumptions)." IQ Colin Horbal, Manager of the North American Diesel Quarterback Department, reported to Ms. Samardzich at the July 2007 PDQR that the "warranty spend" on the 6.0L was \$11 million greater than anticipated for the most recent four-month tracking period, despite the fact that "no new failure modes had been identified through claims analysis." Rather, Mr. Horbal reported that the "increased spend is driven by more claims, not an increase in cost per claim."

#### **D. Ford Sued Navistar Concerning the Defect**

38. Ultimately, Ford sued Navistar in Michigan state court in March 2007, seeking \$493 million in damages for warranty costs, including a portion of some \$84 million spent buying

back vehicles specifically attributable to 6.0L Engine issues. It was in that context that Bob Fascetti, Ford's Director of Diesel Engineering, attested to the following:

“Ford has experienced unprecedented repair rates with the 6.0L engines. The 6.0L has had the largest R/1000 (repairs per thousand) rate ever experienced by Ford for an engine in widespread production. In fact, the 6.0L, which represents only 10% of Ford's total engine volume, accounts for approximately 80% of all of Ford's warranty spending on engines. Additionally, warranty spending on the 6.0L accounts for approximately 25% of Ford's overall warranty spending.”

39. Ford's documents, testimony and judicial admissions make it clear that the problems with the 6.0L Engine were the result of defects in the engine design. Yet, in the words of Bob Fascetti, as the Navistar “engine was falling apart,” Navistar contended that “most of the failures weren't their problem.”

40. Ford's customers were caught in the crossfire between Ford and Navistar. For example, John Koszewnik, Ford's Director, North American Diesel, in February 2006 –the last year of mass production of the 6.0L– complained that he “considered an EGR valve upgrade to be a ‘no brainer’”, but the Ford Program Team “would always fall back on the argument that they didn't pay originally for a deficient design, therefore, they weren't going to pay for an upgrade. Of course, Navistar's position was simple: “no added pricing, no added content.” Koszewnik could not get Ford Motor Company to approve an upgraded EGR valve for the 6.0L, “because there was no agreement with [Navistar] on pricing and content.”

41. Similarly, Ford found problems in 86% of the 6.0L's injectors and 95% of its turbochargers returned under warranty when tested under “real world” conditions, refuting Navistar's claim that there were no problems in these same parts.

42. The pleadings in Navistar demonstrate that the problems that Ford's customers have experienced with the 6.0L Engines are due to a defectively designed and manufactured engine.

**E. Ford Failed to Disclose the 6.0L Engine's Defects While Touting the Engine's Supposedly Superior Attributes**

43. As the foregoing allegations demonstrate, Ford knew from the outset that there were severe and pervasive design, manufacturing, and quality issues plaguing the Ford 6.0L Engines. Yet, despite this knowledge, Ford never disclosed any of these issues to consumers.

44. To the contrary, at the same time that Ford and Navistar were battling over the quality issues and defects plaguing the Ford 6.0L Engines, Ford was making precisely the opposite representations to consumers as to the quality of the engine and the vehicles it powered. For example, in its sales brochure for the 2005 Ford F-250 truck, Ford touted to consumers that:

- (a) The 2005 Ford F-250 and Ford F-350 trucks had the "Best Power," explicitly referencing the "6.0L 32 Valve Power Stroke® V8 Turbo Diesel;"
- (b) The Ford F-250 and F-350 were equipped with a "Best in Class" "Longest-Lasting Diesel Engine;"
- (c) "Longest-Lasting Diesel: Cast-Iron Block Head-This proven architecture withstands the higher combustion pressure of peak diesel operation. The stiff bedplate provides rigidity. Electro-Hydraulic Direct Injection (EDHI), 4-valve induction, and electronic engine control promote efficient combustion for optimized horsepower and torque. All-together the 6.0L Power Stroke® is the longest-lasting diesel in its class;" and
- (d) "Power Stroke V8 Turbo Diesel-F-Series Super Duty outpulls the competition from a dead stop, in a 0-60 mph tow off. It's done through careful powertrain management from engine to gearing to wheels and tire. The result is more-capable trucks."

45. The sales brochure is but one of the many advertisements and representations that Ford disseminated about the Ford F-Super Duty truck series that were equipped with the 6.0L

Engines. Despite knowing that the engines were plagued with what Ford internally described as “unprecedented problems,” Ford orchestrated and implemented a widespread advertising and marketing campaign to convince consumers that the precise opposite was true; namely, that the engines and vehicles were of superior quality, design, manufacture, and reliability. In this regard, Mark Fields, Ford’s then President of the Americas, publicly proclaimed that the Navistar 6.0L Power Stroke diesel engine –the very same engine whose design and quality issues led Ford to sue Navistar– was a “great engine.” Despite its knowledge of the 6.0L Engine's many flaws and quality concerns, Ford trained its dealers throughout the country to specifically tout the supposedly superior attributes of the engine, without ever mentioning its troubled history of design, manufacturing, and reliability defects.

**F. Ford Opted to Reduce Warranty Spend Instead of Fixing the Defect and Complying with its Warranty Obligations**

46. While Ford was pursuing its \$493 million lawsuit against Navistar, Ford shifted its efforts from trying to repair issues with the 6.0L –which was near the end of its production life– to simply reducing Ford’s warranty spend.

47. Ford’s Vehicles containing the 6.0L Engines were sold with Ford’s Limited Warranty, whereby Ford warrants that authorized dealers will repair, replace, or adjust all defective vehicle parts until a vehicle attains 60,000 kilometres or 3 years in service, whichever comes first, and all defective powertrain components, including the engine, up to 100,000 kilometres or 5 years in service, whichever comes first. The warranty provides that “[d]uring this coverage period, authorized Ford Motor Company dealers will repair, replace, or adjust all parts on your vehicle that are defective in factory-supplied materials or workmanship.”

48. In 2006, for example, among Ford's "6.OL Top Parts Warranty Actions" were new procedures adopted to address "turbo coking" and "EGR coking," issues that had plagued the engine since its inception. Rather than replace the coked turbo charger or EGR valve, Ford commenced a program in mid-2006 of simply "cleaning" the parts in question, thus saving Ford a projected \$9 million and \$2.5 million in warranty spend, respectively, on those two items. Mr. Horbal, Ford's Quarterback Department Manager, later admitted that "simply cleaning the coking off the turbo" would "not address the root cause of what created the coking to begin with," and that, if only cleaning was done, Ford would save millions in projected warranty spending on that item, by simply postponing the problem for the customer. Similarly, in the previously-referenced email from Mr. Horbal to Barb Samardzich in July 2007, Mr. Horbal characterized his "assignments" from a prior PDQR as "Continue to Look for More Service Cost Reductions" with respect to the 6.OL Engine.

49. Although Ford may contend that changes in the 6.OL Engine improved performance in later versions, it told a dramatically different story when deposed by Navistar, stating that repair rates were high for the 2003, 2004, and 2005 engines and, though improved for the 2006 and 2007 engines, they "continued to be high," despite Ford's admitted initiatives to "reduce warranty spend" (as opposed to fixing the root causes). Ford's inability to repair the 6.OL and its core problems, as well as Ford's desire to sit on the problem rather than adequately address it, is pointedly exemplified by the September 7, 2004 Frank Ligon memo warning that Ford had no definitive repair action, but that Ford must not share that information until an "official action" was announced.

50. It seems that no “official action” was ever announced; however, as Michael Berardi admitted that the same absence of a “definitive repair action or production parts to properly address the concern universe” continued in 2005 and 2006 (Berardi could not remember whether it continued in 2007).

51. In January 2006 (after more than 75% of the 6.0L Engines had been placed in service), Ford engineer Mark Freeland analyzed 6.0L Warranty Claims and likewise observed that it is likely that the symptoms were the result of the same root causes, and that the same root causes were responsible for the majority of all claims. Mr. Freeland concluded the symptoms were being caused by leaks between the fuel rail, the combustion chamber and the coolant jacket.

52. The leaks identified by Mr. Freeland led to poor or incomplete combustion, a systematic problem with this engine that led to components being clogged with soot from coking. Ford’s practice of cleaning or replacing a component clogged with soot did not address the root problem of excess soot production, but instead just prolonged the time until that component or another component failed due to excessive soot. The problem of improper combustion is caused by the defective design of the engine and not by improper maintenance or owner misuse.

53. Six months after Mr. Freeland's report, another Ford engineer, Mike Frommann, admitted that the 6.0L head gasket problems resulted from “exceed[ing] our own cylinder pressure specs in normally performing engines,” warned against having Ford's cylinder pressure specs “published or documented” or “subpoenaed” because Ford might face a “class action,” and “recommend[ed] we all delete these emails.”

54. Acknowledging its inability to repair the defects in the 6.0L Engines, Ford considered various pilot initiatives in an attempt to address the problem. Michael Berardi entailed Francisco “Cisco” Codina, Frank Ligon, and Bill Osborn and explained, “[p]er your request to reduce 6.0L RAVs [reacquired vehicles] (based on expanding the current “Stalls/Quit” Pilot initiative), we have developed three specific scenarios...” “We do need to keep in mind that these initiatives will not eliminate the RAVs, as customers will continue to come into the dealership multiple times until we can honestly eliminate all the concerns with the 6.0L.”

55. However, Ford rejected the “Stalls/Quits” Pilot plan to have Ford technicians assist dealerships with repairing defects, as well as the expanded “Stalls/Quits” Pilot Proposals #1 and #2. Berardi's email regarding these rejected initiatives states: “Please keep in mind that the biggest concern will be finding the proper resources to implement” the program. Berardi later testified that the “resources” at issue were people, and that Ford rejected the proposals.

56. Not only did Ford reject these pilot initiatives, but when suggestions were made that Ford authorize full and complete repairs of defective engines brought into Ford dealerships for repair, Ford rejected those suggestions as too expensive. Mr. Berardi emailed Bill Osborn on October 8, 2004:

You had also mentioned throwing the “Kitchen Sink” at the vehicle during the first repair attempt to help eliminate the need to come back a second time. That particular philosophy is opposite of what we have been training our dealers to do and could lead to a very expensive warranty bill across vehicle lines.



Regarding training its dealers to do the opposite, Berardi later admitted that Ford trained its dealers to only “repair whatever component has failed as long as it wasn’t customer abuse or lack of maintenance.”

57. Ford’s inability to ever develop an effective repair for the defective 6.0L Engine was further confirmed by its development of the 6.4L Diesel Engine –that is, Ford solved the defects in the 6.0L by developing a wholly new engine. In July 2006, Ford engineers explained that “the processes used to develop and launch the 6.4L Power Stroke were significantly improved over the 6.0L in all areas,” and identified “Specific Design Improvements” for the 6.4L in the “usual suspects”: turbo charger, fuel injectors, EGR system, and sealing.

58. Ford’s warranty repair program includes numerous checks to ensure that problems caused by improper maintenance, owner misuse, accidents, etc. are excluded. Ford’s team leader for Warranty Controls and Warranty Communications attested that:

Ford implements various internal controls to ensure that warranty claims are justified, properly supported, and in accordance with Ford’s warranty policies and procedures. Ford applies these internal controls to all warranty claims submitted by its dealers, including claims involving 6.0L engine repairs.

59. For example, Ford’s Automated Claims Editing System Version II (“Aces II”) User Manual, November 2007, includes among the “Service Advisor Responsibilities:” “Make a preliminary evaluation whether work will be covered under warranty,” and Ford’s Warranty and Policy Manual, November 2005, expressly provides that “all returned warranty parts are inspected” and “[c]laims may be charged back” for specific reasons, including when a “part [is] damaged” “due to improper use or lack of maintenance.”

60. Through these systems, Ford has detailed information regarding each time a vehicle is brought into a Ford dealership for repair, including, but not limited to, the symptoms that required the unit be brought in for service, the diagnosis of the problem, the repair authorized by Ford, and the work performed on the vehicle.

61. Accordingly, Ford accumulated a massive database through which it realized that the minor repairs it was authorizing were inadequate to properly repair these defective engines, and that major repairs including engine replacement were necessary to address these defects. Despite Ford's experience and knowledge of the defects, Ford continued its practice of only authorizing minor ineffective repairs of these engine defects.

62. Ford admitted that there were specific common design defects causing the parts to fail. "For many of the engine parts, Ford, Navistar, and/or Navistar's suppliers have identified specific design ... issues ... that have caused the parts to fail."

63. Year after year, the same issues plagued the engine. Indeed, the consistency with which the same components on the 6.OL failed is undeniable. Ford's two Directors of its diesel product line, John Koszewnik and Bob Fascetti, identified the primary components that were having problems in early 2003 through 2004, as the injectors and fuel injection system, head gasket, turbo chargers, EGR valves, and EGR coolers. David Enerson, Ford's Product Design Engineer for Diesel Quality, produced matrices of "6.OL top issues & actions" on November 21, 2005, demonstrating that regardless of the changes made by Ford from the first version of the engine through the life of the engine, several top issues remained, including issues with the injectors, EGR valve, EGR cooler, turbocharger, oil cooler, and rear seal. The consistency in the list of top

issues demonstrates Ford failed to adequately determine and remedy the common defects in these engine components.

64. Ford's internal investigation into the high cost of warranty repairs on the 6.0L Engine, conducted by Mark Freeland, under the direction of John Koszewnik (Ford's then Director of North American Diesel), concluded that Customer Concern Codes ("CCCs") for engines that were difficult or slow to start, would not start, or stalled, were likely symptoms that "are all the result of the same root causes." Freeland hypothesized, since the findings regarding these CCCs were "very similar to the overall shape of all CCCs combined, that the same root cause or causes are responsible for the majority of all claims."

65. The 6.0L Engine continuously suffered the same problems and Ford never changed its "solution" of reducing its warranty spend. That is, through its own internal investigation and its lawsuit with Navistar, Ford knew that the engine was defective, that the defect manifested itself in definitive ways during the engine's use, and that Ford's recommended repairs were only "band-aids" designed not to address the root cause defects in the engine, but merely to postpone recurrence of the malfunctions until the warranty expired and the customer –not Ford– would pay for repairs. Rather than repairing the engine to eliminate damage to the Root-Cause-Damaged Components, Ford simply "kicked the can down the road," and cleaned or replaced the damaged components, knowing full well that the defects in the engine would lead to the failure of the cleaned or new components.

66. Ford unfairly benefitted by this practice because Ford knew that after the warranty expired, the vehicle owner, rather than Ford, would have to pay for all future repairs. Because engine replacements cost more than ten times the cost of these lesser repairs, Ford profited

enormously at the expense of its customers by failing to authorize necessary major engine repairs or engine replacements during the warranty period, instead only authorizing cheaper services (like injector replacements) that were not adequate repairs, and would merely serve as a temporary measure until the warranty expired.

67. Because Ford never redesigned the 6.0L Engine and never satisfactorily addressed the root causes of the persistent and systemic engine malfunctions being experienced at unprecedented rates by vehicle owners and, indeed, had no plan or idea how to fix the defectively designed root-cause components, it could never provide adequate warranty service for the engine. Ford's "warranty repair," instead, amounted to nothing more than offering consumers (without telling them as much) a band-aid fix to cover-up a symptom of the malfunctioning vehicle rather than an adequate and proper repair of the actual problem plaguing the vehicles. This band-aid fix did not remedy the defects in the 6.0L Engines, as Ford was required to do under the terms of the warranty, but merely served to postpone the problem, virtually ensuring that aggrieved owners would continue to experience engine problems from the unremedied defective root cause engine components in the near future and, often times, delaying these repeat problems so that they conveniently (to Ford) would reoccur shortly after the warranty period expired. By failing to adequately repair the defective engines, Ford never lived up to its warranty obligations.

#### **THE REPRESENTATIVE PLAINTIFF**

68. On or about August, 2002, the Plaintiff purchased a new 2003 Model Year Ford 6.0L F-350 Super Duty Truck from Thorncrest Ford in Etobicoke, Ontario for a purchase price of

approximately \$45,000 plus taxes. This vehicle contained the defective 6.0L Engine for which repairs were required as detailed below.

69. Within a short period of time, the truck began to suffer from mechanical problems with the turbocharger. The turbocharger exploded in approximately February 2005 and then two more times, all three of which were covered by the warranty.

70. In April 2006, the turbocharger exploded again, but this time it was no longer covered by Ford's warranty. The Plaintiff was forced to have his truck fixed at Access Ford Corpus Christi at 3680 U.S. 77, in Corpus Christi, Texas, 78410 for approximately \$7,500 in repair costs.

71. On October 31<sup>st</sup>, 2011, the turbocharger blew up for a fifth time and again, it was not covered by Ford's warranty. The Plaintiff was forced to have his truck fixed at Thorncrest Sherway Ford at 1575 The Queensway, in Etobicoke, Ontario, M8Z 1T9 for approximately \$5,638.50 in repairs costs.

72. Cumulatively, the Plaintiff has paid a total of approximately \$13,138.50 in repairs related to the turbocharger.

73. In January 2012, the truck began to suffer with problems related to the fuel injectors. Specifically, the fuel injector exploded on January 26<sup>th</sup>, 2012. As the warranty was expired, the Plaintiff was forced to have his truck fixed at L & H Motors Ltd. at 2 McMurray Street, in Parry Sound, Ontario, P2A 1E7 for approximately \$895.80 in repair costs.

74. In August 2012 the truck experienced problems with the fuel injectors again. This time the Plaintiff was forced to have his truck fixed at Cambrian Ford at 1615 Kingsway, in Greater Sudbury, Ontario, P3B 4J8 for approximately \$2,000 in repair costs.

75. Cumulatively, the Plaintiff has paid a total of approximately \$2,895.80 in repairs related to the fuel injectors.

76. In sum, due to problems relating to both the turbocharger and the fuel injectors, the Plaintiff has paid out-of-pocket for repairs in the amount of approximately \$16,034.30.

77. The Plaintiff has suffered damages as a result of the Defendants' conduct and the Design Deficiencies, including the out-of-pocket expenses for repairs and replacement parts as well as time lost and the diminution of value of the Vehicle.

## **CAUSES OF ACTION**

### **Duties of Care Owed by the Defendants to the Plaintiff and to the Class**

78. The Plaintiff pleads that the Defendants owed to the Plaintiff and the Class the following duties of care to avoid the acts and omissions detailed below:

- (a) To ensure that the 6.0L Engines were designed, marketed, tested and/or manufactured safely, properly and in a good and workmanlike manner so that they would not be defective and be unreasonably dangerous to consumers;

- (b) To disclose to the Plaintiff and the Class of the quality, design, manufacturing and reliability defects once they became aware (or through reasonable diligence could have become aware) of their existence, i.e. prior to the engine's launch;
- (c) To remedy the quality, design, manufacturing and reliability deficiencies upon discovering them through the recall and repair of the Vehicles or, if that was impossible, by recalling the Vehicles and compensating the Class.

79. In addition and in the alternative, the Plaintiff pleads that Defendants owed him and all Class Members a duty of care to ensure that the Vehicles were of merchantable quality and fit for their intended purpose, namely, to operate as functional motor vehicles which are not plagued by serious and pervasive defects;

80. Further, the Defendants were subject to an express warranty and/or an implied warranty at common law or under the *Sale of Goods Act* to supply the Ford Vehicles free from material defects and fit for their intended use.

### **Negligence of the Defendants**

81. The Defendants breached their duty of care to the Plaintiff and to the Class Members by negligently designing, manufacturing, marketing and testing the Class Vehicles and by failing to ensure that they were of merchantable quality and fit for their intended purpose. The aforesaid loss suffered by the Plaintiff was caused by this negligence, particulars of which include, but are not limited to, the following:

- (a) The Defendants failed to properly design the 6.0L Engine such that, under normal conditions, Class Members experienced serious problems including, but not limited to, loss of engine power, blown head gaskets, warped or disfigured head bolts, oil cooler failure, engine gas recirculation (EGR) cooler failure and coolant entering the engine ventilation system;
- (b) The Defendants failed to properly manufacture the 6.0L Engine such that, under normal conditions, Class Members experienced serious problems including, but not limited to, loss of engine power, blown head gaskets, warped or disfigured head bolts, oil cooler failure, engine gas recirculation (EGR) cooler failure and coolant entering the engine ventilation system;
- (c) The Defendants failed to properly market the Class vehicles such that Ford failed to reveal the deficiencies with the 6.0L Engine and the associated serious consequences;
- (d) The Defendants failed to adequately test the 6.0L Engine to ensure a proper design and to ensure proper and timely modifications to the engine to eliminate the foreseeable risks;
- (e) The Defendants failed to accurately, candidly, promptly and truthfully disclose the defective nature of the Vehicles;
- (f) The Defendants failed to conform with good manufacturing and distribution practices;



- (g) The Defendants failed to disclose to Class Members that the engine was defective when knowledge of the defects became known to them;
- (h) The Defendants failed to recall and to carry out the proper repairs or to replace said defective engines;
- (i) The Defendants continued to sell Ford vehicles equipped with the 6.0L Engine when they knew or ought to have known of the defective nature and other associated problems with said engine;
- (j) The Defendants consciously accepted the risk of the Design Deficiencies;
- (k) The Defendants failed to establish any adequate procedures to educate their distributors, dealerships or the ultimate users;
- (l) The Defendants failed to identify, implement and verify that procedures were in place to address the engine defects;
- (m) The Defendants failed to change their design, manufacturing, marketing and testing process with respect to the Vehicles in a reasonable and timely manner;
- (n) The Defendants knew or ought to have known of the defective engine and risk of damage to the Vehicles as well as accidents, injury and death and the substantial danger to the safety of the Plaintiff and the Class Members;

- (o) The Defendants failed to engage in adequate pre-market and production testing of the 6.0L Engines; and
- (p) The Defendants continue to fail to fulfill their ongoing obligations.

82. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage and posed a real and substantial risk to the safety of the Plaintiff and of the Class Members.

83. The loss, damage and injuries were foreseeable.

84. The Defendants' negligence proximately caused the loss, damage, injury and damages to the Plaintiffs and to the other Class Members.

85. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to him and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to manufacture, distribute, market, test and sell Ford motor vehicles with the defective engine;

- (d) Each Defendant owed a duty of care to the other and to each Class Member by virtue of the common business plan to manufacture, distribute, market, test and sell Ford Vehicles with the defective 6.0L Engine;
- (e) The Defendants intended that their businesses be run as one global business organization.

### **Failure to Disclose and Recall and/or Adequately Repair**

86. The Defendants have known about the Design Deficiencies for years, but have failed to take adequate remedial steps.

87. Prior to the engine's launch the Defendants were aware of the 6.0L Engine defects due to the Design Deficiencies and, despite this knowledge, they introduced an unmerchantable and unsafe vehicle without a "definitive repair action" to resolve these issues.

88. From at least 2002 through to the present, the Defendants concealed the nature and scope of the Design Deficiencies from the members of the Class.

89. The Defendants had a duty to recall the Ford Vehicles and to rectify the Design Deficiencies or to give the Class back their purchase monies.

### **Breach of the Express Contractual Warranty**

90. Ford provided the Plaintiff and Class Members with the express 6.0L Power Stroke Diesel Engine warranty, that authorized dealers will repair, replace, or adjust all defective

vehicle parts until a vehicle attains 60,000 kilometres or 3 years in service, whichever comes first, and all defective powertrain components, including the engine, up to 100,000 kilometres or 5 years in service, whichever comes first. The warranty provides that during this coverage period, authorized Ford Motor Company dealers will repair, replace, or adjust all parts on the vehicle that are defective in factory-supplied materials or workmanship.

91. This warranty became part of the basis of the bargain.

92. Ford manufactured and sold vehicles equipped with the 6.0L Engine that are covered by the express warranty.

93. Ford breached this express warranty (1) each time its dealerships failed to properly repair, replace, or adjust the malfunctioning engine and thus failed to return the vehicle to proper working condition and (2) each time the Defendants failed to authorize a Ford dealer to perform an adequate repair of a vehicle, instead only authorizing an inadequate repair that resulted in additional engine repair or replacement expenses after the expiration of the warranty period.

94. Ford had actual knowledge of the specific defects associated with defective 6.0L Engines and the problems resulting therefrom.

95. The Plaintiff and Class Members (or the prior owners of their Ford vehicles) notified Ford of the breach within a reasonable time and/or were not required to do so because affording Ford a reasonable opportunity to cure its breach of written warranty would have been futile. After having the subject vehicles repaired repeatedly, the Plaintiff and Class Members notified the Defendants of the breach of warranty claims when they brought their vehicles into a Ford

dealership, and/or contacted Ford directly, as described above. The Plaintiff and Class Members contacted their local Ford dealerships and/or informed a Ford representative of the continuous mechanical malfunctions of the 6.0L Engine design and suffered repeated unsuccessful attempts by Ford Dealerships to repair the problems. To date, the Defendants have neither adequately cured the actual engine defects nor replaced the defective engines.

96. Ford was also on notice of the engine defects from the complaints and service requests it received from Class Members, from repairs of the 6.0L Engines or components thereof, through its own maintenance records, and through its own employees' communications as evidenced in numerous memoranda and email communications.

97. The Defendants' defective 6.0L Engine is the direct and proximate cause of the Plaintiff's and Class Members' injuries.

98. The Plaintiff and the other Class Members are entitled to legal and equitable relief against Ford, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit, and other relief as appropriate.

99. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

## CAUSATION

100. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants have caused or materially contributed to the Class Members suffering injury, economic loss, and damages.

101. The Class Members have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties and obligations of the Defendants and are therefore entitled to the relief sought and judgment against the Defendants.

### **STATUTORY REMEDIES**

102. The Defendants are in breach of the *Consumer Protection Act* and the *Competition Act*, both of which are consumer protection legislation and are federal statutes passed pursuant to the Criminal law jurisdiction of the Government of Canada.

#### **Breach of the *Consumer Protection Act***

103. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

104. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

105. The transactions by which the Plaintiff and Class Members purchased their Vehicles from the Ford Defendants were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

106. The Defendants have engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” or “unconscionable” within the meaning of ss.14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Failing to disclose the material facts which comprise the Representation described above;
- (b) Failing to disclose the Design Deficiencies;
- (c) Representing that the 6.0L Engine had performance characteristics which it did not have; and
- (d) Representing that the 6.0L Engine was of a superior standard and quality, which it was not.

107. The Plaintiff states that the Representation was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Ford Vehicles as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

108. The Plaintiff and the Class Members relied on the Representation and on the express or implied contractual warranty.

109. The reliance upon the Representation and on the express or implied contractual warranty by the Plaintiff and Class Members is established by his or her purchase and/or use of the Vehicles. Had the Plaintiff and Class Members known that the Representation was false and misleading they would certainly not have purchased and/or used the Vehicles.

**Breach of the *Competition Act***

110. Further or alternatively, the Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful, and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

111. The Defendants made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting the business interests of the Defendants;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect; and
- (d) Stated a level of performance and quality of the Vehicles that was not based on adequate and proper testing.

112. The Plaintiff and Class Members relied upon the Representation and on the express or implied contractual warranty by buying or using the Vehicles and suffered damages and loss.



113. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

114. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

115. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

### **Compensatory Damages**

116. As a result of the Defendants' breach and wrongful conduct, the Plaintiff and Class Members suffered loss and damage and have incurred damages, the particulars of which include:

- (a) Out-of-pocket expenditures related to the cost to repair/service the engines (including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered);
- (b) Overpayment for the Vehicles, which contained latent defects;
- (c) Diminution in the value of the Vehicles of the Class Members;
- (d) Future costs of repair of the Design Deficiencies;

- (e) The fair replacement value of the of the defective parts and/or the costs of rectifying the defects;
- (f) Personal injury expenses;
- (g) Lost profits from the inability to utilize the vehicles equipped with the defective engine (caused by the long delays as Ford dealership mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the defects);
- (h) Towing charges incurred due to the repeated break-downs of the Vehicles;
- (i) The cost of purchasing additional vehicles and or/parts necessitated by the repeated problems with the 6.OL Engines; and
- (j) Other damages as described herein.

### **Punitive, Exemplary and Aggravated Damages**

117. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members. The conduct of the Defendants in deliberately concealing the Design Deficiencies and in deliberately exposing the Class Members to considerable expenses, inconvenience and risk of injury is high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful and willful and demonstrates a disregard and indifference to the consumers of their products such that it offends the moral standard of the community and warrants the condemnation of the court.

118. At all material times, the conduct of the Defendants as set forth above was malicious, deliberate and oppressive towards its customers and the general public, and the Defendants conducted themselves in a wilful, wanton and reckless manner, as set forth above.

119. The Defendants' aforesaid acts, omissions, wrongdoings and breaches of legal duties and obligations constitute unfair business practices and dealings with its customers and with the public.

120. As a result of the aforesaid acts, omissions, wrong doings and breaches of legal duties and obligations by the Defendants, the Plaintiff and Class Members have sustained substantial injury, economic loss and damages, and are entitled to awards of aggravated, punitive, and exemplary damages.

#### **WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST**

121. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct, including the alleged breaches of any of the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

122. The Plaintiff reserves the right to elect at the Trial of the Common Issues to Waive the Tort of Negligence and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Ford Vehicles containing the defective 6.0L Engine as a result of the Defendants' wrongful conduct which resulted in revenues and profit for the Defendants.

123. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Ford Vehicles and the Class Members have suffered a corresponding deprivation or detriment in the amount of such monies paid. The benefits which accrued to the Defendants as a result of their wrongful conduct include:

- (a) The saving of costs of recalling the Vehicles;
- (b) The saving of costs of replacing the 6.0L Engine with a properly designed and manufactured engine;
- (c) The saving of costs of redesigning the 6.0L Engine to overcome the Design Deficiencies; and
- (d) The saving of costs of repair by recommending repairs that simply covered up the root cause defects in the engine to postpone recurrence of the malfunctions until the warranty expired.

124. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

125. The Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Vehicles;

- (b) The Class Members suffered a corresponding deprivation by purchasing the Vehicles;
- (c) The Defendants engaged in inappropriate conduct and committed wrongful acts by engaging in unfair business practices alleged in this claim;
- (d) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (e) Equity, justice and good conscience require the imposition of a constructive trust;
- (f) The integrity of the vehicle market and the related express and implied contractual warranties would be undermined if the court did not impose a constructive trust; and
- (g) There are no factors that would render the imposition of a constructive trust unjust.

126. Further, or in the alternative, the Plaintiff claim an accounting and disgorgement of the benefits which accrued to the Defendants.

### **COMMON ISSUES**

127. Common questions of law and fact exist for the Class Members, and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Are the 6.0L Engines defective, non-merchantable, and/or subject to premature failure in the course of their normal use?
- (b) Did Ford negligently perform their respective contractual duties to manufacture and design the subject engine and to train technicians to repair, diagnose, and service the engine?
- (c) Did the Defendants know or should they have known that the 6.0L Engines are defective, non-merchantable, and/or subject to premature failure?
- (d) Did the Defendants fail to adequately disclose to consumers the true defective nature of the 6.0L Engines?
- (e) Did Ford breach its express warranty by refusing to provide proper repairs and/or replacement of the 6.0L Engines during the warranty period?
- (f) Are the Defendants responsible for all related costs (including, but not limited to, the out-of-pocket expenses for repairs to the Vehicles, towing costs for the Vehicles, the loss of use of the Vehicles and expenditures for rental vehicles, the diminished value of the Vehicles, trouble and inconvenience) to Class Members as a result of the problems associated with the Vehicles?
- (g) Should an injunctive remedy be ordered to force Ford to notify, recall, repair and/or replace Class Members' 6.0L Engines and/or the Vehicles free of charge?

- (h) Are the Defendants responsible to pay compensatory, moral, punitive and/or exemplary damages to the Class Members and in what amount?

### **EFFICACY OF CLASS PROCEEDINGS**

128. The members of the proposed Class number in the hundreds of thousands. As a result, the Class is so numerous that joinder in a single action is not practical. However, proceeding with the Class Members' claim by way of a class proceeding is both practical and feasible.

129. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by the offices of Consumer Law Group. These actions include 9046-9479 *Quebec Inc. v. Ford Motor Company of Canada, Limited and et alii*, an action commenced before the Quebec Superior Court in Montreal (May 20, 2011, File No.: 500-06-000570-115).

130. Individual members of the proposed class do not have a significant interest in individually controlling the prosecution of their claim by way of separate actions and individualized litigation would also present the potential for varying, inconsistent and contrary judgments and would magnify the delay and expense to all parties resulting from multiple proceedings on the same issues. The cost to pursue individual actions concerning this claim would effectively deny the individual Class Members access to the Courts and appropriate legal relief.

131. The Plaintiff will fully and adequately protect the interests of the proposed Class Members and has retained counsel to represent the Class Members who are qualified to

prosecute complex class action litigation. Neither the Plaintiff nor their solicitors have interests which are contrary to, or conflicting with, the interests of the proposed Class.

### **LEGISLATION**

132. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

### **JURISDICTION AND FORUM**

#### **Real and Substantial Connection with Ontario**

133. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Ford Motor Company of Canada, Ltd. has a registered office in Ontario;
- (b) The Defendants engage in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario;  
and
- (d) The damages of Class Members were sustained in Ontario.



134. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

### **Service Outside of Ontario**

135. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h), (o) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario on Ford Motor Company, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) Against a person outside Ontario who is necessary and/or proper party to a proceeding properly brought against another person served in Ontario; ie. Ford Motor Company of Canada, Ltd. (rule 17.02(o));
- (f) Against a person carrying on business in Ontario (rule 17.02(p)); and

- (g) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)).

Date: September 21, 2012

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**FORD MOTOR COMPANY OF CANADA LTD. et alii**  
Defendants

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED IN OTTAWA**

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

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