

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

S. PABLA

Plaintiff

- and -

CATERPILLAR OF CANADA CORPORATION AND CATERPILLAR, INC.

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: February 24, 2014

Issued by

Local Registrar

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TO: Caterpillar of Canada Corporation
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AND TO: Caterpillar, Inc.
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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) “**Engines**” means the **Caterpillar** C13 and C15 model years 2007 through 2011 **ACERT** diesel engines;
- (b) “**Vehicles**” means the trucks, buses and other heavy duty vehicles that contain the **Engines**;
- (c) “**ACERT**”, “**Advanced Combustion Emission Reduction Technology**”, “**Caterpillar Regeneration System**” or “**CRS**” means the defective exhaust emissions and regeneration system, including the four key areas - Multiple Injection Combustion, **Clean Gas Induction**, Electronic Controls and a **Diesel Particulate Filter** - designed, manufactured, tested, distributed, delivered, supplied, inspected, marketed, leased and/or sold and warranted by **Defendants** intended to reduce air pollutants to bring its engines into compliance with the **2007 EPA Emission Standard**;
- (d) “**EPA**” means the United States Environmental Protection Agency;
- (e) “**2007 EPA Emission Standard**” means the national control program that regulates heavy-duty highway engines and vehicles, including the **Engines** and the **Vehicles** which was promulgated in 2001 by the **EPA** to reduce **Harmful Emissions**;

- (f) “**Harmful Emissions**” means oxides of Nitrogen (“NOx”); Non-Methane Hydrocarbons (“NMHC”); Non-Methane Hydrocarbon Equivalent; Carbon Monoxide; and Particulate Matter;
- (g) “**Diesel Particulate Filter**” or “**DPF**” means the device designed to remove diesel particulate matter or soot from the exhaust gas of a diesel engine;
- (h) “**Clean Gas Induction**” or “**CGI**” means the technology found in diesel engines to reduce harmful environmental emissions and improve fuel efficiency;
- (i) “**Electronic Control Module**” or “**ECM**” means the **ACERT** component that monitors all of the systems of the **Engine**, including the exhaust emissions controls;
- (j) “**MEUI Fuel System**” or “**Mechanically actuated Electronically controlled Unit Injectors**” means the **Emissions Reduction Technology** employed by **Defendants** as a component of **ACERT**;
- (k) “**Exhaust Emissions Reduction Technology**” or “**Emissions Reduction Technology**” means the technology designed to bring engines in compliance with the **2007 EPA Emission Standard** through reducing harmful emissions from diesel engines into the environment and includes **ACERT**;
- (l) “**Design Defect**” or “**ACERT System Defect**” means the serious and pervasive design and manufacturing defects that render the **Engines** and the **Vehicles** containing the **Engines** unmerchantable and unsuitable for use including, but not limited to: engine

derating, shutdown, aftertreatment regeneration devices plugging, failing and/or clogging, as well as other failures that prevented the engines from properly functioning;

(m) “**Derate**” or “**Derating**” means one of the **ECM**’s responses (along with warning and shutdown) to operating conditions including reducing horsepower in order to get the driver’s attention so the driver can take action in order to avoid engine damage;

(n) “**Class**” or “**Class Members**” means all persons, entities or organizations resident in Canada who purchased and/or leased the **Vehicles** containing the **Engines** designed, manufactured, tested, distributed, delivered, supplied, inspected, marketed, leased and/or sold and warranted by **Defendants**;

(o) “**CEPA**” means the *Canadian Environmental Protection Act*, S.C. 1999, c. 33;

(p) “**Canadian Emission Regulations**” means the *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2;

(q) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c. C-43, as amended;

(r) “*Class Proceedings Act*” means the *Class Proceedings Act*, 1992, SO 1992, c. 6, as amended;

(s) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Schedule A, as amended;

- (t) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended;
- (u) “**Negligence Act**” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (v) “**Sale of Goods Act**” means the *Sale of Goods Act*, R.S.O. 1990, c. S.1, as amended;
- (w) “**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;
- (x) “**Defendants**” or “**Caterpillar**” means Caterpillar of Canada Corporation and Caterpillar, Inc.;
- (y) “**Plaintiff**” means S. Pabla; and
- (z) “**Representation**” means the **Defendants’** false, misleading or deceptive representations that their **Engines** (a) have performance characteristics, benefits and/or qualities which they do not have, (b) are of a particular standard or quality which they are not; and (c) their use of exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the **Design Defect** as such use or failure deceives or tends to deceive.

CLAIM

2. The proposed Representative Plaintiff, S. Pabla, 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 Caterpillar of Canada Corporation and Caterpillar, Inc. (collectively the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that the notice hereby given by the Plaintiff on February 24, 2014, on his own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendants on behalf of all Class Members;
- (c) 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* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

² Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*,

- (e) A declaration that the Representation was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (f) A declaration that the Defendants engaged in unfair practices in violation of s. 17 of the *Consumer Protection Act*;
- (g) A declaration that the Representation was a false and misleading representation contrary to s. 52 of the *Competition Act*;
- (h) General damages in an amount to be determined in the aggregate for the Class Members to compensate them for the overpayment for the purchase price or lease payments of the Vehicles, the out-of-pocket expenses for repairs and replacements, including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered, out-of-pocket costs associated with towing, including future costs of towing, the diminished value of their Vehicles, and trouble and inconvenience;
- (i) Punitive, aggravated and exemplary damages in an amount that this Honourable Court deems appropriate;
- (j) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;

SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

³ Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

- (k) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of their Engines as a result of the Representation to the Plaintiff and to the Class Members;
- (l) A declaration that any funds received by the Defendants through the sale of their Engines as a result of the Representation are held in trust for the benefit of the Plaintiff and Class Members;
- (m) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Engines to members of the Class on the basis of unjust enrichment;
- (n) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Engines to members of the Class on the basis of *quantum meruit*;
- (o) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (p) A permanent injunction restraining the Defendants from continuing any actions taken by them in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (q) 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*;

- (r) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2 (9) of the *Class Proceedings Act*;
- (s) 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
- (t) 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, S. Pabla, is an individual residing in the City of Laval, in the Province of Quebec. Mr. Pabla purchased a Vehicle containing an Engine designed, manufactured, tested, distributed, delivered, supplied, inspected, marketed, leased and/or sold and warranted by Defendants. Plaintiff was deceived by Defendants' misrepresentations regarding the Engine's reliability, durability, total owning or operating costs and dealer support. Plaintiff did not receive the benefit of the bargain and/or suffered loss as a result of Defendants' misrepresentations and was damaged.

The Class

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

All persons, entities or organizations resident in Canada who purchased and/or leased trucks, buses and other heavy duty

vehicles with a model year 2007 through 2011 Caterpillar C13 and/or C15 Advanced Combustion Emission Reduction Technology (“ACERT”) diesel engine.

The Defendants

5. The Defendant Caterpillar of Canada Corporation (hereinafter “Caterpillar Canada”) is a Canadian corporation with its principle place of business in Woodbridge, Ontario. It is a wholly-owned subsidiary of Caterpillar, Inc. (hereinafter “Caterpillar”), which does business throughout Canada, including within the province of Ontario.

6. The Defendant Caterpillar is a Delaware corporation with its principle place of business in Peoria, Illinois. It designs, manufactures, distributes, delivers, supplies, inspects, markets, leases and/or sells and warrants machinery and engines, including the Engines. It is the parent company of Caterpillar Canada. It is also the registrant of the trade-mark ACERT (TMA674243) which was filed on April 15, 2005.

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

8. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

9. The Defendants are and, have been at all relevant times, engaged in the business of designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting the Engines, which has been defined as Caterpillar C13 and C15 model years 2007 through 2011 ACERT diesel engines.

10. These class proceedings concern the numerous quality, design, manufacturing and reliability defects with the Engines present in the Vehicles that render them unmerchantable and unsuitable for use, contrary to Defendants' Representations, even after repeated emissions repairs and replacements. These repeated repairs and replacements failed to repair or to correct the Engines in any lasting way and the Vehicles could not function as required nor as represented.

11. The Defendants failed to disclose, despite longstanding knowledge, that the ACERT system in the Engines is defective and predisposed to constant failure, including, but not limited to engine derating, shutdown, aftertreatment regeneration devices plugging, failing and/or clogging, as well as other failures that prevented the engines from properly functioning (hereinafter the "Design Defect"). Caterpillar actively concealed the Design Defect and the fact that its existence would diminish both the intrinsic and resale value of the Vehicles.

12. Further, the Defendants touted the Engines' reliability, durability, low total owning and operating costs and excellent dealer support.

13. The Representation was made for the purposes of promoting, directly or indirectly, the purchase and/or lease of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to the performance characteristics, the standard and quality and their use of exaggeration, innuendo and ambiguity in failing to disclose the existence of the Design Defect.

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

BACKGROUND: THE EMISSIONS SITUATION

15. Because of the potential for considerable environmental pollution, the diesel engine market is one characterized by stringent governmental regulations regarding allowable pollutants, including exhaust emissions levels of oxides of Nitrogen ("NOx"); Non-Methane Hydrocarbons ("NMHC"); Non-Methane Hydrocarbon Equivalent; Carbon Monoxide; and Particulate Matter (hereinafter the "Harmful Emissions").

16. In Canada, emissions from motor vehicles are regulated by Environment Canada under the *Canadian Environmental Protection Act, 1999* ("CEPA"), which applies to new vehicles imported into Canada or to vehicles shipped inter-provincially, as well as to used vehicles imported into Canada.

17. Increasingly, the general approach to setting vehicle emissions standards in Canada is to harmonize them with United States Environmental Protection Agency ("EPA") standards as much as possible. On January 1, 2004, Environment Canada enacted the *On-Road Vehicle and Engine Emission Regulations, SOR/2003-2* (hereinafter the "Canadian On-Road Vehicle and Engine Emission Regulations"), the purpose of which was to reduce emissions and to "establish emission standards and test procedures for on-road vehicles that are aligned with those of the EPA" for "vehicles and engines that are manufactured in Canada, or imported into Canada, on or after January 1, 2004"⁴. Every model of vehicle or engine that is certified by the EPA and that is

⁴ Canadian On-Road Vehicle and Engine Emission Regulations; ss. 2 & 3.

sold concurrently in Canada and in the United States, is required to meet the same emission standards in Canada as those in the United States.

18. On January 18, 2001, the EPA issued its *Final Rule-Control of Air Pollution from Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements* (hereinafter the “Final Rule”) which states:

“We are establishing a comprehensive national control program that will regulate the heavy-duty vehicle and its fuel as a single system. As a part of this program, new emission standards will begin to take effect in model year 2007, and will apply to heavy-duty highway engines and vehicles. These standards are based upon the use of high-efficiency catalytic exhaust emission control devices or comparably effective advanced technologies. Because these devices are damaged by sulfur, we are also reducing the level of sulfur in highway diesel fuel significantly by mid-2006.”

19. The EPA promulgated the 2007 standards (hereinafter the “2007 EPA Emission Standard”) in 2001 so as to “provide engine manufacturers with the lead time needed to effectively phase-in the exhaust emissions control technology that will be used to achieve the emission benefits of the new standards”.

20. The 2007 EPA Emission Standard regulated both diesel vehicle/engine emissions standards and diesel fuel standards simultaneously, as a single system:

“These options will ensure that there is widespread availability and supply of low sulfur diesel fuel from the very beginning of the program, and will provide engine manufacturers with the lead time needed to efficiently phase-in the exhaust emissions technology that will be used to achieve the emissions benefits of the new standards”.

21. The 2007 EPA Emission Standard sets not-to-exceed standards for Harmful Emissions and the Canadian On-Road Vehicle and Engine Emission Regulations mirror these standards.

22. As is depicted below, the EPA organized a four-tiered system with exhaust emission requirements becoming progressively stricter. In 2014, the Tier 4 Final will take effect, drastically reducing allowable exhaust emissions:



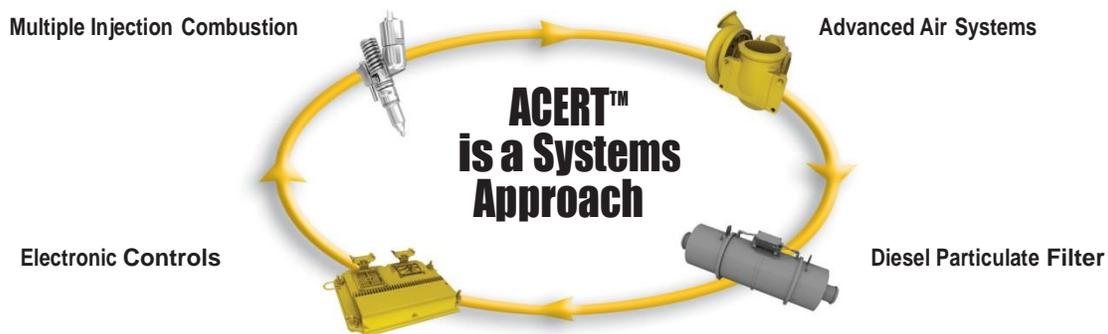
23. With the issuance of the Final Rule and the publication of the 2007 EPA Emission Standard, it was becoming clear to engine makers, including the Defendants, that tougher emissions regulations were inevitably coming into effect. As a result, engine makers turned to new and innovative engine technology to recycle exhaust back through the engine in an attempt to reduce emissions in compliance with these regulations. Caterpillar searched for a long-term emissions solution to bring its engines in compliance and it thus, designed and developed the “Cat Regeneration System” (“CRS”) branded as ACERT.

THE ACERT SYSTEM

24. In response to the more stringent 2007 EPA Emission Standard, Caterpillar designed, manufactured, distributed, delivered, supplied, inspected, marketed, leased and/or sold and warranted the C13 and C15 Engines with ACERT intended to reduce air pollutants to levels not to exceed those set by the EPA.

25. Caterpillar engines were to employ ACERT as a long-term emissions solution for the North American trucking, bus, construction and mining industries, and in order to meet the 2007 EPA Emission Standard for Caterpillar's entire diesel engine product line.

26. As is depicted below, the ACERT System contains integrated components intended to reduce emissions through advanced combustion technology (i.e. through Multiple Injection Combustion and through Advanced Air Systems) in combination with "Aftertreatment" to reduce Harmful Emissions and with advanced Electronic Controls to perform a monitoring function.



27. The ACERT System uses a Clean Gas Induction ("CGI") process. CGI draws off a small amount of non-combustible gas after it has passed through the engine's Aftertreatment system.

The gas is then cooled, blended with more incoming cool, clear air and returned to the combustion chamber. Since the gas is passed through the Diesel Particulate Filter (“DPF”), most contaminants have been removed before the gas re-enters the intake system.

28. The ACERT System works by employing a series of turbochargers to force more cool, clean air into the combustion chamber, instead of the recycled exhaust gas of cooled technology. Working together in series, the turbos turn slower, resulting in increased turbo component life. This turbocharger arrangement is designed to improve engine response while lowering oxides of nitrogen and increasing fuel economy.

29. The DPF works to reduce emissions of hydrocarbons and other contaminants as an aftertreatment of the advanced combustion process. Specifically, the DPF is designed for self-regeneration under all conditions. When the electronic control module detects soot buildup, the Caterpillar Regeneration System (“CRS”) activates. CRS works automatically, using only the precise amount of fuel necessary to oxidize soot. With CRS, no driver action is required for regeneration.

30. Contrary to the express expectation of the EPA Final Report for the use of a DPF with precious metal catalysts, Caterpillar’s CRS employs an un-catalyzed (without precious metal catalysts), or insufficiently catalyzed, DPF which can only regenerate a small amount of soot trapped by the DPF, periodically requiring active regeneration to increase exhaust temperatures needed to burn off of the filter.

31. To periodically achieve the increased temperatures necessary for regeneration in its base metal DPF, the CRS must utilize an Aftertreatment Regeneration Device (“ARD”) to provide

additional heat to the engine's exhaust. Compressed air and ultra-low sulfur diesel fuel enter the head of the ARD where they are mixed and ignited by the spark plug. Once ignited, the mixture mixes with engine exhaust flow directed into the inlet of the DPF to enable regeneration (burning) of the soot trapped by the DPF.

32. The operation of the CRS uses monitoring, diagnostic sensors and engine electronics software to regulate and monitor the operation of the DPF and ARD so as to ensure that the engine exhaust has sufficiently reduced pollutants to the level mandated by the 2007 EPA Emission Standard.

33. Caterpillar's engine electronics plays the major role by working to synchronize and harmonize the components of the ACERT System. First, the system is meant to sense the engine's ever-changing operating conditions. Then, in much the same way as the engine automatically adapts to airflow needs by increasing or decreasing turbocharger boost, the electronic control module sends out signals that variable valve actuators and fuel injectors convert into mechanical responses. If working correctly, the result is an efficient integration of engine components under any operating conditions.

34. The engine electronics continuously monitors engine operating conditions, controls particulate emissions by the CRS, interfaces with the vehicles sensor inputs, and performs the fault detection and diagnostic reporting requirements. The ECM monitors all of the systems of the Engine, including the exhaust emissions controls- "Operating conditions of the Aftertreatment Regeneration Device (ARD)" and the "Operating conditions of The Diesel Particulate Filter." In response to operating conditions, the ECM is programmed to provide one of the following levels of response to operating conditions: Warning, Derate and Shutdown.

“Warning” advises the driver that action must be taken or the ECM will proceed to shut down. “Derate” means that the ECM derates the engine’s performance (reduces horsepower) in order to get the driver’s attention so the driver can take action in order to avoid engine damage. “Shutdown” means that the ECM takes action necessary to shut down the engine within a short period to allow the driver to get off the road. In all instances the event is logged and the vehicle requires immediate authorized maintenance.

35. The Engines are defective in that the CRS repeatedly and frequently experience warning, derate, and shutdown commands issued by the ECM as a result of fault detection in the CRS, which cause the Vehicles to require immediate authorized exhaust emission control diagnoses, and remediation during which time the Vehicles are shutdown.

36. In performing emission system warranty repairs, the Defendants acknowledge that the CRS failures detected are defects in material and workmanship in the Engines because the emissions warranty repairs are performed.

37. However, the Engines repeatedly experience CRS failures that are not corrected by the emission warranty work performed. These repeated and frequent CRS failures cause the Vehicles to be unreliable and which, in spite of numerous attempts, the CRS failures have not and cannot be corrected. The numerous and frequent CRS faults cause warning, derate, and shutdown necessitate costly and time consuming emissions warranty repairs because the Engines do not and cannot effectively and reliably remove exhaust emission pollutants as required by the 2007 EPA Emission Standard and by the Canadian Emission Regulations on a consistent and reliable basis.

38. The Engines also feature the Caterpillar “Mechanically actuated Electronically controlled Unit Injectors (“MEUI fuel system”). The MEUI fuel system is designed to provide a patented split injection fuel delivery to the combustion chamber, reducing emissions and optimizing fuel economy. With split injection, a minute amount of fuel is injected at the beginning of combustion. This is the pilot injection. A millisecond later, during combustion, a larger volume of fuel is used as the main injection. Then a post injection, another smaller amount of fuel, completes the cycle. How much fuel is injected at each phase is determined by advanced Caterpillar electronics. The split fuel injection strategy incorporated into ACERT System lowers peak cylinder temperatures, allowing fuel to burn more completely. In theory, this should translate into not only lower emissions, but also superior fuel economy.

39. The final component that completes Caterpillar’s ACERT System is its Diesel Oxidation Catalyst (“DOC”). The DOC has no moving parts, is designed to require no maintenance, and is designed to last as long as the engine itself. The DOC is located in the exhaust system and consists of a honeycomb-like structure covered by a chemical coating that acts as a catalyst. As hydrocarbons, carbon monoxide and particulate exhaust emissions pass through the DOC and come into contact with the catalyst, they are chemically converted into carbon dioxide and water vapour, which are harmless substances that are subsequently passed on out of the exhaust system. Thus the DOC is designed as an “effective exhaust aftertreatment” system.

40. It is clear that the ACERT System is quite a complicated mechanical system; however, all that is necessary to comprehend is that this system was afflicted with serious and pervasive design and manufacturing defects that rendered the Engines and thus, the vehicles containing the

Engines, unmerchantable and unsuitable for use and these defects were actively concealed by the Defendants despite longstanding knowledge.

41. According to its “ACERT Technology Brochure” (hereinafter the “Marketing Brochure”), Caterpillar has pioneered many of the most important innovations in diesel technology, because only Caterpillar has the self-professed “POWER TO LEAD”.

42. The Defendants assert in their Marketing Brochure that ACERT “maintains engine performance, efficiency and durability while dramatically reducing emissions” and “meets or exceeds the performance of the engine it replaces. By matching or exceeding the power and torque, we can insure machines with ACERT Technology meet customer needs”.

43. The Defendants allege that engine life and wear are not affected by the advanced combustion process, that “the new Cat C-Series engines with ACERT Technology deliver even better performance—often with improved power density—along with the power to lead the industry into the future” and that “ACERT means dependable engines with the reliability, low operating costs and long life you expect from Caterpillar”.

44. Caterpillar touts the Engines as having a life of one million miles with recommended maintenance.

45. Caterpillar marketed the ACERT System as a superior alternative to the systems installed by other truck engine manufacturers to comply with the 2007 EPA Emission Standard and represented that their “engines meet tougher emissions standards while still providing excellent reliability, low ownership costs and outstanding fuel economy”. In addition, Caterpillar claimed

that “the CRS activates automatically when DPF soot builds up, with no driver action required”. The DPF and CRS are incorporated into the muffler and, according to Caterpillar, are supposed to require no maintenance or cleaning.

46. In addition, the Defendants represented that the expected life of the aftertreatment unit was equal to the life of the Engine itself.

47. The Defendants represent that the Engines offer “outstanding reliability”, “million-mile durability”, “fuel economy”, “low operating costs” and “dealer support” as the 2004 compliant engines.

48. Caterpillar’s representations about the ACERT System proved to be wrong. As the DPF became extremely hot, the heat put extreme and harmful pressure on other Engine components as well, including the turbos, resulting in regular and catastrophic failures of the Emissions and Regeneration System, and sometimes other Engine parts.

49. The Defendants exited the North American heavy-duty engine market just before the EPA’s Tier 4 Interim 2010 regulations were to take effect.

50. Although many Engines are still in service and the Defendants had assured that they would be backed with the proper service, this promise has not been fulfilled. In fact, the Defendants stopped sending representatives to meetings of the Technology & Maintenance Council of the American Trucking Association, so that its representatives have conveniently not been present to answer the numerous complaints about the Engines made through that group.

51. In addition, authorized service centers are unable to obtain the necessary parts from the Defendants, despite its warranty obligations, such that some authorized service centers are unable to service the defective Engines.

THE WARRANTY AND THE BAND-AID APPROACH

52. The Engines are covered by two (2) different warranties. The standard warranty term for the Engines is the earlier to occur of twenty four (24) months from the date of purchase or two hundred thousand (200,000) miles. For the ACERT system, the warranty expires after only one hundred thousand (100,000) miles.

53. The Defendants have been aware for several years of the true nature and cause of the Design Defect in the Engines. In particular, Caterpillar authorized dealers around the country have seen sharp increases in repair work since the introduction the ACERT system beginning with the 2007 model year Engines. Further, numerous complaints on the internet and elsewhere discuss the problem, including accounts from Class Members who have complained about this very issue to the Defendants. Notwithstanding its knowledge, Defendants have intentionally withheld from and/or misrepresented to the Petitioner and to the Class Members this material information. Instead, the Defendants made numerous affirmative representations about the high quality and reliability of the Engines.

54. Most owners and lessees of vehicles containing the Engines have had to repair or replace their emission and regeneration systems multiple times, thereby incurring costly repairs and replacements. Moreover, given the nature of the Engines, owners and lessees have incurred significant costs associated with the towing of the Vehicles.

55. Additionally, the Design Defect causes the Engines to stop the Vehicles containing the Engines from proceeding, forcing the truck or bus with the Engine to pull to the side of the road and be towed to a Caterpillar authorized repair shop. This creates a serious safety concern to the drivers of the Vehicles, to the occupants of other vehicles, and to the public.

56. As a result of the Defendants' unfair, deceptive and prohibited business practices, as set forth herein, the Engines and the Vehicles that house the Engines have a lower market value and are inherently worth less than they would be in the absence of the Design Defect.

57. For customers with vehicles within the standard 100,000 mile warranty period for the emission and regeneration system, as discussed above, Caterpillar has done no more than to temporarily repair the emission and regeneration system or to replace it with another equally defective and inherently failure-prone system, but has not remedied the Design Defect. Further, Caterpillar has refused to take any action to correct this concealed Design Defect when it occurs in vehicles outside the warranty period. Since the Design Defect surfaces well within the warranty period for the Engines, and continues unabated after the expiration of the warranty, even where Caterpillar has replaced the system several times – and given the Defendants' knowledge of this concealed Design Defect – any attempt by Caterpillar to limit its warranty with respect to the Design Defect is unconscionable.

58. Based on Defendants' misleading and deceptive sales scheme, Defendants were able to charge a premium for their Engines over the costs of other similar 2007 EPA Emission Standard compliant engines.

59. Plaintiff and the Class Members that he seeks to represent suffered economic damages by purchasing and/or leasing Defendants' products, did not receive the benefit of the bargain, suffered out-of-pocket loss, and are therefore entitled to damages.

60. The Defendants know or understand that the promotion and advertising of their Engines, in part, targets consumers and customers in Canada.

61. The Defendants placed their Engines into the stream of commerce in Ontario and elsewhere with the intention and expectation that consumers, such as the Plaintiff and Class Members, would purchase and/or lease the Vehicles containing them based on their Representation.

62. The Defendants knew or ought to have known that purchasers and/or lessors of Vehicles equipped with their Engines would not be reasonably able to protect their interests, that such purchasers and/or lessors would be unable to receive a substantial benefit from the Engines and that consumers would be relying on the Defendants' Representation to their detriment.

63. Canadian consumers were never compensated for damages incurred as a result of purchasing and/or leasing the Vehicles containing the Defendants' Engines in reliance upon the Representation.

THE REPRESENTATIVE PLAINTIFF

64. In or around May 2010, the Plaintiff purchased a 2011 Caterpillar truck with a C15 engine from Kenworth Truck Centres at 5475 Dixie, in Mississauga, Ontario for a total cost of approximately \$130,000.

65. A substantial factor in the Plaintiff's purchasing decision was the Defendants' extensive promotional and advertising campaign focusing on the superior quality, reliability, durability, fuel economy, lower operating costs and dealer support.

66. At the time of sale, the Plaintiff was under the impression that he was purchasing a truck that was free of any design defects; unbeknownst to him, he overpaid for the purchase price as the truck was in fact suffering from the Design Defect.

67. The Plaintiff was injured at the point-of-sale as the purchase price reflected a truck that was represented to be free of any defects and he suffered a prejudice in that he overpaid in reliance upon this misrepresentation and/or omission of fact.

68. Neither the Defendants, nor any of their authorized dealers or other representatives related the existence of the Design Defect to the Plaintiff and he was thus unaware of its existence. To the contrary, the Plaintiff was told by the Defendants' representatives that the truck was a good purchase.

69. At present, the Plaintiff still owns the truck and he has thus far been unable to sell it as the engines are notoriously defective within the industry and nobody wants to purchase a truck that suffers from a design defect.

70. The Plaintiff has recently discovered, while researching online, that the Defendants had been engaging in widespread deception and misrepresentations and that several class actions have been instituted in the United States due to this same issue.

71. The internet is replete with references to the common and profound problems that consumers have experienced with the Engines as a result of the Design Defect. The problem with the Engines is both significant and widespread.

72. It was at this moment in time that the Plaintiff was finally made aware that he had purchased a truck that was plagued by a Design Defect.

73. The Plaintiff has suffered damages as a result of purchasing the Vehicle.

CAUSES OF ACTION

A. Breach of Express Contractual Warranty

74. According to the terms of its Emissions Warranty, the Defendants must, within the warranty period, or extended warranty period if applicable, provide new, remanufactured, or repaired parts and/or components required to correct the defect, as well as 'reasonable and customary' labour required to make the warranty repair.

75. Under this warranty, the Defendants expressly warranted to all owners and lessors of its Engines that all emissions related parts and components were designed, built, and equipped so as to conform to the 2007 EPA Emission Standard and to the Canadian Emission Regulations.

76. Caterpillar expressly warranted to Plaintiffs and to Class members that the exhaust emissions controls of its Engines to be free from defects in material and workmanship and in the event that a defect manifested, the Defendants were obligated to correct the defect. This express

representation becomes a basis of the bargain, implicating the Defendants' joint and several liability for breach.

77. Plaintiffs and the Class members did rely on the express warranties of the Defendants herein.

78. The Defendants knew or should have known that, in fact, said Representation and warranties were false, misleading and untrue.

79. The Design Defect at issue in this Statement of Claim was present at the time of sale and/or lease to Plaintiff and members of the Class.

80. Defendants breached their express warranties (and continue to breach these express warranties) because they did not (and do not) cover the expenses associated with replacing the defective Engines in Plaintiff's and Class Members' Vehicles with a non-defective engine. Defendants further breached these express warranties because the same defective Engines with the same ACERT system were placed in Vehicles during purported repairs.

81. Pursuant to the express warranties, Defendants were obligated to pay for or reimburse Plaintiff and the Class Members for costs incurred in replacing the defective Engines.

82. Pursuant to the express warranties, Defendants were also obligated to repair the Design Defect.

83. Contrary to this warranted representation, the exhaust emission controls, the CRS, was defective in that it repeatedly and frequently failed to function properly in reducing emission

pollutants on a reliable and dependable basis, resulting in repeated fault detection, and failures of the Exhaust Aftertreatment System, the Aftertreatment Regeneration Device, and the Electronic Control System covered by the Emissions Warranty. The faults resulted in warming, derating, and shutdown, requiring authorized and expensive maintenance to remediate the active fault codes, which defects the Defendants were unable to correct in spite of repeated and numerous attempts.

84. Defendants knew, or should have known, that the CRS employed by the Engines was defective and that its defects could not be corrected, especially in light of the EPA Final Report finding that exhaust emission controls, at least as of 2000, using base metal catalyzed (non-precious metal catalysts) Diesel Particulate Filters requiring periodic, active regeneration were unreliable.

85. By failing to correct the defects, in spite of repeated, frequent attempts, Defendants have breached the express Emissions Control System Warranty.

86. By virtue of repeated and frequent presentation of the Class Members' Vehicles at authorized CAT repair facilities, Defendants were notified of the defects in the exhaust emission controls and failed to correct them.

87. By failing to provide an exhaust emission control capable of meeting the 2007 EPA Emission Standard on a reliable basis, the Defendants' Emission Warranty limitation to repair and replace, but not correct, the CRS, for a period limited by the warranty, have caused a failure of the essential purpose of the emission warranty to provide a reliable emission technology

capable of functioning as required under all operating conditions for the reasonably expected life of the Vehicle.

88. As a direct and proximate result foregoing acts and/or omissions, Plaintiffs and the Class members have suffered damages entitling them to compensatory damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

B. Breach of Implied Warranty of Fitness for a Particular Purpose

89. The Defendants are “merchants” in the business of designing and manufacturing diesel engines to be contained in trucks, buses and other heavy duty vehicles to be bought and/or leased by foreseeable consumers such as Plaintiff and the members of the Class, including, but not limited to the Caterpillar C13 and C15 ACERT diesel engines with a model year 2007 to 2011.

90. Defendants manufactured only heavy duty diesel engines and not the vehicles in which they are installed. Defendants directly sold and marketed its Engines to Vehicle manufacturers, like those from whom Plaintiff and Class Members purchased and/or leased their Vehicles, for the intended purpose of installing those engines in the Vehicles, owned and/or leased by Plaintiff and the Class Members. The Defendants knew that the Engines would and did pass unchanged from the vehicle manufacturer to Plaintiff and Class Members.

91. Plaintiffs and the members of the Class relied on the Defendants’ representations which induced the Plaintiff and Class Members to purchase and/or lease the Vehicles containing the Engines.

92. The Defendants knew that all emission warranty work would, and could, only be performed by an authorized CAT repair facility under its direct supervision and employing its “Cat Electronic Technician” and with a direct data link to the Defendants.

93. The Defendants knew that the CRS was an exhaust emission control designed and manufactured for use in the Engines and that the Engines could only use the CRS to meet the 2007 EPA Emission Standard for exhaust emission control.

94. The Defendants knew that the Engine’s fault detection functions and fault codes were proprietary to CAT and could only be accessed by the “Cat Electronic Technician”, such that the on board diagnostics and fault code clearing could only be performed by direct contact with CAT and its authorized warranty repair facilities.

95. The Defendants included the Emission Warranty, as required by the 2007 EPA Emission Standard to the Operating Manual, for all Vehicles powered by the Engines.

96. The Defendants knew that the CRS was programmed to disable the operation of the Engines until fault detection codes were cleared by direct contact with CAT and its authorized warranty repair facilities; that such direct contact would be required each time there was a CRS warning, derating, or shutdown; and that only CAT or its authorized warranty repair facility could repair the CRS.

97. The Defendants knew that the CRS failures detected by the monitoring function of the electronics module would render the Vehicles inoperable until the diagnostic codes triggering the

warning, derate, or shutdown were “cleared” by the Cat Electronic Technician, and only the Cat Electronic Technician.

98. The Defendants knew and required that the Cat Electronic Technician necessary to clear the engine warning, shutdown, and derate codes be inaccessible to Plaintiff and to Class Members, other than through a licensed and authorized CAT dealer.

99. The Defendants knew that its CRS was unique to the Engines, that other reliable exhaust emissions controls could not be used on the Engines, and that all repairs to and diagnosis of the CRS required its intervention.

100. The Emission Warranty does not disclaim any implied warranties.

101. The Defendants were notified of the defects of the Engine exhaust emission controls, but have failed to correct them to date.

102. As a direct and proximate result of Defendants’ breach of the implied warranty of fitness for particular purpose, Plaintiff and Class Members have suffered financial loss and other damages, including the diminished value of their vehicles, and the cost to re-power the Vehicles with diesel engines having reliable exhaust emissions controls.

C. Breach of Implied Warranty of Merchantability

103. Defendants knew, or should have known, that base metal catalysts, or a catalyst insufficient to regenerate the anticipated soot load in the DPF without periodic active regeneration, would require high exhaust temperatures to effectively oxidize pollutants collected

in the DPF. Precious metal DPFs were known to provide a continuous regeneration at lower exhaust temperatures on a reliable basis. Nevertheless the Defendants, for their own business purpose, and for their own profit, failed to use known, reliable exhaust emission controls in the Engines.

104. The CRS exhaust emission controls rendered the Engines, and therefore the Vehicles powered by those engines, unfit, inherently unsound for use, that they would not pass without objection in the trade; that they were not fit for the ordinary purpose for which they were used; that they would not operate on a reliable basis for the reasonable life of the engine; and were unmerchantable.

105. Consequently, the Defendants breached the implied warranty of merchantability, to wit: it failed to use reliable exhaust emissions controls that would reduce exhaust emissions to the EPA Standard for the anticipated life of the Vehicles of 1,000,000 miles and/or 10 years.

106. Defendants impliedly warranted that the repairs and component replacements to the exhaust emission controls would correct the defect in its CRS in a good and workmanlike manner; however, Engine exhaust emission controls have failed to be corrected because the CRS is incapable of reliable functioning.

107. Defendants were notified of the defects of the Engines' ACERT systems, but have failed to correct them. Defendants have received thousands of complaints and other notices from customers advising of the Design Defect associated with the Engines.

108. As a direct and proximate result of Defendants' breach of the implied warranty of merchantability, Plaintiff and Class Members have suffered financial loss and other damages, including the diminished value of their vehicles, and the cost to re-power the Vehicles with diesel engines having reliable exhaust emissions controls.

D. Tort of Negligence

109. The Defendants had a positive legal duty to use reasonable care to perform its legal obligations to the Plaintiff and Class Members;

110. The Defendants were aware that its customers (including Plaintiff and the Class) relied on it to provide truthful and accurate information about its products, including their Engines.

111. It was certainly reasonably foreseeable that if the Defendants were negligent in their duty to provide accurate information about their Engines, that customers would sustain injury and damages.

112. The Defendants breached their duty of care to the Plaintiff and to the Class Members by negligently designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting the Engines and by failing to ensure that they were of merchantable quality and fit for their intended purpose. The aforesaid loss suffered by the Plaintiff and Class Members was caused by this negligence, particulars of which include, but are not limited to, the following:

- (a) The Defendants failed to properly design the Engines such that, under normal conditions, Class Members experienced serious problems including, but not

limited to, engine derating, shutdown, aftertreatment regeneration devices plugging, failing and/or clogging, as well as other failures that prevented the engines from properly functioning;

- (b) The Defendants failed to properly manufacture the Engines such that, under normal conditions, Class Members experienced serious problems including, but not limited to, engine derating, shutdown, aftertreatment regeneration devices plugging, failing and/or clogging, as well as other failures that prevented the engines from properly functioning;;
- (c) The Defendants failed to properly market the Engines such that Caterpillar failed to reveal the deficiencies with the Engines and the associated serious consequences;
- (d) The Defendants failed to adequately test the Engines 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 Engines;
- (f) The Defendants failed to conform with good manufacturing and distribution practices;
- (g) The Defendants failed to disclose to Class Members that the Engines were 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 the Engines 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 Defect;
- (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 Engines in a reasonable and timely manner;
- (n) The Defendants failed to engage in adequate pre-market and production testing of the Engines; and
- (o) The Defendants continue to fail to fulfill their ongoing obligations.

113. 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.

114. The loss, damage and injuries were foreseeable.

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

116. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendants.

E. Breach of Implied Covenant of Good Faith and Fair Dealing

117. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

118. Plaintiff and the Class Members entered into agreements to purchase and/or lease Vehicles containing the Engines, or otherwise were in contractual privity with Defendants as a result of the express warranties described herein.

119. The contracts and warranties were subject to the implied covenant that Defendants would conduct business with Plaintiff and the Class Members in good faith and would deal fairly with them.

120. Defendants breached those implied covenants by selling Plaintiff and the Class Members Engines with the Design Defect, when it knew, or should have known, that the contracts and/or warranties were unconscionable and by abusing its discretion in the performance of the contract or by intentionally subjecting Plaintiff and the Class Members to a risk beyond that which they would have contemplated at the time of purchase and/or lease as well as by exiting the market and failing to provide for proper parts and service of the Engines it sold.

121. Defendants also breached the implied covenants by not placing terms in the contracts and/or warranties that conspicuously disclosed to Plaintiff and the Class Members that the Engines and ACERT systems were defective as described herein.

122. As a direct and proximate result of Defendants' breach of its implied covenants, Plaintiff and the Class Members have been damaged in an amount to be determined at trial.

CAUSATION

123. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

124. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

Compensatory Damages (Economic Losses)

125. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include:

- (a) Overpayment for the purchase price or lease payments of the Vehicles,

- (b) Out-of-pocket expenses for repairs and replacements, including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered,
- (c) The fair replacement value of the of the defective parts and/or the costs of rectifying the defects;
- (d) Out-of-pocket costs associated with towing, including future costs of towing,
- (e) The diminished value of their Vehicles,
- (f) Lost profits from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Defendants' mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects);
- (g) The cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines;
- (h) Trouble and inconvenience, and
- (i) Other damages as described herein.

Punitive, Exemplary and Aggravated Damages

126. The Defendants have taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

127. In addition, it should be noted since the Defendants are parts of a highly-revered, multi-billion dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

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

STATUTORY REMEDIES

129. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act* and/or other similar/equivalent legislation.

130. The Plaintiff pleads and relies upon consumer protection and trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

A. Breach of the *Sale of Goods Act*

131. At all times relevant to this Claim, the Plaintiff and Class Members were “buyer[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

132. At all times relevant to this action, the Defendants were “seller[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

133. There were implied conditions as to merchantable quality or fitness pursuant to s. 15 of the *Sale of Goods Act* as well as an implied condition as regards defects as the Design Defect could not have been revealed upon examination.

134. The Defendants were aware that the consumers purchased and/or leased the Engines based on its representations and based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will be perform as presented.

135. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s.15 of Part I of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act*

136. 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*.

137. 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*.

138. The transactions by which the Plaintiff and Class Members purchased and/or leased their Vehicles containing Defendants’ defective Engines were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

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

- (a) Representing that the Engines has performance characteristics, benefits and/or qualities, which they do not have;
- (b) Representing that the Engines are of a particular standard or quality which they are not; and
- (c) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the Design Defect as such use or failure deceives or tends to deceive.

140. The Representation was and is unconscionable because *inter alia* the Defendants know or ought to know that consumers are likely to rely, to their detriment, on Defendants’ misleading statements as to reliability and durability of the Engines.

141. 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 and/or lease the Vehicles containing the Engines as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

142. The Plaintiff and the Class Members relied on the Representation.

143. The reliance upon the Representation by the Plaintiff and Class Members is established by his or her purchase and/or lease of the Vehicles. Had the Plaintiff and Class Members known that the Representation was false and misleading they would either not have purchased and/or leased the Vehicles, or would not have paid such a high price.

C. Breach of the *Competition Act*

144. At all times relevant to this action, the Defendants' designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting business was a "business" and the Engines were "product(s)" within the meaning of that term as defined in s.2 of the *Competition Act*.

145. 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*.

146. 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, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;
- (b) Was made knowingly or recklessly;
- (c) Was made to the public;
- (d) Was false and misleading in a material respect; and
- (e) Stated a level of engine performance and quality that was false and not based on adequate and proper testing.

147. The Plaintiff and Class Members relied upon the Representation by buying and/or leasing the Vehicles containing the Engines and suffered damages and loss.

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

149. 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*.

150. 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.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

151. 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 *Sale of Goods Act*, 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.

152. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong 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 Engines as a result of the Defendants' false Representation which resulted in revenues and profit for the Defendants.

153. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Engines and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through:
 - i. Revenues and profits from the sale of the Engines;
 - ii. The saving of costs of recalling the Engines;
 - iii. The saving of costs of replacing the Engines with properly designed and manufactured engines;
 - iv. The saving of costs of redesigning the Engines to overcome the Design Defect; and

- v. The saving of costs of repair by recommending repairs that simply covered up the root cause defects in the Engines to postpone recurrence of the malfunctions until the warranty expired.
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. 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.

154. Further, or in the alternative, 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 Engines;
- (b) The Class Members suffered a corresponding deprivation by purchasing and/or leasing the Vehicles containing the Engines;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;

- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

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

COMMON ISSUES

156. 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 Engines defective, non-merchantable, and/or subject to premature failure in the course of their normal use?
- (b) Did the Defendants negligently perform their duties to properly design, manufacture, test, distribute, deliver, supply, inspect, market, lease and/or sell and warrant the Engines and to train technicians to repair, diagnose, and service the Engines?
- (c) Did the Defendants misrepresent or fail to adequately disclose to consumers the true defective nature of the Engines?

- (d) Did the Defendants breach their express and/or implied warranty by not providing proper repairs and/or replacement of the Engines during the warranty period?
- (e) Did the Defendants engage in unfair, false, misleading, and/or deceptive acts or practices in their designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting of the Engines?
- (f) Are the Defendants responsible for all related costs (including, but not limited to, overpayment of the Vehicles for the purchase price or lease payments, the out-of-pocket expenses for repairs and replacements for the Vehicles , including future costs of repair and including deductibles paid when repairs were covered by warranty, and the full cost of repair when they were not covered, the fair replacement value of the of the defective parts and/or the costs of rectifying the defects, towing costs for the Vehicles, including the cost of future towing, the loss of use of the Vehicles and expenditures for rental vehicles, the diminished value of the Vehicles, the lower resale value of the Vehicles, lost profits from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Defendants' mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects), the cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines, and trouble and inconvenience to class members as a result of the problems associated with the Vehicles?

- (g) Did the Defendants impliedly warrant the Engines for fitness for a particular purpose?
- (h) Did the Defendants impliedly warrant the Engines for merchantability?
- (i) Do the Defendants owe the Class members a duty to use reasonable care?
- (j) Did the Defendants act negligently in failing to use reasonable care to perform its legal obligations?
- (k) Did the Defendants intend that the Vehicles containing the Engines be purchased by the Plaintiff, Class Members and/or others?
- (l) Did the Defendants intend or foresee that the Plaintiff or other Class Members would purchase the Vehicles containing the Engines based on the Representations?
- (m) Did the Defendants' negligence proximately cause loss or injury and damages?
- (n) Did the Defendants breach their implied covenant of good faith and fair dealing?
- (o) Did the Defendants' acts or practices breach the *Consumer Protection Act*, the *Competition Act* and/or other similar/equivalent legislation?
- (p) Were the Defendants unjustly enriched?

- (q) Have Class Members been damaged by the Defendants' conduct and, if so, what is the proper measure of such damages?
- (r) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- (s) Are the Defendants responsible to pay punitive damages to class members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

157. The members of the proposed Class potentially number in the hundreds of thousands if not millions. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

158. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, and the small amount being claimed by each person, many people will hesitate to institute an individual action against the Defendants. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

159. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgements on questions of fact and law that are similar or related to all members of the class.

160. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice.

161. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel are qualified to prosecute complex class actions.

LEGISLATION

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

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

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

- (a) Defendant Caterpillar of Canada Corporation has its head 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.

164. 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*.

DEFENDANTS' JOINT AND SEVERAL LIABILITY

165. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to herself 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, market and sell the Engines;
- (d) Each owed a duty of care to the other and to each Class Member by virtue of the common business plan to design, manufacture, test, distribute, deliver, supply, inspect, market, lease and/or sell and warrant the Engines; and

- (e) The Defendants intended that their businesses be run as one global business organization.

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

167. 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*.

SERVICE OUTSIDE ONTARIO

168. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) 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, 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) The claim is authorized by statute, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: February 24, 2014

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Plaintiff

CATERPILLAR OF CANADA CORPORATION et *alli*
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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