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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

|                                           |   |                                 |
|-------------------------------------------|---|---------------------------------|
| <hr/>                                     |   |                                 |
| T.J. McDERMOTT TRANSPORTATION CO., INC.,  | : | Civil Action No.: 2:14-cv-04209 |
| DEMASE WAREHOUSE SYSTEMS, INC., HEAVY     | : | (WHW)(CLW)                      |
| WEIGHT ENTERPRISES, INC., P&P ENTERPRISES | : |                                 |
| CO., LLC, YOUNG'S AUTO TRANSPORT, INC.,   | : | <b>THIRD AMENDED</b>            |
| HARDWICK ALLEN, AND JOSE VEGA,            | : | <b>COMPLAINT AND</b>            |
|                                           | : | <b>DEMAND FOR JURY TRIAL</b>    |
|                                           | : |                                 |
| Plaintiffs,                               | : |                                 |
|                                           | : |                                 |
| vs.                                       | : |                                 |
|                                           | : |                                 |
| CUMMINS, INC., and PACCAR, INC. d/b/a     | : |                                 |
| PETERBILT MOTOR COMPANY AND               | : |                                 |
| KENWORTH TRUCK COMPANY,                   | : |                                 |
|                                           | : |                                 |
| Defendants.                               | : |                                 |
| <hr/>                                     |   |                                 |

Plaintiffs, T. J. McDermott Transportation Co., Inc. (“McDermott”), DeMase Warehouse Systems, Inc. (“DeMase”), Heavy Weight Enterprises, Inc. (“Heavy Weight Enterprises”), P&P Enterprises Co., LLC (“P&P”), Young’s Auto Transport, Inc. (“Young’s Transport”), Hardwick Allen (“Allen”), and Jose Vega (“Vega”) (collectively, “Plaintiffs”) bring this action against Defendants PACCAR, Inc. d/b/a Peterbilt Motor Company and Kenworth Truck Company (“PACCAR”) and Cummins, Inc., (“Cummins” and, together with PACCAR, “Defendants”).

**THE PARTIES, JURISDICTION AND VENUE**

1. McDermott is a New Jersey corporation with its principal place of business at 75-89 Third Avenue, Kearny, New Jersey and, thus, is a citizen and resident of New Jersey. McDermott’s sole place of business is in Kearny, New Jersey.

2. DeMase is a New Jersey corporation with its principal place of business at 2 Jerome Avenue, Lyndhurst, New Jersey and, thus, is a citizen and resident of New Jersey. DeMase’s sole place of business is in Lyndhurst, New Jersey.

3. Heavy Weight Enterprises is a Michigan corporation with its principle place of business in Troy, Michigan.

4. P&P is a Connecticut corporation with its principle place of business in Branford, Connecticut.

5. Young’s Transport is a Florida corporation with its principle place of business in Fort Myers, Florida.

6. Allen is a citizen and resident of Georgia.

7. Vega is a citizen and resident of California.

8. Cummins, Inc. is an Indiana corporation with its principal place of business at 500 Jackson Street, Columbus, Indiana, and, thus, is a citizen and resident of Indiana.

9. PACCAR, is a Delaware corporation with its principal place of business at 777 106th Avenue NE, Bellevue, Washington, and, thus, is a citizen and resident of Delaware and Washington. Peterbilt Motor Company and Kenworth Truck Company are divisions of PACCAR.

10. This class action is within the original jurisdiction of this Court pursuant to 28 U.S.C. § 1332(a), and 28 U.S.C. § 1332(d)(1)(B) and (d)(2) (the Class Action Fairness Act). The aggregated amount in controversy exceeds five million dollars (\$5,000,000), exclusive of interest and costs, and at least one member of the putative classes is a citizen of a state different than the Defendants. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because McDermott and DeMase are located in this District and Defendants are subject to personal jurisdiction in this District. Defendants have advertised and solicited the sale of their products to customers, including McDermott and DeMase, in this District, maintain authorized repair and other facilities through their dealerships within this District, have provided warranty services to McDermott and DeMase and others in this District, and have received substantial revenue and profits from the sale and/or leasing and repair of trucks and other vehicles, engines, and other products and services in this District. Defendants performed much of the warranty and other repair work on McDermott's and DeMase's Subject Vehicles at authorized Cummins and/or PACCAR repair facilities in New Jersey.

12. This Court has personal jurisdiction over Defendants. Defendants intentionally and purposefully have placed vehicles and engines into the stream of commerce within New Jersey and throughout the United States. Defendants maintain regular and systematic contacts with New Jersey and regularly do business within New Jersey. As such, they have conducted substantial business in this judicial District.

#### **GENERAL FACTUAL ALLEGATIONS**

13. In early 2001, PACCAR and Cummins announced the formation of a partnership and long term agreement for the development, design, manufacture, assembly, marketing and sale of, among other things, heavy duty diesel tractor trucks (the "PACCAR/Cummins Venture").

14. PACCAR and Cummins, as part of the PACCAR/Cummins Venture, jointly developed, designed, manufactured, marketed, assembled and sold heavy duty trucks (the “Subject Vehicles”) that purportedly would comply with the Environmental Protection Agency’s 2010 Heavy Duty On Highway Diesel Emissions Standard (“EPA Emission Standard”) under both the Peterbilt and Kenworth brands.

15. Specifically, Cummins and PACARR designed, manufactured, marketed, assembled and sold 2010 and later model year Heavy Duty On Highway Diesel vehicles powered by the Cummins ISX15 diesel engine (“Subject Engines”).

16. The Subject Engines employ engine exhaust emissions control devices (referred to as “auxiliary emissions control devices, or “AECD”) to reduce exhaust toxins and bring the engine emissions within EPA Standards. These emissions controls include an electronic on-board diagnostic systems (“OBD”) that monitor and report malfunctions that impact the emissions control devices.

17. The Subject Engines employ an Engine Protection System that monitors critical engine and emissions systems, logs diagnostic fault codes so as to detect over or under normal operating conditions (“out of range conditions”), and alert the operator of system malfunctions, derate or shut down the engine to prevent engine damage or an increase in exhaust emissions levels.

18. The Subject Engines employ emissions control devices that are comprised of the Exhaust Recirculation System (EGR), the Diesel Exhaust Fluid System (“DEF”), the Aftertreatment System (comprised of the Diesel Oxidation Catalyst-“DOC”, and the Diesel Particulate Filter-“DPF”, the Selective Catalytic Reduction Catalyst (“SCR”), and the Electronic Control Module (“ECM), (referred to herein collectively as the “Exhaust System”). The Exhaust System is materially identical in all Subject Engines.

19. PACCAR uniformly marketed the Subject Vehicles and Subject Engines as functioning reliably, and did not disclose any of the known defects in the Exhaust System.

20. The on-board diagnostics system installed by Defendants in the Subject Vehicles continuously monitors and regulates engine performance, and all truck system components, as well as information regarding the safety, emissions and performance functions of the Subject Vehicles by constant analyses that store trouble, diagnostic or fault codes and provide data to Defendants' and/or their authorized service providers' diagnostic computers used to determine the meaning and potential repair associated with the fault codes. In-cab engine warning lamps serve as the sole indicator for Plaintiffs' tractor drivers to be made aware of engine and Exhaust System problems.

21. When an in-cab engine warning lamp illuminates, the Subject Vehicle's driver is alerted that there are problems with the Subject Engine or Exhaust Systems that require that the Subject Vehicle be brought to one of Defendants' authorized service providers. After a short time of continued driving, a second warning lamp is illuminated and results in the engine being de-rated (regulated to diminish power output by the Subject Engine) and a third warning lamp illumination further de-rates the Subject Engine to speeds of less than 5 or 10 miles per hour. Finally after a short de-rated operating time, the Subject Engine is shut down by the on-board diagnostic system.

22. Where Subject Engine warning illuminations occur, the Subject Vehicle's driver is forced to divert from the intended trucking route to one of Defendants' authorized service providers, if the de-rating system will permit the driver to reach one of Defendants' authorized service providers.

23. Defendants deliberately do not release explanations or descriptions of the problems that are tethered to the numeric diagnostic codes or fault codes to their customers and despite requests have failed or refused to provide such information. As such, Plaintiffs and Class and Sub-Class Members have no way of identifying, diagnosing or fixing faults that are detected and have no choice but to bring the Subject Vehicle to Defendants' authorized service providers for service.

24. On information and belief, Defendants knew at the time that Plaintiffs and Class and Sub-Class Members purchased the Subject Vehicles that the Subject Vehicles with the Subject Engines were experiencing Subject Engine and Exhaust System failures, that repeated

repairs were required for the Subject Vehicles with the Subject Engine and the Exhaust System, and failed and refused to disclose these conditions to Plaintiffs and the Class and Sub-Class Members prior to or at the time of Plaintiffs' and the Class and Sub-Class Members' purchase of the Subject Vehicles.

25. For the model years 2007 through 2009, PACCAR vehicles equipped with Cummins ISX15 engines had significant problems with exhaust gas recirculation ("EGR"), the EGR valves, diesel particulate filter ("DPF") systems and other sensors, and other piping and containment components for the Exhaust System, that caused major failures in the engines.

26. Without correcting the known problems with the 2007 through 2009 model year vehicles and engines, Defendants unconscionably and unreasonably designed, manufactured, assembled, marketed and sold the Subject Vehicles with Subject Engines and vehicle diagnostic systems with knowledge and deliberate indifference that the problems with the prior generation of engines had not been corrected.

27. Among other things, at the time of Plaintiffs' purchases, Cummins warranted to Plaintiffs that the Subject Engines would be free from defects in material and workmanship and that in the event a defect manifested, Cummins was obligated to correct the defect. See, for example, Exhibit A.

28. Despite the foregoing representations and warranties, Defendants developed, designed, manufactured, marketed, assembled and sold Subject Vehicles and Subject Engines, that suffered problems and defects known to Defendants and intentionally concealed from Plaintiffs and others, which include but are not limited to:

- a. Persistent manufacturing and assembly and/or design flaws in the Subject Engines' EGR valve assembly hardware as well as controlling sensors or software and EGR coolers that allow for EGR system failures, cause, contribute to, or caused EGR valve leaks, EGR cooler leaks, EGR valve operating failures and electrical connection failures as well as engine fuel injector control sensor or software and actuators, and

turbocharger control system, sensor and software failure.

- b. Persistent manufacturing and assembly and/or design flaws in the Exhaust System DPF, DOC, and SCR causing failures in the doser valve control system, sensors and software and doser valve manifold failures.
- c. Persistent manufacturing and assembly and/or design flaws in the Exhaust System's hydrocarbon doser causing failures in the doser valve, doser valve sensors and software, doser manifold and related sensors, as well as persistent premature cracking, clogging, and plugging. See CK Commercial Vehicle Research, 9-20-10 Best Practice Report.
- d. Other persistent manufacturing and assembly and/or design flaws in the Subject Engines and the Exhaust System causing failures in several sensors, including the exhaust gas pressure sensor, the intake manifold pressure sensor, the EGR temperature sensor, the DPF temperature sensor, the DPF differential pressure sensor, the intake manifold temperature sensor, the oil pressure sensor, the oil temperature sensor, and/or the ambient air pressure sensor.
- e. Other design flaws in the Exhaust System's piping and containment components causing failures in the piping and containment components.

29. Reportedly, owners and operators of tractors with the Subject Engines experienced DPF premature cracking, often before the 200,000 mile interval, at a high rate. Inferentially, the misdesign and/or substandard materials and workmanship in the Exhaust System also cause excessive clogging and plugging, which require repeated and costly de-clogging repairs. Clogging and plugging of the Exhaust System Components, stemming from misdesign and/or substandard materials and workmanship, caused or contributed to failures in the Subject Engines' sensors and Exhaust System. See CK Commercial Vehicle Research, 9-20-10 Best Practice Report.

30. From April 15, 2011, through February 17, 2014, Cummins issued at least seventeen

(17) technical service bulletins (“TSBs”), listing problems with the Subject Engines and Exhaust Systems installed by Defendants in Subject Vehicles like Plaintiffs' Subject Vehicles. These TSBs acknowledge problems, among others, with the DPF (including cracking) and problems with valves and seals elsewhere in the Subject Engines. The TSBs also acknowledge problems with the selective catalytic reduction sensor, problems with thermostats including missing flange seals in the Subject Engines resulting in thermostat failures, problems with the Exhaust System’s crankcase breather system, and/or improper torquing of the fuel pump brace.

31. The Subject Vehicles and Subject Engines had problems and defects which were known to Defendants and intentionally concealed at the time such products were placed in the stream of commerce and/or the time of sale.

32. Defendants failed to publish information or disclose material information which would have affected the purchase of the Subject Vehicles, specifically the problems with Exhaust System and the on-board diagnostic systems, which problems were knowingly concealed by Defendants.

33. Contrary to Defendants' representations, the Subject Engines had problems with materials and workmanship and/or defects in design such that Subject Vehicles repeatedly and frequently broke down, failed to function properly, and failed to function reliably and dependably. The problems and defects resulted in warnings, deratings, and shutdowns, requiring expensive repairs in an effort to remediate the faults and frequent and excessive down times for the Subject Vehicles.

34. Defendants, through their authorized service providers, failed to correct these repeated Exhaust System failures in the Subject Vehicles in spite of repeated and numerous attempts. Defendants knew and intentionally concealed or omitted, at the time of sale and throughout all of the repair efforts that these failures and defects would persist and continue to cause the Subject Engines to break down or otherwise fail.

35. By failing to disclose at the time of sale and by thereafter failing to remedy the Exhaust System failures in the Subject Vehicles with materials, workmanship and/or the design of the



Subject Engines, the Exhaust System, and/or the on-board diagnostics, Defendants have breached their express warranties and statutory warranties, including the warranty of merchantability and the warranty of fitness for a particular purpose.

36. Information regarding Defendants' knowledge, regarding the performance of the 2007 – 2009 Cummins ISX15 Exhaust System failures was concealed and were not corrected in the Subject Vehicles and Subject Engines, which knowledge and information lies within the exclusive control of Defendants, and is otherwise not available to Plaintiffs and the Class and Sub-Class Members. The identity of persons at Defendants who knew about and intentionally concealed the foregoing information lies within the exclusive control of Defendants and the identity of these persons has been has not been revealed to Plaintiffs, the Class or Sub-Class Members, or the public. The factual information set forth in this Third Amended Complaint is principally based on Plaintiffs' and the Class and Sub-Class Members' experiences with their Subject Vehicles, TSBs issued by Defendants that were discovered on the Internet, Plaintiffs' and the Class and Sub-Class Members' conversations with other owners of PACCAR Subject Vehicles and the Subject Engines, industry research reports regarding Defendants' products from 2010 through 2012, other written reviews and complaints of Defendants' Subject Vehicles and Subject Engines, and other publically available information.

#### **PLAINTIFFS' FACTUAL ALLEGATIONS**

37. In reliance upon representations and/or omissions made by Defendants, Plaintiff McDermott was induced to purchase Subject Vehicle(s) on or about the dates indicated:

- a. On or about December 8, 2010, Plaintiff McDermott purchased a new 2011 Peterbilt Series 389 tractor (VIN #1XPXD49X5BD129341) (McDermott Unit #8069) for \$132,800.24 for use in its New Jersey-based business. In August 2014, Plaintiff McDermott traded in the Subject Vehicle for \$73,000.00, an amount significantly lower due to the continued failure history of the Subject Engines.

- b. On or about December 8, 2010, Plaintiff McDermott purchased a new 2011 Peterbilt Series 389 tractor (VIN #1XPXD49X7BD129342) (McDermott Unit #8169) for \$129,848.40 for use in its New Jersey based business. In August 2014, Plaintiff McDermott traded in the Subject Vehicle for \$72,000.00, an amount significantly lower due to the continued failure history of the Subject Engines.
- c. On or about March 29, 2011, Plaintiff McDermott purchased a new 2012 Peterbilt Series 389 tractor (VIN #1XPXD49X6CD136123) (McDermott Unit #8269) for \$130,864.40 for use in its New Jersey-based business. In August 2014, Plaintiff McDermott traded in the Subject Vehicle for \$87,000.00, an amount significantly lower due to the continued failure history of the Subject Engines.
- d. On or about December 8, 2011, Plaintiff McDermott purchased a new 2012 Peterbilt Series 389 tractor (VIN #1XPXD49X4CD139280) (McDermott Unit #8769) for \$138,274.10 for use in its New Jersey-based business. In August 2014, Plaintiff McDermott traded in the Subject Vehicle for \$87,000.00, an amount significantly lower due to the continued failure history of the Subject Engines.
- e. On or about December 8, 2011, Plaintiff McDermott purchased a new 2012 Peterbilt Series 389 tractor (VIN #1XPXD49X6CD139281) (McDermott Unit #8669) for \$138,274.16 for use in its New Jersey-based business. In August 2014, Plaintiff McDermott traded in the Subject Vehicle for \$84,000.00, an amount significantly lower due to the continued failure history of the Subject Engines.

38. In reliance upon representations and/or omissions made by Defendants, Plaintiff DeMase was induced to purchase Subject Vehicle(s) on or about the dates indicated:

- a. On or about December 28, 2011, Plaintiff DeMase purchased a new 2012 Kenworth T800 (VIN #1XKDD49X0CJ329491).
- b. On or about December 28, 2011, Plaintiff DeMase purchased a new 2012 Kenworth T800 (VIN #1XKDD49X2CJ329492).
- c. On or about December 28, 2011, Plaintiff DeMase purchased a new 2012 Kenworth T800 (VIN #1XKDP4EX8CJ329493).
- d. On or about December 28, 2011, Plaintiff DeMase purchased a new 2012 Kenworth T800 (VIN #1XKDD40X2CJ331319).

39. In reliance upon representations and/or omissions made by Defendants, Plaintiff Heavy Weight Enterprises was induced to purchase the following Subject Vehicle(s) on or about the dates indicated:

- a. On or about June 23, 2010, Plaintiff Heavy Weight Enterprises purchased a new 2011 Peterbilt vehicle (VIN #1XPHD49X7BD122279) for Approximately \$126,000.00.

40. In reliance upon representations and/or omissions made by Defendants, Plaintiff P&P was induced to purchase the following Subject Vehicle(s) on or about the dates indicated:

- a. On or about March 15, 2010, Plaintiff P&P purchased a new 2010 Peterbilt vehicle (VIN #1XPXD49X3AD1878) for \$119,056.00.

41. In reliance upon representations and/or omissions made by Defendants, Plaintiff Young's Transport was induced to purchase the following Subject Vehicle(s) on or about the dates indicated:

- a. On or about October 12, 2012, Plaintiff Young's Transport purchased a new 2013 Peterbilt vehicle (VIN #1NPWD49XXDD197840) for \$162,416.80 from Rush Truck Center in Orlando, Florida.
- b. On or about December 17, 2012, Plaintiff Young's Transport purchased a new 2013 Peterbilt (VIN #1NPWD49X2DD184726) for \$163,249.00

from Rust Truck Center in Orlando, Florida.

42. In reliance upon representations and/or omissions made by Defendants, Plaintiff Allen was induced to purchase the following Subject Vehicle(s) on or about the dates indicated:

- a. On or about November 1, 2010, Plaintiff Allen purchased a new 2011 Kenworth vehicle (VIN #1XKWD49X6BJ285875) for \$160,723.40.

43. In reliance upon representations and/or omissions made by Defendants, Plaintiff Vega was induced to purchase the following Subject Vehicle(s) on or about the dates indicated:

- a. On or about December 20, 2013, Plaintiff Vega purchased a new 2014 Peterbilt vehicle (VIN #1XPXD49X2ED222242) for \$132,581.88

44. Plaintiffs' Subject Vehicles experienced repeated and frequent break downs, engine derating and shutdown, DPF plugging, clogging and cracking, and other Exhaust System failures that rendered the Subject Vehicles inoperable and unusable for long periods of time.

45. Plaintiffs would not have purchased vehicles equipped with Subject Engines or not have paid as much for those vehicles had they been aware of the defects in the Exhaust System and the problems said defects would cause.

46. By way of example and not limitation, in or around August 2014, Plaintiff McDermott received a report from Network Fleet Reports, which listed alerts and fault codes for the month of September 2013 for four of Plaintiff McDermott's five Subject Vehicles that are the subject of this lawsuit. The report lists over 1,500 faults notices with regard to these four Subject Vehicles for September, 2013. However, Defendants have not disclosed or provided detailed information concerning fault codes to Plaintiff McDermott.

47. Defendants, through their authorized service providers, have performed warranty repairs on Plaintiffs' Subject Vehicles as well as out-of-warranty repairs. Neither the warranty services provided by Defendants' authorized service providers have not, or cannot, correct the defects in the Exhaust System of the Subject Engines.

48. Defendants' knowing, and intentional omissions, misrepresentations, and

unconscionable practices with regard to the failures of the Subject Engines caused Plaintiffs to suffer substantial ascertainable losses and damages including, but not limited to out-of-pocket costs of repair, towing and lodging costs, rental costs of replacement vehicles, diminished value of the Subject Vehicles, and goodwill.

49. Plaintiffs expected to receive Subject Vehicles and Engines that were at least worth their purchase price, but instead received Subject Vehicles and Engines that were worth significantly less than their purchase price, and had substantially diminished resale value and intrinsic value.

#### **CLASS ACTION ALLEGATIONS**

50. Plaintiffs bring this action on behalf of themselves and all others similarly situated, as members of the classes proposed below, under Federal Rule of Civil Procedure 23. The requirements of subsections (a), (b)(2), and (3) to Rule 23 are met with respect to the Classes and Sub-Classes defined below.

51. Plaintiffs seek to represent, and bring this action on behalf of, the following Classes and sub-classes:

- a. New Jersey Class—All persons and entities, in the State of New Jersey, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a vehicle powered by a Subject Engine. Plaintiffs McDermott and DeMase are members and putative class representatives of the New Jersey Class.
- b. New Jersey PACCAR Sub-Class—All persons and entities, in the State of New Jersey, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a PACCAR vehicle powered by a Subject Engine. Plaintiffs McDermott and DeMase are members and putative class representatives of the New Jersey PACCAR Sub-Class.

- c. California Class—All persons and entities, in the State of California, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a Subject Vehicle powered by a Subject Engine. Plaintiff Vega is a member and putative class representative of the California Class.
- d. California PACCAR Sub-Class—All persons and entities, in the State of California, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a PACCAR vehicle powered by a Subject Engine. Plaintiff Vega is a member and putative class representative of the California PACCAR Sub-Class.
- e. Florida Class—All persons and entities, in the State of Florida, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a vehicle powered by a Subject Engine. Plaintiff Young's Transport is a member and putative class representative of the Florida Class.
- f. Florida PACCAR Sub-Class—All persons and entities, in the State of Florida, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a PACCAR vehicle powered by a Subject Engine. Plaintiff Young's Transport is a member and putative class representative of the Florida PACCAR Sub-Class.
- g. Georgia Class – All persons and entities, in the State of Georgia, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the

vehicles at lease end) of a vehicle powered by a Subject Engine. Plaintiff Allen is a member and putative class representative of the Georgia Class.

- h. Michigan Class—All persons and entities, in the State of Michigan, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a vehicle powered by a Subject Engine. Plaintiff Heavy Weight Enterprises is a member and putative class representative of the Michigan Class.
- i. Connecticut Class—All persons and entities, in the State of Connecticut, who are users, purchasers, subsequent purchasers, owners, subsequent owners, and lessors (having purchased via a TRAC option or some rights to residual purchase of the vehicles at lease end) of a vehicle powered by a Subject Engine. Plaintiff P&P Enterprises is a member and putative class representative of the Connecticut Class.

52. The above proposed classes exclude: (1) any entity in which Defendants have a controlling interest, and its legal representatives, officers, directors, employees, assigns, and successors; (2) the Judge to whom this case is assigned and any member of the Judge's staff or immediate family; (3) Class Counsel; and (4) claims for personal injury and emotional distress.

53. On information and belief, Defendants sold thousands of Subject Vehicles with Subject Engines. Each of these Subject Engines contained a defective Exhaust System. While the precise number and identities of the members of the Classes and Sub-Classes are unknown to Plaintiffs, this information can be ascertained through reasonable discovery diligence and appropriate notice. Given Defendants' sales volume, there will be at least 40 putative class members as to each individual claim asserted by Plaintiffs.

54. Lack of public information regarding the problems with materials and workmanship

and/or design flaws was material to Plaintiffs' and the Class and Sub-Class Members' purchases of the Subject Vehicles with the Subject Engines. Information material to the transaction was knowingly concealed from Plaintiffs and the Class and Sub-Class Members by Defendants.

55. Defendants intended that Plaintiffs and the Class and Sub-Class Members would rely on such knowing and intentional concealments of material information, specifically the problems and defects set forth throughout this pleading, which induced Plaintiffs and the Class and Sub-Class Members to purchase the Subject Vehicles.

56. Had the problems with the substandard materials and workmanship or design defects of the Cummins Exhaust System not been, Plaintiffs and the Class and Sub-Class Members would not have purchased or would have paid less for the Subject Vehicles.

57. There are numerous common questions of law and fact that predominate over any questions affecting only individual members of the Classes and Sub-Classes. Among these common questions of law and fact are the following:

- a. Whether the Subject Vehicles with the Subject Engines, and specifically the Exhaust System, was incapable of reliable operation without repeated failure, and or could not be properly coerced with warranty or post warranty repair.
- b. Whether Defendants breached their warranty obligations;
- c. Whether Defendants violated their statutory consumer protection obligations;
- d. Whether Defendants knew the Exhaust System was defective;
- e. When Defendants learned that the Exhaust System was defective;
- f. Whether Defendants knew that the Exhaust System would not operate as represented reliably for the expected life of the Subject Vehicles and with the Subject Engines.
- g. Whether Defendants failed to disclose the defect in the Exhaust System;
- h. Whether the defect diminished the value of the Subject Vehicles equipped with the Exhaust System;
- i. Whether Plaintiffs and the members of the Classes and Sub-Classes have suffered



damages as a result of the conduct alleged herein, and if so, the measure of such damage.

58. The claims of Plaintiffs are typical of the Class and Sub-Class Members' claims. As described herein, Defendants uniformly violated consumer protection statutes by manufacturing, assembling, marketing and selling Subject Vehicles with the Subject Engines with knowledge and deliberate indifference that the problems with the prior generation of engines had not been corrected.

59. Moreover, Cummins expressly warranted to Plaintiffs and the Class and Sub-Class Members that the Subject Engines would be free from defects and that, in the event of a defect, it would repair and correct the defect. Cummins uniformly breached its express warranty to Plaintiffs and Class and Sub-Class Members by failing to repair and correct the defect.

60. The Subject Vehicles failed, malfunctioned, and were defective in a manner about which, upon information and belief, Defendants knew and in a manner in which Cummins and PACCAR failed to fix all the while knowing that in fact the warranty and post warranty repairs were not correcting the defects in the Exhaust System off the Subject Engines.

61. Plaintiffs, like all Class and Sub-Class Members, purchased and/or leased the Subject Vehicles in which the Subject Engines were defective. Plaintiffs, like all Class and Sub-Class Members, have been damaged by Defendants' misconduct. Additionally, the factual bases of Defendants' misconduct are common.

62. Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs' interests coincide with and are not antagonistic to the Class Members' interests. Plaintiffs have retained counsel experienced and competent in complex, commercial, multi-party, consumer, and class action litigation. Plaintiffs' counsel has litigated complex class actions in state and federal courts across the Country.

**NEW JERSEY COUNTS**

**Count 1: VIOLATIONS OF NEW JERSEY CONSUMER FRAUD ACT  
(Against Cummins on behalf of the New Jersey Class and against Cummins and PACCAR on  
behalf of the New Jersey PACCAR Sub-Class)  
(N.J.S.A. 56:8-1, et seq.)**

63. Plaintiffs McDermott and DeMase incorporate the allegations set forth above as if fully set forth herein.

64. Plaintiffs McDermott and DeMase and Defendants are “persons” within the meaning of the New Jersey Consumer Fraud Act (the “NJCFA”), and Defendants’ conduct described herein with regard to Plaintiffs is within the scope of the NJCFA.

65. The Subject Vehicles, Subject Engines, the Exhaust System, and/or the on-board diagnostic systems are “merchandise” within the meaning of the NJCFA.

66. At all relevant times material hereto, Defendants conducted trade and commerce in New Jersey within the meaning of the NJCFA.

67. Before purchasing the Subject Vehicles, Plaintiff McDermott obtained literature regarding the Peterbilt Series 389 tractors with the Cummins ISX15 engine and with respect to its engine and emissions controls. Likewise, before purchasing the Subject Vehicles, Plaintiff DeMase obtained literature regarding the Kenworth T800 tractors with the Cummins ISX15 engine and with respect to its engine and emission controls.

68. Among other things, Plaintiffs McDermott and DeMase were led to believe that the Subject Vehicles with the Cummins ISX15 engine would, with appropriate maintenance, perform reliably and cost effectively for the expected useful life of the vehicle, and would provide increased fuel efficiency, power and lower maintenance costs.

69. Among other things, Defendants’ specifications call for the following maintenance intervals:

- a. Fuel Filter at 25,000 miles
- b. Coolant Filters at 50,000 miles
- c. Valve Adjustment at 500,000 miles
- d. Diesel Exhaust Fluid Filters at 200,000 miles

70. Defendants developed, designed, engineered, manufactured, assembled, marketed and sold Subject Vehicles with the Subject Engines that included an engine Exhaust System and electronic on-board diagnostic systems to monitor and control all aspects of safety, emissions and performance of the Subject Engines.

71. Defendants' unconscionable practices, knowing and intentional concealments and omissions of material information, and misrepresentations violated the NJCFA as described throughout this Second Amended Complaint and for the following reasons:

- a. Defendants knowingly and intentionally omitted or concealed from Plaintiffs McDermott and DeMase at the time of sale and other times the material facts that the Subject Vehicles, Subject Engines and Exhaust System and their on-board diagnostic systems had a history of repeated system failures, and as such, the Subject Vehicles, Subject Engines, Exhaust Systems and their on-board diagnostic systems were not of merchantable quality or fit for their ordinary and intended purpose, were not worth their purchase price, and would otherwise suffer engine failures;
- b. Defendants engaged in unconscionable and/or deceptive commercial practices by placing the Subject Vehicles, Subject Engines, Exhaust Systems and their on-board diagnostic systems in the stream of commerce with malicious knowledge and intentional indifference that similar problems with substandard materials and workmanship and design defects with the 2007 through 2009 generation of EPA-compliant engines had not been corrected, and knowingly and intentionally concealed those problems.
- c. Defendants misrepresented and mislead customers including Plaintiffs McDermott and DeMase to believe that the Subject Vehicles, Subject Engines, Exhaust Systems and their on-board diagnostic systems were engineered to run, with appropriate maintenance, without problems for 1,000,000 miles, that the DPF would not require

maintenance until the 200,000 miles, that they are durable and dependable, and/or that they would otherwise be free from defects in material and workmanship and/or design at the time of sale and would operate without problems.

72. Plaintiffs McDermott and DeMase and the New Jersey Class sustained ascertainable losses and damages caused by Defendants' malicious, knowing and intentional omissions, misrepresentations, and unconscionable practices including but not limited to diminution of value of the Subject Vehicles including diminished re-sale and trade in value as set forth, supra. Plaintiffs McDermott and DeMase and the New Jersey Class also sustained ascertainable losses and damages including out-of-pocket losses including post-limited warranty repairs, rentals of replacement vehicles, loss of use of the Subject Vehicles, towing, rental and other expenses, loss of sales and loss of good will. Plaintiff McDermott's out-of-pocket expenses for post-limited warranty repairs to the Subject Engines and Exhaust Systems on all five of its Subject Vehicles alone exceed \$80,000.00.

**Count 2: BREACH OF EXPRESS WARRANTY  
(Against Cummins on behalf of the New Jersey Class)**

73. Plaintiffs McDermott and DeMase incorporate the allegations set forth above as if fully set forth herein.

74. Cummins had certain obligations under N.J.S.A. § 12A:2-313 to conform the Subject Vehicles, Subject Engines, Exhaust Systems, and on-board diagnostic systems to the express warranties.

75. When Plaintiffs McDermott and DeMase purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust Systems and their on-board diagnostic systems were free from defects in material and workmanship.

76. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

77. Cummins also expressly warranted that the Subject Engines, Exhaust System and their on-board diagnostic systems in the Subject Vehicles were engineered to run without

problems for at least 250,000 miles.

78. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer Q &A, © Cummins, Inc., dated March 2009.

79. Cummins did not provide disclosure about the problems and defects set forth in this Amended Complaint, which were known to Defendants at the time of sale to Plaintiffs McDermott and DeMase and the New Jersey Class. Cummins' warranties are unenforceable and unconscionable for this reason. As a result, Plaintiffs McDermott and DeMase and the New Jersey Class did not receive the Subject Engines expressly warranted by Cummins.

80. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiffs McDermott and DeMase and the New Jersey Class.

81. Cummins further breached their warranties by delivering Subject Engines with problems that were worth less to Plaintiffs McDermott and DeMase and the New Jersey Class than the Subject Engines promised and warranted by Defendants. Plaintiffs McDermott and DeMase and the New Jersey Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

82. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

83. Cummins, through its authorized service providers, has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Second Amended Complaint, has voided any attempt on its part to disclaim liability for its actions.

84. Plaintiffs McDermott and DeMase and the New Jersey Class used the Subject

Vehicles in a manner consistent with their intended use and performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins unconscionable and/or fraudulent conduct set forth throughout this Third Amended Complaint.

85. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

86. Any attempt by Cummins to limit Plaintiffs McDermott's and DeMase's and the New Jersey Class's legal rights or remedies by relying on the agreements signed by Plaintiffs McDermott and DeMase and the New Jersey Class is improper based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for the problems and defect at issue is null and void based on Cummins' deceptive and/or fraudulent conduct prior to and after Plaintiffs McDermott's and DeMase's and the New Jersey Class's purchase of the Subject Vehicles.

87. Plaintiffs McDermott and DeMase and the New Jersey Class suffered damages caused by Cummins' breach of the express warranties and are entitled to recover damages as set forth herein, including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of Plaintiffs McDermott's and DeMase's and the New Jersey Class's Subject Engines, loss of use, as well as the monies spent and to be spent to repair and/or replace its Subject Engines.

### **CALIFORNIA COUNTS**

#### **Count 3—Breach of Express Warranty (Against Cummins on behalf of the California Class)**

88. Plaintiff Vega and the California Class incorporate the allegations set forth above as if fully set forth herein.

89. As an express warrantor and manufacturer and merchant, Defendants had certain obligations under California Commercial Code § 2313 to conform the Subject Engines and Exhaust System to the express warranties.

90. When Plaintiff Vega and the California Class purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust System and their on-board diagnostic systems were free from defects in material and workmanship.

91. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

92. Cummins also expressly warranted that the Subject Engines, Exhaust Systems and their on-board diagnostic systems in the Subject Vehicles were engineered to run without problems for at least 250,000 miles.

93. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer Q &A, © Cummins, Inc., dated March 2009.

94. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiff Vega and the California Class.

95. Cummins further breached its warranties by delivering Subject Engines with problems that were worth less to Plaintiff Vega and the California Class than the Subject Engines promised and warranted by Defendants. Plaintiff Vega and the California Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

96. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

97. Cummins, through its authorized service providers has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Complaint, has voided any attempt on its part to disclaim liability for its actions.

98. Plaintiff Vega and the California Class used the Subject Vehicles in a manner consistent with their intended use and performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins' unconscionable and/or fraudulent conduct set forth throughout this Complaint.

99. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

100. Any attempt by Cummins to limit Plaintiff Vega's and the California Class's legal rights or remedies by relying on the agreements signed by Plaintiff Vega and the California Class is improper based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for the problems and defect at issue is null and void based on Cummins' deceptive and/or fraudulent conduct prior to and after Plaintiff Vega's and the California Class's purchase of the Subject Vehicles.

101. Plaintiff suffered damages caused by Cummins' breach of the express warranties and is entitled to recover damages as set forth herein, including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of Plaintiff's Subject Engines, loss of use, as well as the monies spent and to be spent to repair and/or replace its Subject Engines.

**Count 4—Violation of the California Unfair Competition Law  
(Against Cummins on behalf of the California Class and against Cummins and PACCAR on  
behalf of the California PACCAR Sub-Class )**

102. Plaintiff Vega and the California Class incorporate the allegations set forth above as if fully set forth herein.

103. California Business and Professions Code § 17200, the Unfair Competition Law, prohibits any "unlawful, unfair, or fraudulent business act or practices." Defendants have engaged in unlawful, fraudulent, and unfair business acts and practices in violation of this Law.

104. Defendants have violated the unlawful prong of § 17200 by its violations as set forth below.



105. Defendants have violated the fraudulent prong of § 17200 because the omissions regarding the defective nature of the Subject Engines and its Exhaust System, as set forth in this Complaint, were likely to deceive a reasonable consumer, and the information would be material to a reasonable consumer.

106. Defendants have violated the unfair prong of § 17200 because the acts and practices set forth in the Complaint, including the manufacture and sale of the defective Subject Engine and its defective Exhaust System, Defendants' failure to adequately disclose and remedy that defect, and Defendants' misrepresentations regarding the defective nature of the Subject Engine and its Exhaust System, and the fact that Defendants knew that they could not remedy the repeated Exhaust System failures, warnings, de-rating and shut downs in spite of repeated warranties and post warranty repairs offend established public policy, and because the harm these acts and practices cause to consumers greatly outweighs any benefits associated with those practices.

107. Defendants' conduct has also impaired competition within the heavy duty on-highway vehicles market and has prevented Plaintiff Vega and the California Class from making fully informed decisions about whether to purchase or lease vehicles equipped with the Subject Engines and/or the price to be paid to purchase or lease those vehicles.

108. Vega has standing to pursue this claim on behalf of the California Class because he has suffered an injury-in-fact, including the loss of money or property, as a result of and in reliance on Defendants' unfair, unlawful, and deceptive practices. As set forth above, had Defendants disclosed the defect with the Subject Engine and its Exhaust System prior to his purchase, Plaintiff Vega would not have purchased the Subject Vehicle equipped with the Subject Engine or not have paid as much for the Subject Vehicle. In addition, Plaintiff Vega has expended money related to the engine defect and has suffered a diminution in value of his Subject Vehicle.

109. All of the wrongful conduct alleged herein occurred, and continues to occur, in

the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated in the State of California.

110. Plaintiff Vega and the California Class request that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiff Vega and the California Class any money Defendants acquired by unfair competition, including restitution and/or restitutionary disgorgement, as provided in California Business and Professions Code § 17203 and California Civil Code § 3345, and for such other relief set forth below.

**FLORIDA COUNTS**

**Count 5—Breach of Express Warranty  
(Against Cummins on behalf of the Florida Class)**

111. Plaintiff Young's Transport and the Florida Class incorporate the allegations set forth above as if fully set forth herein.

112. As an express warrantor and manufacturer and merchant, Cummins had certain obligations under § 672.313, Florida Statutes, to conform the Subject Engines and their Exhaust System to the express warranties.

113. When Plaintiff Young's Transport and the Florida Class purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust Systems and their on-board diagnostic systems were free from defects in material and workmanship.

114. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

115. Cummins also expressly warranted that the Subject Engines, Exhaust Systems and their on-board diagnostic systems in the Subject Vehicles were engineered to run without problems for at least 250,000 miles.

116. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer

Q & A, © Cummins, Inc., dated March 2009.

117. Cummins did not provide disclosure about the problems and defects set forth in this Third Amended Complaint, which were known to Defendants at the time of sale to Plaintiff Young's Transport and the Florida Class. Cummins' warranties are unenforceable and unconscionable for this reason. As a result, Plaintiff Young's Transport and the Florida Class did not receive the Subject Engines expressly warranted by Cummins.

118. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiff Young's Transport and the Florida Class.

119. Cummins further breached their warranties by delivering Subject Engines with problems that were worth less to Plaintiff Young's Transport and the Florida Class than the Subject Engines promised and warranted by Defendants. Plaintiff Young's Transport and the Florida Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

120. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

121. Cummins, through its authorized service providers has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Complaint, has voided any attempt on its part to disclaim liability for its actions.

122. Plaintiff Young's Transport and the Florida Class used the Subject Vehicles in a manner consistent with their intended use and has performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins' unconscionable and/or fraudulent conduct set forth throughout

this Complaint.

123. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

124. Any attempt by Cummins to limit Plaintiff Young's Transport's and the Florida Class's legal rights or remedies by relying on the agreements signed by Plaintiff Young's Transport and the Florida Class is improper based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for the problems and defect at issue is null and void based on Cummins' deceptive and/or fraudulent conduct prior to and after Plaintiff Young's Transport's and the Florida Class's purchase of the Subject Vehicles.

125. Plaintiff Young's Transport and the Florida Class suffered damages caused by Cummins' breach of the express warranties and is entitled to recover damages as set forth herein, including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of Plaintiff the Subject Engines, loss of use, as well as the monies spent and to be spent to repair and/or replace its Subject Engines.

**Count 6—Violation of Florida's Unfair and Deceptive Trade Practices Act  
(Against Cummins on behalf of the Florida Class and against Cummins and PACCAR on behalf  
of the Florida PACCAR Sub-Class )**

126. Plaintiff Young's Transport and the Florida Class incorporate the allegations set forth above as if fully set forth herein.

127. Defendants' business acts and practices alleged herein constitute unfair, unconscionable and/or deceptive methods, acts or practices under the Florida Unfair and Deceptive Trade Practices Act, § 501.201, *et seq.*, Florida Statutes ("FUDTPA").

128. At all relevant times, Plaintiff Young's Transport and the Florida Class were "consumers" within the meaning of the FUDTPA. § 501.203(7), Fla. Stat.

129. Defendants' conduct, as set forth herein, occurred in the conduct of "trade or commerce" in the state of Florida, within the meaning of the FUDTPA. § 501.203(8), Fla. Stat.

Young's Transport's decision to purchase the Subject Vehicles and the actual purchase of the Subject Vehicles was made in Florida.

130. The practices of Defendants, described above, violate the FUDTPA for, *inter alia*, one or more of the following reasons:

- a. Defendants represented that goods or services have sponsorship, approval, characteristics, uses, and benefits that they do not have;
- b. Defendants provided, disseminated, marketed, and otherwise distributed uniform false and misleading advertisements, technical data and other information to consumers regarding the performance, reliability, quality and nature of the Subject Engines and their Exhaust System;
- c. Defendants represented that goods or services were of a particular standard, quality, or grade, when they were of another;
- d. Defendants engaged in unconscionable commercial practices in failing to reveal material facts and information about the Subject Engine, which did, or tended to, mislead Plaintiff Young's Transport and the Florida Class about facts that could not reasonably be known by the consumer;
- e. Defendants failed to reveal facts that were material to the transactions in light of representations of fact made in a positive manner;
- f. Defendants caused Plaintiff Young's Transport and the Florida Class to suffer a probability of confusion and a misunderstanding of legal rights, obligations, and/or remedies by and through its conduct;
- g. Defendants failed to reveal material facts to Plaintiff Young's Transport and the Florida Class with the intent that Plaintiff Young's Transport and the Florida Class members rely upon the omission;
- h. Defendants made material representations and statements of fact to Plaintiff Young's Transport and the Florida Class members that resulted in Plaintiff

Young's Transport and the Florida Class reasonably believing the represented or suggested state of affairs to be other than what they actually were;

- i. Defendants intended that Plaintiff Young's Transport and the Florida Class rely on their misrepresentations and omissions, so that Plaintiff Young's Transport and the Florida Class would purchase vehicles equipped with the Subject Engines.

131. Defendants' actions impact the public interest because Plaintiff Young's Transport and the Florida Class were injured in exactly the same way as thousands of others purchasing and/or leasing the vehicles with Subject Engines as a result of and pursuant to Defendants' generalized course of deception.

132. Had Plaintiff Young's Transport and the Florida Class known of the defective nature of the Subject Engines, they would not have purchased or leased vehicles equipped with the Subject Engines or would have paid less for them.

133. The foregoing acts, omissions and practices took place in the state of Florida, and proximately caused Plaintiff Young's Transport and the Florida Class to suffer actual damages in the form of, *inter alia*, diminution in value of the vehicles equipped with Subject Engines, and are entitled to recover such damages, together with all other appropriate damages, attorneys' fees and costs of suit.

#### **GEORGIA COUNTS**

##### **Count 7—Breach of Express Warranty (Against Cummins on behalf of the Georgia Class)**

134. Plaintiff Allen and the Georgia Class incorporate the allegations set forth above as if fully set forth herein.

135. As an express warrantor and manufacturer and merchant, Cummins had certain obligations under Ga. Code Ann., § 11-2-313, to conform the Subject Engines and their Exhaust Systems to the express warranties.

136. When Plaintiff Allen and the Georgia Class purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust System

and their on-board diagnostic systems were free from defects in material and workmanship.

137. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

138. Cummins also expressly warranted that the Subject Engines, Exhaust System and their on-board diagnostic systems in the Subject Vehicles were engineered to run without problems for at least 250,000 miles.

139. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer Q &A, © Cummins, Inc., dated March 2009.

140. Cummins did not provide disclosure about the problems and defects set forth in this Amended Complaint, which were known to Defendants at the time of sale to Plaintiff Allen and the Georgia Class. Cummins' warranties are unenforceable and unconscionable for this reason. As a result, Plaintiff Allen and the Georgia Class did not receive the Subject Engines expressly warranted by Cummins.

141. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiff Allen and the Georgia Class.

142. Cummins further breached their warranties by delivering Subject Engines with problems that were worth less to Plaintiff Allen and the Georgia Class than the Subject Engines promised and warranted by Defendants. Plaintiff Allen and the Georgia Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

143. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

144. Cummins, through its authorized service providers has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Complaint, has voided any attempt on its part to disclaim liability for its actions.

145. Plaintiff Allen and the Georgia Class used the Subject Vehicles in a manner consistent with their intended use and have performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins unconscionable and/or fraudulent conduct set forth throughout this Complaint.

146. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

147. Any attempt by Cummins to limit Plaintiff Allen's and the Georgia Class's legal rights or remedies by relying on the agreements signed by Plaintiff Allen and the Georgia Class is unconscionable based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for the problems and defect at issue is null and void based on Cummins' unconscionable, deceptive and/or fraudulent conduct prior to and after Plaintiff Allen's and the Georgia Class's purchase of the Subject Vehicles.

148. Plaintiff Allen and the Georgia Class suffered damages caused by Cummins' breach of the express warranties and are entitled to recover damages as set forth herein, including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of the Subject Vehicles, loss of use, as well as the monies spent and to be spent to repair and/or replace their Subject Engines.

**MICHIGAN COUNTS**  
**Count 8—Breach of Express Warranty**  
**(Against Cummins on behalf of the Michigan Class)**

149. Plaintiff Heavy Weight Enterprises and the Michigan Class incorporate the allegations set forth above as if fully set forth herein.



150. As an express warrantor and manufacturer and merchant, Cummins had certain obligations under Michigan UCC § 440.2313 to conform the Subject Engines and their Exhaust System to the express warranties.

151. When Plaintiff Heavy Weight Enterprises and the Michigan Class purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust System and their on-board diagnostic systems were free from defects in material and workmanship.

152. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

153. Cummins also expressly warranted that the Subject Engines, Exhaust Systems and their on-board diagnostic systems in the Subject Vehicles were engineered to run without problems for at least 250,000 miles.

154. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer Q &A, © Cummins, Inc., dated March 2009.

155. Cummins did not provide disclosure about the problems and defects set forth in this Amended Complaint, which were known to Defendants at the time of sale to Plaintiff Heavy Weight Enterprises and the Michigan Class. Cummins' warranties are unenforceable and unconscionable for this reason. As a result, Plaintiff Heavy Weight Enterprises and the Michigan Class did not receive the Subject Engines expressly warranted by Cummins.

156. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiff Heavy Weight Enterprises and the Michigan Class.

157. Cummins further breached their warranties by delivering Subject Engines with problems that were worth less to Plaintiff Heavy Weight Enterprises and the Michigan Class than the Subject Engines promised and warranted by Defendants. Plaintiff Heavy Weight Enterprises and

the Michigan Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

158. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

159. Cummins, through its authorized service providers has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Complaint, has voided any attempt on its part to disclaim liability for its actions.

160. Plaintiff Heavy Weight Enterprises and the Michigan Class used the Subject Vehicles in a manner consistent with their intended use and has performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins' unconscionable and/or fraudulent conduct set forth throughout this Complaint.

161. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

162. Any attempt by Cummins to limit Plaintiff Heavy Weight Enterprises' and the Michigan Class's legal rights or remedies by relying on the agreements signed by Plaintiff Heavy Weight Enterprises and the Michigan Class is improper based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for the problems and defect at issue is null and void based on Cummins' deceptive and/or fraudulent conduct prior to and after Plaintiff Heavy Weight Enterprises' and the Michigan Class's purchase of the Subject Vehicles.

163. Plaintiff Heavy Weight Enterprises and the Michigan Class suffered damages caused by Cummins' breach of the express warranties and are entitled to recover damages as set forth herein,

including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of the Subject Engines, loss of use, as well as the monies spent and to be spent to repair and/or replace their Subject Engines.

**CONNECTICUT COUNTS**  
**Count 9—Breach of Express Warranty**  
**(Against Cummins on behalf of the Connecticut Class)**

164. Plaintiff P&P and the Connecticut Class incorporate the allegations set forth above as if fully set forth herein.

165. As an express warrantor and manufacturer and merchant, Cummins had certain obligations under C.G.S.A. § 52-572m, et. seq. to conform the Subject Engines and their ExhaustSystem to the express warranties.

166. When Plaintiff P&P and the Connecticut Class purchased the Subject Vehicles, Cummins expressly warranted under the warranties that the Subject Engines and the Exhaust System and their on-board diagnostic systems were free from defects in material and workmanship.

167. Cummins provides a base engine warranty against defects in material and workmanship for 2 years, 250,000 miles, or 6,250 hours of operation, whichever occurred first.

168. Cummins also expressly warranted that the Subject Engines, Exhaust System and their on-board diagnostic systems in the Subject Vehicles were engineered to run without problems for at least 250,000 miles.

169. Cummins further warranted the Subject Vehicles' DPF would operate without replacement for 200,000 miles. See Cummins 2010 Heavy-Duty and MidRange Products Customer Q &A, © Cummins, Inc., dated March 2009.

170. Cummins did not provide disclosure about the problems and defects set forth in this Amended Complaint, which were known to Defendants at the time of sale to Plaintiff P&P and the Connecticut Class. Cummins' warranties are unenforceable and unconscionable for this reason. As a result, Plaintiff P&P and the Connecticut Class did not receive the Subject Engines expressly warranted by Cummins.

171. Cummins breached its warranties by placing the Subject Engines into the stream of commerce with knowledge and malicious indifference that same had the problems and defects set forth herein at the time of sale to Plaintiff P&P and the Connecticut Class.

172. Cummins further breached their warranties by delivering Subject Engines with problems that were worth less to Plaintiff P&P and the Connecticut Class than the Subject Engines promised and warranted by Defendants. Plaintiff P&P and the Connecticut Class paid for Subject Vehicles that were supposed to contain Subject Engines free from defects but received vehicles that were worth the equivalent of Subject Vehicles that did not contain those components.

173. Cummins further breached its express warranties because it did not cover the expenses associated with replacing the defective materials and workmanship in the Subject Engines. Cummins further breached these express warranties because the replacement parts used in the repairs suffered from the same substandard materials and workmanship.

174. Cummins, through its authorized service providers has failed and refused to conform the Subject Engines to the express warranties and Cummins' conduct, as set forth throughout this Complaint, has voided any attempt on its part to disclaim liability for its actions.

175. Plaintiff P&P and the Connecticut Class used the Subject Vehicles in a manner consistent with their intended use and have performed all duties required under the terms of the warranties, except as may have been excused or prevented by the conduct of Cummins or by operation of law in light of Cummins' unconscionable and/or fraudulent conduct set forth throughout this Complaint.

176. Cummins received timely notice regarding the problems at issue in this litigation and, notwithstanding such notice, have failed and refused to offer an effective remedy.

177. Any attempt by Cummins to limit Plaintiff P&P's and the Connecticut Class's legal rights or remedies by relying on the agreements signed by Plaintiff P&P and the Connecticut Class is unconscionable based on Cummins' malicious, knowing and intentional concealment of the problems and defects prior to the sales, and any such effort to disclaim or otherwise limit liability for

the problems and defect at issue is null and void based on Cummins' unconscionable, deceptive and/or fraudulent conduct prior to and after Plaintiff P&P's and the Connecticut Class's purchase of the Subject Vehicles.

178. Plaintiff P&P and the Connecticut Class suffered damages caused by Cummins' breach of the express warranties and are entitled to recover damages as set forth herein, including the loss attributable to the value of the Subject Vehicles promised to the value of those received, the loss attributable to the diminished value of the Subject Engines, loss of use, as well as the monies spent and to be spent to repair and/or replace their Subject Engines.

### **REQUESTS FOR RELIEF**

**WHEREFORE**, Plaintiffs and the Class and Sub-Class Members request judgment as follows:

- I. Awarding all damages requested in the Complaint including direct, compensatory, consequential and incidental damages;
- II. Awarding treble damages, attorneys' fees, costs and all other remedies provided by the New Jersey Consumer Fraud Act and other law;
- III. Awarding pre- and post-judgment interest;
- IV. Awarding attorneys' fees, costs, and disbursements in this action;
- V. Certifying the Classes and Sub-classes, as identified, appointing the named Plaintiffs as Class Representatives and their counsel as Class Counsel; and
- VI. Awarding such other relief as the Court deems just and proper.

### **DEMAND FOR JURY TRIAL**

Plaintiffs and the Class and Sub-Class Members hereby demand a trial by jury as to all issues so triable.

**MCELROY, DEUTSCH, MULVANEY,  
& CARPENTER, LLP**

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Dated: September 6, 2016

**CERTIFIED PURSUANT TO L. CIV. R. 11.2**

Pursuant to Local Civil Rule 11.2, Plaintiffs and the Class and Sub-Class Members hereby state that the matter in controversy not is subject of any other action pending in any court, arbitration proceeding, or other proceeding. Plaintiffs' and the Class and Sub-Class Members' counsel is not aware of any other parties who need to be joined in the above action.

**MCELROY, DEUTSCH, MULVANEY,  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 6, 2016, I caused the foregoing to be filed with the clerk of the Court using the CM/ECF filing system and, by so doing, served all counsel of record electronically.

/s/James M. Mulvaney  
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Dated: September 6, 2016



# **Exhibit A**

# Cummins Warranty

ISX11.9 And ISX15 Series Engines For EPA 2010  
United States And Canada  
Automotive

# Coverage

## Products Warranted

This Warranty applies to new EPA 2010 ISX11.9 and ISX15 Series Engines sold by Cummins Inc. and delivered to the first user on or after October 1, 2009, that are used in automotive on-highway applications in the United States\* and Canada, except for Engines used in bus and coach, recreational vehicle, fire apparatus/crash truck, applications for which different Warranty is provided.

## Base Engine Warranty

The Base Engine Warranty covers any failures of the Engine which result, under normal use and service, from defects in Cummins material or factory workmanship (Warrantable Failure). This Coverage begins with the sale of the Engine by Cummins and ends two years or 250,000 miles (402,336 kilometers) or 6,250 hours of operation, whichever occurs first, after the date of delivery of the Engine to the first user.

Engine aftertreatment components included in the Cummins Critical Parts List (CPL) and marked with a Cummins part number are covered under Base Engine Warranty.

Additional Coverage is outlined in the Emission Warranty section.

**These Warranties are made to all Owners in the chain of distribution and Coverage continues to all subsequent Owners until the end of the periods of Coverage.**

# Cummins Responsibilities

Cummins will pay for all parts and labor needed to repair the damage to the Engine resulting from a Warrantable Failure.

Cummins will pay for the lubricating oil, antifreeze, diesel exhaust fluid, filter elements, belts, hoses and other maintenance items that are not reusable due to a Warrantable Failure.

Cummins will pay for reasonable labor costs for Engine removal and reinstallation when necessary to repair a Warrantable Failure.

Cummins will pay reasonable costs for towing a vehicle disabled by a Warrantable Failure to the nearest authorized repair location. In lieu of the towing expense, Cummins will pay reasonable costs for mechanics to travel to and from the location of the

vehicle, including meals, mileage and lodging, when the repair is performed at the site of the failure.

# Owner Responsibilities

Owner is responsible for the operation and maintenance of the Engine as specified in the applicable Cummins Operations and Maintenance Manual. Owner is also responsible for providing proof that all recommended maintenance has been performed.

Before the expiration of this Coverage, Owner must notify a Cummins distributor, authorized dealer or other repair location approved by Cummins of any Warrantable Failure and make the Engine available for repair by such facility. Except for Engines disabled by a Warrantable Failure during the Base Engine Warranty period, Owner must also deliver the Engine to the repair facility.

Service locations are listed on the Cummins Worldwide Service Locator at [cummins.com](http://cummins.com).

Owner is responsible for the cost of lubricating oil, antifreeze, diesel exhaust fluid, filter elements and other maintenance items provided during Warrantable repairs unless such items are not reusable due to the Warrantable Failure.

Owner is responsible for communication expenses, meals, lodging and similar costs incurred as a result of a Warrantable Failure.

Owner is responsible for non-Engine repairs, "downtime" expenses, cargo damage, fines, all applicable taxes, all business costs and other losses resulting from a Warrantable Failure.

# Limitations

Engines with an emissions certification listed below must be operated using only diesel fuel having no more than the corresponding maximum sulfur content. Failure to use the specified fuel (see also Cummins Fuel Bulletin #3379001) can damage the Engine and aftertreatment system within a short period of time. This damage could cause the Engine to become inoperable and failures attributable to the use of incorrect fuels will be denied Warranty Coverage.

Maximum sulfur levels by emissions certification level as listed on the Engine's dataplate are:

|                            |                           |
|----------------------------|---------------------------|
| EPA 2007                   | max. 15 parts per million |
| EPA 2010                   | max. 15 parts per million |
| EPA Tier 4 Interim / Final | max. 15 parts per million |
| EU Stage IIIB 2011         | max. 15 parts per million |
| Euro 4/5                   | max. 50 parts per million |

Cummins is not responsible for failures or damage resulting from what Cummins determines to be abuse or neglect, including, but not limited to: operation without adequate coolants or lubricants; overfueling; overspeeding; lack of maintenance of lubricating, cooling or intake systems; improper storage, starting, warm-up, run-in or shutdown practices; unauthorized modifications of the Engine.

Any unauthorized modifications to the aftertreatment could negatively effect emissions certification and void Warranty.

Cummins is also not responsible for failures caused by incorrect oil, fuel or diesel exhaust fluid or by water, dirt or other contaminants in the fuel, oil or diesel exhaust fluid.

This Warranty does not apply to accessories supplied by Cummins which bear the name of another company. Such non-warranted accessories include, but are not limited to: alternators, starters, fans, air conditioning compressors, clutches, filters, transmissions, torque converters, steering pumps and non-Cummins fan drives, Engine compression brakes and air compressors.

Failures resulting in excessive oil consumption are not covered beyond the Base Engine Warranty. Before a claim for excessive oil consumption will be considered, Owner must submit adequate documentation to show that consumption exceeds Cummins published standards.

Failures of belts and hoses supplied by Cummins are not covered beyond the first year from the date of delivery of the Engine to the first user or the duration of the Warranty, whichever occurs first.

Parts used to repair a Warrantable Failure may be new Cummins parts, Cummins approved rebuilt parts or repaired parts. Cummins is not responsible for failures resulting from the use of parts not approved by Cummins.

A new Cummins or Cummins approved rebuilt part used to repair a Warrantable Failure assumes the identity of the part it replaced and is entitled to the remaining Coverage hereunder.

Cummins Inc. reserves the right to interrogate Electronic Control Module (ECM) data for purposes of failure analysis.

CUMMINS DOES NOT COVER WEAR OR WEAROUT OF COVERED PARTS.

CUMMINS IS NOT RESPONSIBLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.

THIS WARRANTY AND THE EMISSION WARRANTY SET FORTH HEREINAFTER ARE THE SOLE WARRANTIES MADE BY CUMMINS IN REGARD TO THESE ENGINES. CUMMINS MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OR OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

This Warranty gives you specific legal rights, and you may also have other rights which vary from state to state or province to province.

## Emission Warranty

### Products Warranted

This Emission Warranty applies to new EPA 2010 ISX11.9 and ISX15 Series Engines marketed by Cummins that are used in the United States\* in vehicles designed for transporting persons or property on a street or highway. This Warranty applies to Engines delivered to the first user on or after October 1, 2009.

### Coverage

Cummins warrants to the first user and each subsequent purchaser that the Engine is designed, built and equipped so as to conform at the time of sale by Cummins with all U.S. Federal emission regulations applicable at the time of manufacture and that it is free from defects in Cummins material or factory workmanship which would cause it not to meet these regulations within the longer of the following periods: (A) Five years or 100,000 miles (160,935 kilometers), or 3,000 hours of operation, whichever occurs first, as measured from the date of delivery of the Engine to the first user or (B) The Base Engine Warranty.

If the vehicle in which the Engine is installed is registered in the state of California, a separate California Emission Warranty also applies.

### Limitations

Engines with an emissions certification listed below must be operated using only diesel fuel having no more than the corresponding maximum sulfur content. Failure to use the specified fuel (see also Cummins Fuel Bulletin #3379001) can damage the Engine and aftertreatment system within a short period of time. This damage could cause the Engine to become

inoperable and failures attributable to the use of incorrect fuels will be denied Warranty Coverage.

**Maximum sulfur levels by emissions certification level as listed on the Engine's dataplate are:**

|                            |                           |
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| EPA 2007                   | max. 15 parts per million |
| EPA 2010                   | max. 15 parts per million |
| EPA Tier 4 Interim / Final | max. 15 parts per million |
| EU Stage IIIB 2011         | max. 15 parts per million |
| Euro 4/5                   | max. 50 parts per million |

Failures, except those resulting from a defect in material or factory workmanship, are not covered by this Warranty.

Cummins is not responsible for failures or damage resulting from what Cummins determines to be abuse or neglect, including, but not limited to: operation without adequate coolants or lubricants; overfueling; overspeeding; lack of maintenance of lubricating, cooling or intake systems; improper storage, starting, warm-up, run-in or shutdown practices; unauthorized modifications of the Engine.

Any unauthorized modifications to the aftertreatment could negatively effect emissions certification and void Warranty.

Cummins is also not responsible for failures caused by incorrect oil or fuel, or by water or diesel exhaust fluid, dirt or other contaminants in the fuel or oil or diesel exhaust fluid.

Cummins is not responsible for non-Engine repairs, "downtime" expenses, cargo damage, fines, all applicable taxes, all business costs or other losses resulting from a Warrantable Failure.

**CUMMINS IS NOT RESPONSIBLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.**

\* United States includes American Samoa, the Commonwealth of Northern Mariana Islands, Guam, Puerto Rico and the U.S. Virgin Islands.



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