

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000720-140

(Class Action)  
SUPERIOR COURT

---

**4037308 CANADA INC.**

*Petitioner*

-vs.-

**NAVISTAR CANADA INC.**  
and  
**NAVISTAR, INC.**  
and  
**NAVISTAR INTERNATIONAL  
CORPORATION**

*Respondents*

---

---

**AMENDED APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS  
ACTION & TO APPOINT THE PETITIONER AS REPRESENTATIVE  
(Art. 574 C.C.P. and following)**

---



## TABLE OF CONTENTS

<b>I. <u>GENERAL PRESENTATION</u></b> .....	<b>1</b>
A) The Action.....	1
B) The Respondents.....	2
C) The Situation.....	4
(a) Diesel Engines.....	4
(b) The Emissions Situation.....	5
(c) Exhaust Gas Recirculation (EGR) and Selective Catalytic Reduction (SCR) – A Timeline.....	8
(d) Navistar’s Advanced EGR Emission Control System – Explained..	11
(e) Navistar’s Knowledge of the Design Defect.....	16
(f) Navistar’s Representations.....	22
(g) Navistar’s Authorized Dealers and the Navistar Network.....	43
(h) Navistar’s Warranties and the Band-Aid Approach.....	44
(i) Summative Remarks.....	46
D) The British Columbia Litigation.....	47
E) The U.S. Litigation.....	48
<b>II. <u>FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER</u></b> ...	<b>49</b>
<b>III. <u>FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP</u></b> .....	<b>51</b>
<b>IV. <u>CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION</u></b> .....	<b>52</b>
A) The composition of the Class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings.....	52
B) The claims of the members of the Class raise identical, similar, or related issues of law or fact.....	53
<b>V. <u>NATURE OF THE ACTION AND CONCLUSIONS SOUGHT</u></b> .....	<b>55</b>
A) The Petitioner requests that it be designated as representative of the Class	56
B) The Petitioner suggests that this class action be exercised before the Superior Court of Justice in the district of Montreal.....	57



TO THE HONOURABLE MR. JUSTICE PIERRE-C. GAGNON OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER STATES AS FOLLOWS:

## **I. GENERAL PRESENTATION**

### **A) The Action**

1. Petitioner wishes to institute a class action on behalf of the following group, of which it is a member, namely:
  - all persons, entities or organizations resident in Quebec who purchased and/or leased trucks, buses and other heavy-duty vehicles with a model year 2010 through 2013 Navistar 11, 13 and 15-litre MaxxForce Advanced EGR diesel engine (collectively, the “Vehicles” and the “MaxxForce Engines” or “Engines”), or any other group to be determined by the Court;
2. The Respondents designed, manufactured, tested, distributed, delivered, supplied, inspected, marketed, leased and/or sold and warranted the Vehicles with a defectively-designed integrated emissions system (hereinafter, the “Design Defect”). The emissions system defect resulted from Navistar’s election to use “Advanced EGR”, an “exhaust gas recirculation” emissions technology system with their MaxxForce Engines, which was plagued by serious and pervasive design and manufacturing defects that rendered the Engines and thus, the Vehicles containing the Engines, unmerchantable, unreliable and unsuitable for use;
- 2.1 The Vehicles include, but are not limited to the following trucks that are classified as “Class 8” heavy-duty vehicles under the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*<sup>1</sup>:
  - (a) International ProStar and Lonestar, which are heavy-duty, long haul tractor trailer trucks;
  - (b) International DuraStar, a heavy-duty truck used for various applications, including pick-up and delivery, ambulance services, and construction;
  - (c) International Transtar, a heavy duty, regional haul truck;
  - (d) International Workstar and Paystar, severe duty trucks used for construction applications, for example as dump trucks; and

---

<sup>1</sup> *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*, SOR-2013-24.



- (e) International Loadstar, a severe duty cab forward truck used for various applications, including garbage trucks and airplane refueling trucks;
- 2.2 This action arises from Navistar's knowledge that the emissions system designed into the MaxxForce Engines has an inherent Design Defect that causes repeated failures, and its failure to disclose to, and active concealment from, the Petitioner and Class members, of that material fact. The action also arises from Navistar's failure to properly repair the Design Defect as required by Navistar's express and implied warranties;
3. The Vehicles could not function as required nor as represented under all operating conditions, on a consistent and reliable basis, even after repeated emissions repairs and replacements. These repeated repairs and replacements failed to repair or to correct the Engines in any lasting way;
4. In addition, the Petitioner contends that the Respondents failed to disclose, despite longstanding knowledge, that the Advanced EGR system is defective and is therefore predisposed to constant failures, including, but not limited to operator warning, check engine lights illuminating, engine derating, shutdown, as well as other failures that prevented the Engines from properly functioning and/or operating including build-up of soot in Engine filters, Engine overheating, leaking fuel pumps, issues with the EGR coolant and particulate filter, damage to the recalculating valve, damage to the fan hub, fan hubs running at all times (to try to keep the engine cool), bearing and belt failures, cooling failures, A/C blower and compressor failures, hose/ connector clogging and failure, Diesel Particulate Filter (DPF) clogging, Vehicles losing power when driven uphill, broken sensors, and broken valves. Navistar actively concealed the Design Defect and the fact that its existence would diminish both the intrinsic and the resale value of the Vehicles;
- 4.1 Further, the Design Defect rendered the MaxxForce Engines unreasonably dangerous in that it could lead to sudden breakdowns, forcing the Vehicles, often heavily loaded with cargo, to attempt emergency manoeuvres, such as pulling over to the side of the road as well as causing coolant and exhaust fumes to enter the passenger compartment of the Vehicles, risking poisoning;
- 4.2 Many Class Members were left financially devastated by the MaxxForce Engines' repeated failures;
5. By reason of this unlawful conduct, the Petitioner and members of the Class have suffered material and moral damages (which is further detailed herein), upon which they are entitled to claim;

## **B) The Respondents**

6. Respondent Navistar Canada Inc. (hereinafter "Navistar Canada") is a Canadian corporation with its head office in Burlington, Ontario. It is a wholly-owned



subsidiary of Navistar, Inc., that does business throughout Canada, including within the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registraire des entreprises*, produced herein as **Exhibit R-1**;

7. Respondent Navistar, Inc. is a Delaware corporation with its head office in Lisle, Illinois. It is the parent company of Navistar Canada (Exhibit R-1) and it is a wholly-owned subsidiary of Respondent Navistar International Corporation;
8. Respondent Navistar International Corporation (hereinafter “Navistar International”) is a Delaware holding corporation with its head office in Lisle, Illinois. It is the parent company of Respondent Navistar, Inc. It is also the registrant of the Canadian trade-marks (word) INTERNATIONAL (TMA192625), which was filed on May 8, 1972, (design) NAVISTAR (TMA337095) which was filed on October 3, 1985 and (word) NAVISTAR (TMA337494) which was filed on September 11, 1985, the whole as appears more fully from a copy of said trade-marks from the CIPO database, produced herein *en liasse* as **Exhibit R-2**;



- 8.1 Respondents Navistar, Inc. and Navistar International report their income together in a consolidated return in the United States and Respondent Navistar, Inc.’s income is funneled directly to Respondent Navistar International as income from a subsidiary, the whole as appears more fully from a copy of extracts from the Respondents’ Annual Report for the Fiscal Year 2013, produced herein as **Exhibit R-19**;
- 8.2 All 3 Respondents share many of the same corporate officers (Exhibit R-1 and Exhibit R-19)<sup>2</sup>;
- 8.3 According to Curt A. Kramer, Corporate Secretary of Navistar International, Navistar International has “no operational employees”, including any management employees, but is instead operated by its subsidiary employees. The only officers of Navistar International are the officers of Navistar, Inc. – in the exact same capacity, the whole as appears more fully from a copy of the case of *Ross Neely Systems, Inc. v. Navistar, Inc., et al.*, which was filed in the U.S. District Court in the Northern District of Texas – Dallas Division under Court File No. 3:13-cv-1587-m-BN (hereinafter, the “Neely Case”), produced herein as **Exhibit R-20**;
- 8.4 In the Neely Case (Exhibit R-20), it was revealed that even Respondent Navistar, Inc.’s own employees, both former and current, do not know the difference

<sup>2</sup> See, for example, Troy Clarke, Walter G. Borst who serve on the boards of Navistar Canada and Navistar International.



between the two companies, and Respondent Navistar International and Respondent Navistar, Inc.'s "common" corporate representative produced for deposition, vice-president of customer support for Respondent Navistar, Inc., testified that "if the employees of [Navistar] don't [know the distinction and the difference between Navistar International and Navistar, Inc.], I wouldn't expect the customers to...". The corporate representative further testified that the subsidiary's officers speak on behalf of the parent company, although he does not understand under what authority they do so;

9. The Respondents design, manufacture, test, distribute, deliver, supply, inspect, market, represent, lease and/or sell and warrant the Vehicles containing the MaxxFace Engines as well as the Engines themselves, and, in particular, the exhaust emission control, the Advanced EGR, to be free of defects in material and workmanship;
10. Given the close ties between the Respondents and considering the preceding, all Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, all Respondents will be referred to as "Navistar" for the purposes hereof;

### **C) The Situation**

#### **(a) Diesel Engines**

11. 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 ("NO<sub>x</sub>"), Non-Methane Hydrocarbons ("NMHC"), Non-Methane Hydrocarbon Equivalent, Carbon Monoxide and Particulate Matter (hereinafter the "Harmful Emissions");
12. Diesel engines pose a particularly difficult challenge to the environment because they have an inherent compromise between power, fuel efficiency, and emissions – the greater the power and fuel efficiency, the "dirtier" and more harmful the emissions become. Compared to gasoline engines, diesel engines generally produce greater power, better drivability, and much higher fuel efficiency. But these benefits come at the cost of much more harmful emissions than gasoline vehicles
13. Instead of using a spark plug to combust highly-refined fuel with short hydrocarbon chains (as gasoline engines do), diesel engines compress a mist of liquid fuel and air to very high temperatures and pressures, which causes the diesel to spontaneously combust. This causes a more powerful compression of the pistons, which produces greater engine torque (that is, more power);



- 13.1 The diesel engine is able to do this both because it operates at a higher compression ratio than a gasoline engine and because diesel fuel contains more energy than gasoline does;
- 13.2 In June 2012, the World Health Organization declared that diesel vehicle emissions were carcinogenic to humans (Group 1), which is about as dangerous as asbestos, the whole as appears more fully from a copy of International Agency for Research on Cancer (WHO) Press Release entitled "IARC: Diesel Engine Exhaust Carcinogenic" dated June 12, 2012 and from a copy of the Toronto Star article entitled "Diesel exhaust as cancerous as asbestos, says WHO" dated June 13, 2012, produced herein *en liasse* as **Exhibit R-21**;

**(b) The Emissions Situation**

- 13.2 In December 2000, the EPA announced a new program for reducing heavy-duty diesel truck exhaust emissions. Details of this new program were set out in a regulatory announcement issued by the EPA, which included the following:

We are finalizing a PM [particulate matter] emissions standard for new heavy-duty engines of 0.01 grams per brake-horsepower-hour (g/bhp-hr), to take full effect for diesels in the 2007 model year. We are also finalizing standards for NOx and non-methane hydrocarbons (NMHC) of 0.20 g/bhp-hr and 0.14 g/bhp-hr, respectively. These NOx and NMHC standards will be phased in together between 2007 and 2010, for diesel engines. The phase-in will be on a percent-of-sales basis: 50 percent from 2007 to 2009 and 100 percent in 2010.

The whole as appears more fully from a copy of the EPA Regulatory Announcement entitled "Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements" dated December 2000, produced herein as **Exhibit R-22**;

14. 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" or the "EPA Emission Standard") 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”<sup>3</sup>,

The whole as appears more fully from a copy of the Final Rule 40 CFR Parts 69, 80, and 86 entitled “Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements” dated January 18, 2001, produced herein as **Exhibit R-4**;

14.1 The new EPA Emissions Standard mandated a 90% reduction in NO<sub>x</sub> and Particulate Matter (PM) emissions between 2004 and 2010;

15. The EPA promulgated these standards in 2001, intended to be in full effect by 2010, 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” (Exhibit R-4);

16. The EPA Emissions Standard regulated both diesel vehicle/ engine emissions standards and diesel fuel standards simultaneously, as a single system (Exhibit R-4):

“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”<sup>4</sup>;

16.1 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;

16.2 The general approach to setting vehicle emissions standards in Canada is to harmonize them with the federal United States Environmental Protection Agency (“EPA”) standards as much as possible;

16.3 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”<sup>5</sup>. Every model of vehicle or engine that is certified by the EPA and that is sold concurrently in Canada and in the United States, is required to meet the same

<sup>3</sup> Exhibit R-4 at page 5002.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Canadian On-Road Vehicle and Engine Emission Regulations*; ss. 2 & 3.





emission standards in Canada as in the United States, the whole as appears more fully from a copy of the DieselNet article entitled “Emission Standards: Canada” revision dated April 2012, produced herein as **Exhibit R-3**;

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

18. The Final Rule (Exhibit R-4) contemplated exhaust emission control necessary for compliance with the emission standards to be a “complete emission control system” integrated with on-board diagnostics to detect and identify malfunctions in all monitored emission-related engine systems:

“The Complete System: We expect that the technologies described above would be integrated into a complete emission control system as described in the final RIA. The engine-out emissions will be balanced with the exhaust emission control package in such a way that the results are the most beneficial from a cost, fuel, economy, emissions standpoint.

...

The manufacturers are expected to take a system approach to the problem of optimizing the engine and exhaust control systems to realize the best overall performance possible.”<sup>6</sup>

19. “Reliability” of the exhaust emission control system is defined in the Final Rule as “the expectation that emission control technologies must continue to function as required under all operating conditions for the life of the vehicle”<sup>7</sup>;

20. Reliability and durability criteria for the emissions controls under the EPA Standard required that “[t]o ensure that no manufacturer underdesigns their absorbers or traps (compared to the level of durability that is achievable), we are requiring that these technologies be designed to last for the full useful life or the engine. More specifically the final regulations state that scheduled replacement of the PM filter element, NO<sub>x</sub> absorber, or other catalyst module bed is not allowed during the useful life, unless the manufacturer can show that the replacement will in fact occur and pays for the replacement. Otherwise only cleaning and adjustment will be allowed as scheduled maintenance”;

21. The EPA Emissions Standard set the not-to-exceed limits for NO<sub>x</sub> at 0.20 grams per brake-horsepower-hour (g/bhp-hr). The not to exceed NO<sub>x</sub> standard of 0.20g/bhp-hr was to be phased-in between January 1, 2007 and December 31, 2009: “The NO<sub>x</sub> and NMHC standards will be phased-in together between 2007 and 2010, for diesel engines. The phase-in will be on a percentage-of-sales basis: 50 percent from 2007 to 2009 and 100 percent in 2010”, the whole as

<sup>6</sup> Exhibit R-4 at pages and 5054-5055 and 5090.

<sup>7</sup> *Id.*, at page 5056.



appears more fully from a copy of the EPA Highway Diesel Progress Review Report 2, dated March 2004, produced herein as **Exhibit R-5**;

		Standard (g/bhp-hr)	Phase-In by Model Year			
			2007	2008	2009	2010
Diesel	NOx	0.20	50%	50%	50%	100%
	NMHC	0.14				
	PM	0.01	100%	100%	100%	100%

22. As is depicted below, the EPA ultimately organized a four-tiered system with exhaust emission requirements becoming progressively stricter. By the end of 2014, the Tier 4 Final was to take effect, drastically reducing allowable exhaust emissions;



22.1 In February 2013, Environment Canada adopted the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*, SOR/2013-24, establishing mandatory greenhouse gas emission standards (including NO<sub>x</sub>), which are harmonized with the U.S. EPA Phase 1 regulations. These regulations apply to heavy-duty vehicles of the 2014 and later model years;

**(c) Exhaust Gas Recirculation (EGR) and Selective Catalytic Reduction (SCR) – A Timeline**

23. With the issuance of the Final Rule and the publication of the EPA Emission Standard, it was becoming clear to engine makers, including the Respondents, that tougher emissions regulations were inevitably coming into effect. As a result, all engine makers, except the Respondents, developed a new and innovative



engine technology called Selective Catalytic Reduction (“SCR”) to recycle exhaust back through the engine to reduce emissions in compliance with these regulations;

24. On the other hand, Navistar made the unilateral business decision to utilize an exhaust gas recirculation system (“EGR”) in the MaxxForce Engines branded as MaxxForce Advanced EGR, which ultimately proved unable to meet the 2010 EPA Emissions Standard;
25. Instead of developing compliant technology in the nine (9) year lead time provided by the EPA when it issued the Final Rule in 2001 (Exhibit R-4), the Respondents chose instead to:
  - First challenge the feasibility of the standard,
  - Amass NO<sub>x</sub> emissions credits to delay compliance,
  - Sue EPA and ARB<sup>8</sup>, challenging certification of Selective Catalytic Reduction (SCR) (eight different lawsuits filed by Navistar),
  - Heavily promote and sell nonconforming, lower-cost EGR systems while denigrating SCR in the marketplace,

The whole as appears more fully from a copy of the PowerPoint presentation prepared for the White House meeting dated August 17, 2012, produced herein as **Exhibit R-6**;

26. Navistar continued to sell its noncompliant Engines after the 2010 Emissions Standard took effect through banked emission credits and in October of 2011 Navistar informed the EPA that it would run out of these credits in 2012, which would effectively force it to stop manufacturing the Engines;
27. On January 31, 2012, the EPA promulgated an “Interim Final Rule” (“IFR”) to permit “technological[ly] laggard” manufacturers of heavy-duty diesel engines to pay nonconformance penalties in exchange for the right to sell noncompliant engines, the whole as appears more fully from a copy of the EPA Interim Final Rule 40 CFR Part 86 entitled “Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines” dated January 31, 2012, produced herein as **Exhibit R-7**;
28. On June 12, 2012, the United States Court of Appeals for the District of Columbia Circuit vacated the EPA’s IFR and the nonconformance penalties based on the lack of a good cause for the EPA’s failure to provide formal notice or an opportunity to comment, the whole as appears more fully from a copy of the United States Court of Appeals for the District of Columbia Circuit Decision dated June 12, 2012 (“the USCA Decision”) and from a copy of the Bloomberg article entitled “Navistar Falls After Court Throws Out EPA Engine Rule” dated June 12, 2012, produced herein *en liasse* as **Exhibit R-8**;

---

<sup>8</sup> ARB is the United States Air Resources Board.



29. The following are noteworthy excerpts from the USCA Decision (Exhibit R-8):

“... the only purpose of the IFR is, as Petitioners put it, “to rescue a lone manufacturer from the folly of its own choices”.<sup>9</sup>

...

...it is a consequence brought about by Navistar’s own choice to continue to pursue a technology which, so far, is noncompliant<sup>10</sup>.

...

NCPs<sup>11</sup> are not designed to bail out manufacturers that voluntarily choose, for whatever reason, not to adopt an existing, compliant technology...NCPs have always been intended for manufacturers that cannot meet an emission standard for technological reasons rather than manufacturers choosing not to comply... (...NCPs are inappropriate “if many manufacturers’ vehicles/engines were already meeting the revised standard or could do so with relatively minor calibration changes or modifications”). Based solely on what EPA has offered in the IFR, it at least appears to us that NCPs are likely inappropriate in this case.<sup>12</sup>

30. After Navistar was no longer allowed to pay the non-conformance penalties, on July 6, 2012, Navistar announced that it would begin using the SCR technology to meet the NOx standards, the whole as appears more fully from a copy of the Trucking Info article entitled “Navistar Will Add Urea-Based Aftertreatment to Meet Emissions Regulations” dated July 2012 and from a copy of the Fleet Owner article entitled “Navistar switching to SCR” dated July 6, 2012, produced herein *en liasse* as **Exhibit R-9**;

31. The EPA revised its Final Rule on Nonconformance Penalties on August 30, 2012 based on the USCA Decision (Exhibit R-8) and almost doubled the nonconformance penalties applicable to the Respondents’ noncompliant Engines, the whole as appears more fully from a copy of the Regulatory Announcement entitled “Nonconformance Penalties for Heavy-Duty Diesel Engines Subject to the 2010 NOx Emission Standard” dated August 2012, from a copy of the Regulatory Announcement entitled “Nonconformance Penalties for Heavy-Duty Diesel Engines Subject to the 2010 NOx Emission Standard” – Response to Comments dated August 2012, from a copy of the EPA document entitled “Nonconformance Penalties for On-highway Heavy-duty Diesel Engines” – Technical Support Document, dated August 2012, from a copy of the Amended Final Rule on Nonconformance Penalties entitled “Nonconformance Penalties for On-Highway Heavy-Duty Diesel Engines” dated September 5, 2012, from a copy of the Cantruck article entitled “EPA Again allows Penalties to Sell Non

<sup>9</sup> *Mack Trucks, Inc. and Volvo Group North America, LLC v. Environmental Protection Agency*, 2012, case #12-1077, at page 11.

<sup>10</sup> *Ibid.*

<sup>11</sup> NCPs means noncompliance penalties.

<sup>12</sup> *Supra.* note 9 at page 15.



Compliant Engines” dated September 7, 2012, from a copy of the Reuters article entitled “EPA raises fines on non-compliant Navistar engines” dated August 30, 2012, and from a copy of the Forbes article entitled “Navistar Starts Paying The Piper For Its Costly Strategic Mistake” dated August 31, 2012, produced herein *en liasse* as **Exhibit R-10**;

32. On December 11, 2013, the United States Court of Appeals for the District of Columbia Circuit vacated the EPA’s Amended Final Rule (Exhibit R-10) and the nonconformance penalties based again on the EPA’s failure to provide adequate notice or an opportunity to comment, the whole as appears more fully from a copy of the United States Court of Appeals for the District of Columbia Circuit Decision dated December 11, 2013 (“the Second USCA Decision”), produced herein as **Exhibit R-11**;

32.1 In July, 2015, the United States Department of Justice, on behalf of the EPA, filed a civil lawsuit against Navistar claiming that Navistar completed 7,750 trucks in 2010 that did not meet the EPA Emissions Standard and seeking \$300 million in legal penalties calculated at \$37,500 a day for each violation, the whole as appears more fully from a copy of the Land Line article entitled “EPA sues Navistar for \$300 million in penalties” dated July 21, 2015 and from a copy of the Trucks and Parts article entitled “Navistar’s Wrong Diesel Engine Technology Costing Millions” dated October 15, 2015, produced herein *en liasse* as **Exhibit R-23**;

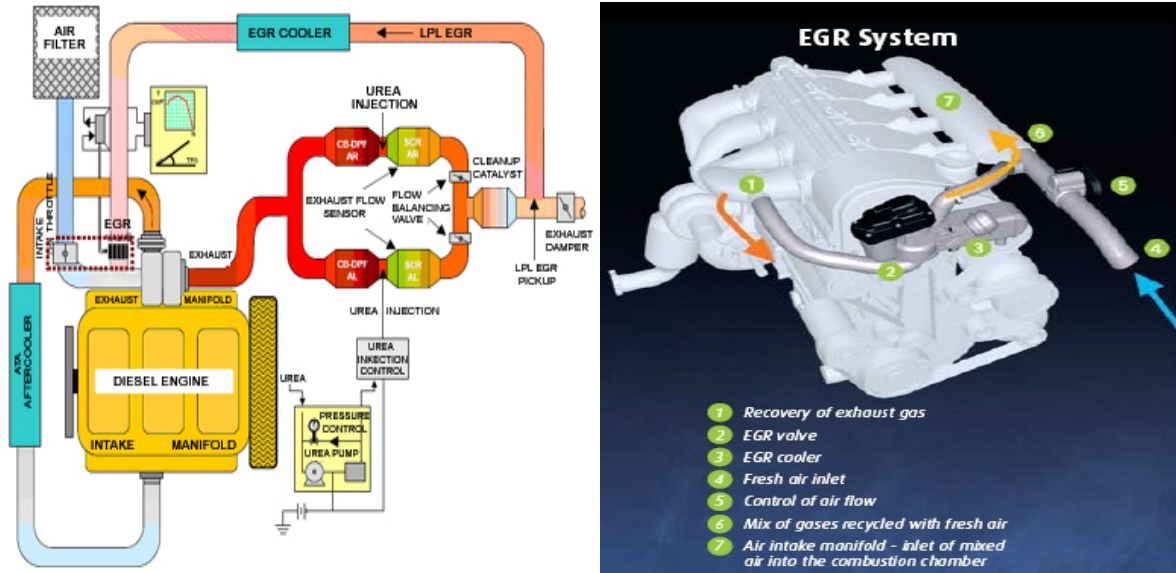
#### **(d) Navistar’s Advanced EGR Emission Control System - Explained**

33. Navistar made the business decision to design, manufacture, test, distribute, deliver, supply, inspect, market, lease and/or sell and warrant the MaxxForce Engines with Advanced EGR as an emissions solution for the North American trucking, bus, construction and mining industries, and it represented the Engines as being capable of reducing air pollutants in order to meet the 2010 phased-in EPA Emission Standard, which predominantly targeted NO<sub>x</sub> emissions. The issue was that this strategy bet heavily on unproven EGR technology;

34. In order to attempt to meet the 2010 phased-in EPA Emission Standard, Navistar elected to use greater amounts of exhaust gas recirculation; i.e., Advanced EGR, which sends higher amounts of engine exhaust gases back into to engine cylinders for a second time, and uses enhanced electronic controls, even-higher-pressure fuel injection, multiple coolers, and double turbocharging. The EGR system diverted some engine exhaust into an EGR cooler, which used ordinary engine coolant to reduce the exhaust temperature and then recirculated back into the engine’s air intake through EGR valves;

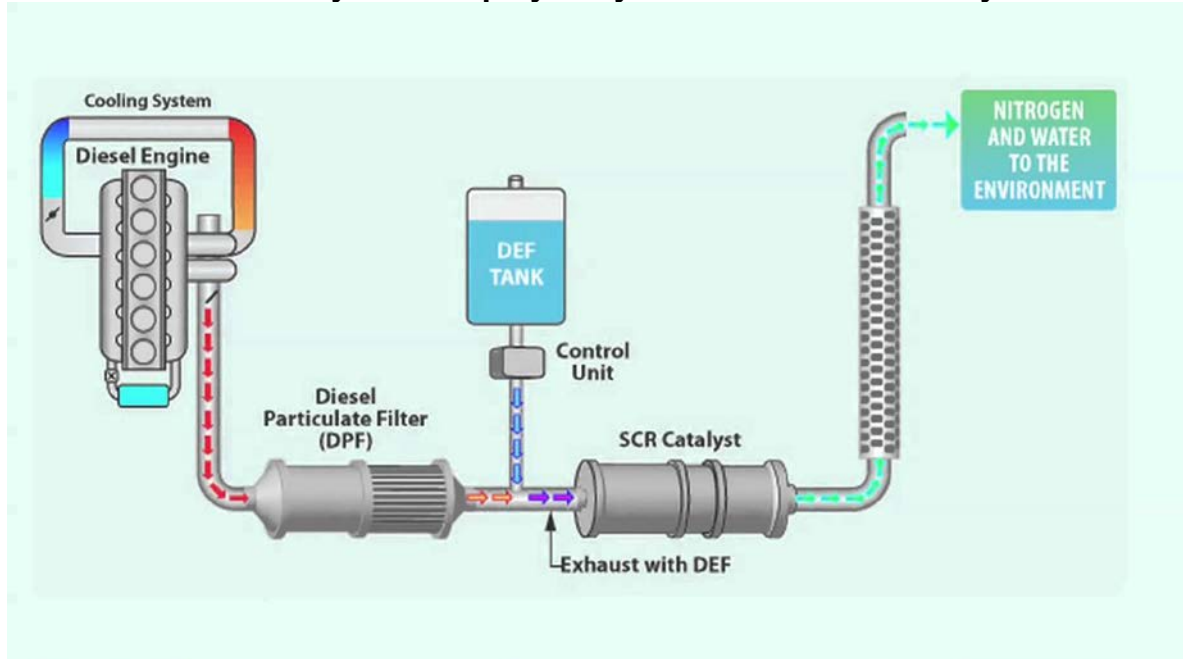


### Navistar's Advanced EGR System



34.1 Every other engine manufacturer chose to meet the EPA Emissions Standard by injecting diesel exhaust fluid to break down NO<sub>x</sub> in the exhaust; i.e. SCR (Selective Catalytic Reduction);

### The SCR System Employed by the Rest of the Industry



34.2 According to Dr. Jim Cowart, a mechanical engineering expert retained in the parallel BC Action, who was asked to describe the EGR and SCR technologies as used in emissions systems in Class 8 diesel trucks, EGR technology may be described as follows:

...the combustion temperature in the combustion chamber of the engine may be reduced by re-circulating some exhaust gases (preferably cooled before re-entering) back into the fresh air intake side of the engine. EGR (Exhaust Gas Recirculation) both reduces the overall combustion temperature since EGR is mostly inert gas (already burned), as well as reduces the oxygen concentration in the engine's combustion chamber (since oxygen is consumed in combustion). Both of these affect NO<sub>x</sub> formation.

The whole as appears more fully from a copy of Expert Report of Dr. Jim Cowart in the BC Action, produced herein as **Exhibit R-24**;

34.3 Dr. Cowart also describes the SCR technology as follows (Exhibit R-24):

The SCR system reduces vehicle-out levels of NO<sub>x</sub> emissions, by reducing NO<sub>x</sub> (NO and NO<sub>2</sub>) from the engine to atmospheric nitrogen and water using DEF (Diesel Exhaust Fluid) which contains urea that is converted to ammonia, NH<sub>3</sub> before reacting with exhaust NO<sub>x</sub>...The SCR system uses a separate tank of DEF on the vehicle in order to dose the SCR catalyst with urea.

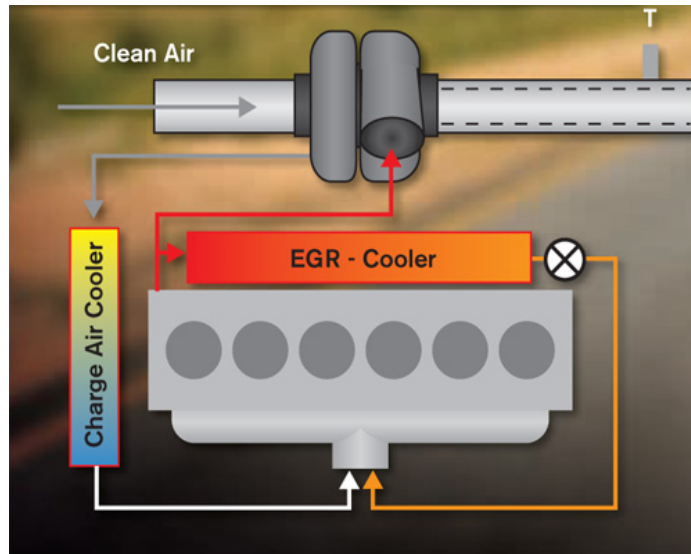
34.4 Advanced EGR technology is very similar to the EGR that had been used since 2004; however, according to the Respondents, it has 4 additional attributes, namely: (i) advanced fuel injection technology, (ii) proprietary combustion bowl design, (iii) advanced air management, and (iv) electronic calibration. These attributes result in higher fuel injection pressure, the whole as appears more fully from a copy of the Respondents brochure entitled "MaxxForce Advanced EGR vs. SCR Technology" produced herein as **Exhibit R-25**;

34.5 The Advanced EGR system was defective in that it recirculated a very large percentage of engine exhaust into the cylinders. Because of the additional recirculated exhaust, the Advanced EGR system generated far more heat within the engine than in the SCR engines. This excessive heat and pressure, in turn, leads to broken EGR valves; exhaust leaks that melt and destroy other engine components; EGR cooler failures, which send uncooled exhaust gas back into the engine (causing the computer to shut down the engine); and other types of sudden and accidental physical injury to the Engine. The defect also causes the EGR cooler to leak coolant through the EGR valves into the engine. The added stress of pushing non-flammable coolant out of the exhaust valves in the cylinder head destroys the head gasket, which joins the head to the cylinders. This ultimately results in the engine having to be rebuilt;

35. Navistar MaxxForce Engines implemented the Advanced EGR system for NO<sub>x</sub> reduction and a Diesel Oxidation Catalyst ("DOC") Diesel Particulate Filter ("DPF") for reduction of particular matter;



36. The MaxxForce Advanced EGR system was calculated and represented to be an “in-cylinder solution” to reduce NO<sub>x</sub> by diverting a portion of the exhaust gas into the “EGR cooler” which fed the cooled exhaust back through the engine’s air intake system. The purpose of exhaust gas recirculation is to reduce combustion temperature and thereby the level of NO<sub>x</sub> entering the exhaust stream<sup>13</sup>;



37. Some of the known trade-offs of employing an EGR system to reduce NO<sub>x</sub> emissions are increased fuel consumption, increased emissions of particulate matter (“PM”), increased emission of carbon dioxide (“CO<sub>2</sub>”), and increased emissions of hydrocarbons (“HC”);
38. Navistar represented that “[l]ow combustion temperatures are one of the keys to Navistar’s Advanced MaxxForce EGR system for meeting EPA 2010 clean-air standards without burdening commercial truck operators with liquid urea based selective catalytic reduction (SCR) after-treatment” and that “Navistar customers benefit with high performance, high efficiency and low diesel emissions”, the whole as appears more fully from a copy of the Navistar Press Release entitled “Navistar's Pure Power Technologies Acquires Holley EGR Valve Technology” dated January 19, 2010, produced herein as **Exhibit R-12**;
39. The Advanced EGR recirculates a high percentage of exhaust gas (up to 50%) to the engine intake subjecting the MaxxForce Engine to high operating temperatures and significant heat stress;
40. In designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting the MaxxForce Engine, Navistar knew, or should have known that the Advanced EGR system

<sup>13</sup> Navistar represented the Advanced EGR as comprised of “advanced fuel injection”; “improved air intake management”; “improved electronic calibration”; and “proprietary combustion technology”.





would not meet the 2010 NO<sub>x</sub> standard of 0.20 gm/bhp-hr, its representations to the contrary notwithstanding;

41. As eloquently put, Navistar's "decision to break with the rest of the industry to pursue a diesel emissions technology that ultimately failed to obtain EPA certification, was a gamble akin to choosing Betamax over VHS" (Exhibit R-10);
42. Navistar represented the MaxxForce Engines to be free of defects in material and workmanship;
43. In spite of these representations, shortly after purchasing their MaxxForce Engine-equipped Vehicles, the Petitioner and the Class began to experience numerous breakdowns involving the Advanced EGR system, EGR coolers, EGR valves and other emissions controls and related equipment;
44. Navistar's Advanced EGR system produced more heat and pressure than the system was able to cope with, leading to repeated breakdowns of the EGR system, including broken sensors, valves, and other system and Engine components;
45. These breakdowns of the EGR System cause the onboard computer diagnostic control ("OBD") system to send error messages to the operator, leading to a reduction in engine performance and eventual engine shutdown. The OBD controls issued operator warning, derating and shutdown requiring authorized repair and part replacements of the Engines;
46. In spite of numerous authorized repairs and equipment replacements, neither Navistar's authorized agents nor Navistar corrected the defects in any lasting way;
47. After each repair, it was represented to the Petitioner and to the Class that the defects were remedied and that the Engines would thereafter be free of defects. These representations were false and were known to be false by Navistar and its authorized agents;
48. In May 2013, Navistar was forced to recall some of the 2012 model year Engines as they could not be certified by the EPA due to exceeding the established limits for NO<sub>x</sub> emissions, the whole as appears more fully from a copy of the EPA Program Announcement entitled "Navistar Inc. Heavy-Duty Engine Recall" dated June 2013, produced herein as **Exhibit R-13**;
49. Navistar abandoned its Advanced EGR technology for model years 2014 and thereafter (Exhibit R-9);
50. Navistar's MaxxForce Engines are defective in that the EGR system fails to reliably function as intended, does not reduce NO<sub>x</sub> emissions to the EPA



Standard, causes repeated and frequent Engine malfunctions triggering OBD failure diagnosis, warning, derate, and shutdown requiring remediation during which time the vehicles are unavailable for transportation;

51. In addition, the MaxxForce Engines are defective in that Advanced EGR recirculates exhaust gas back into the engine intake reducing engine efficiency, replaces combustible air with non-combustible exhaust, produces increased engine operating temperature, and produces excessive particulate matter and soot inside the Engine reducing performance, durability, reliability and fuel economy, and causing premature failure of Engine components and emission controls;
52. The Engines repeatedly experience Advanced EGR system failures that have not been corrected by the emission work performed, both inside and outside the warranty period. These repeated and frequent failures cause the Vehicles to be unreliable and, in spite of numerous attempts, the failures have not and cannot be remedied. The numerous and frequent faults causing warning, derate, and shutdown necessitate costly and time-consuming emissions repairs because the Engines do not and cannot effectively and reliably remove exhaust emission pollutants as required by the 2010 EPA Emission Standards and by the Canadian Emission Regulations on a consistent and reliable basis;
53. It is clear that the Maxxforce Advanced EGR System is quite a complicated mechanical system; however, all that is necessary to comprehend for our purposes 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 further, these defects were actively concealed by the Respondents despite longstanding knowledge;

**(e) Navistar's Knowledge of the Design Defect**

- 53.1 Navistar was aware that the EGR system was seriously flawed at least as early as 2004, when Navistar's 6.0-litre diesel engines were used in various 2004 Ford vehicles. Ford faced an unprecedented number of complaints with Navistar's 6.0-litre diesel engine, leading to Ford suing Navistar, Inc. in 2007 for its share of repair costs for the diesel warranty claims, the whole as appears more fully from a copy of the Pickup Trucks article entitled "Ford and Navistar Settle Diesel Engine Dispute" dated January 4, 2009, produced herein as **Exhibit R-26**;
- 53.2 These problems persisted throughout the production life of those engines. Navistar's next diesel engine produced for Ford, the 6.4-litre engine, also had an EGR system, and also was plagued with problems throughout its production life in model years 2008 through 2010, leading Ford to begin producing its own diesel engines after Model Year 2010, rather than having them supplied by Navistar. From 2010 onward, Ford went to an SCR system, the whole as appears more



fully from a copy of the Driving Line article entitled “The Power Stroke Blues: 6.4L Edition” dated November 28, 2016 and from a copy of the Discover DEF article entitled “Ford to use SCR on Super Duty trucks” dated September 30, 2009, produced herein *en liasse* as **Exhibit R-27**;

53.3 Despite seeing first-hand the problems with the EGR system from 2004 through 2010, and despite losing Ford as a customer for its EGR-based diesel engines, Navistar continued producing EGR-based engines and selling them to their customers, including the MaxxForce Engines at issue in the present application;

53.4 Complaints by owners of the Vehicles demonstrate how widespread the Design Defect is, how the Design Defect manifests without warning, that Navistar is and has long been aware of the Design Defect, and how potentially dangerous the defective condition is. As evidenced by comments appearing on internet sites such as <http://www.thetruckersreport.com/truckingindustryforum/trucks-eighteen-wheelers/83372-maxxforce-13-a.html>, which are monitored by Navistar’s agents and/or employees, Navistar has been aware of complaints about these complaints Design Defect since at least June 2009;

53.5 The MaxxForce Engine exhaust pipes between the EGR valve and exhaust manifold leak, allowing exhaust fumes into the interior of the Vehicle. This was the subject of a complaint filed with the U.S. National Highway Traffic Safety Administration (“NHTSA”) on 10/11/2011:

THERE IS A STAINLESS STEEL EXHAUST FLEX PIPE UNDER THE CAB, RIGHT SIDE, JUST AFTER THE REGEN DOSER THAT IS WRAPPED IN A FLEX SHEATHING. THE INSIDE OF THE PIPE CRACKS AND WHITE EXHAUST FLOWS OUT AND INTO THE CAB WHEN THE ENGINE GOES THRU A REGEN CYCLE. WE HAD SEVERAL DRIVERS COMPLAIN OF THIS ISSUE, UPON INSPECTION YOU CAN NOT FIND ANY VISIBLE CRACKS IN THE EXHAUST. SEVERAL DRIVERS WERE HAVING TO PUT THE WINDOWS DOWN IN ORDER TO ELIMINATE THE FUMES INSIDE THE CABIN WHILE DRIVING. AFTER SENDING TO THE DEALER, THEY ADVISED THAT THE PIPE WAS CRACKED INTERNALLY BEHIND THE SHEATHING AND NEEDED TO BE REPLACED. THEY ADVISED ON THE PROCEDURE TO CHECK FOR THIS SYMPTOM, YOU HAVE TO USE THE ENGINE SOFTWARE AND FORCE A REGEN SESSION. ONCE YOU DO THAT , YOU CAN SEE THE WHITE FUEL SMOKE AND SMELL RAW FUEL. THIS IS THEN DRAWN UP THRU THE HVAC DUCT AND PUTS IT INSIDE THE CABIN. THE REPAIR IS A 500.00 PIPE PLUS LABOR FOR A TOTAL OF 800.00.

The whole as appears more fully from a copy of an extract from the NHTSA website at [www.nhtsa.gov](http://www.nhtsa.gov), produced herein as **Exhibit R-28**;



53.6 Complaints of exhaust leaks into the cab were very common on the internet as well. The following commentary is available on the internet:

This is a very complex engine and not all dealers put the right techs on the job. International was very late in getting training out for the techs as well so there may be an issue with product knowledge at the dealer your going to. As for your down time, keep a record of your repairs and lost time. There is no written policy, and lost revenue is something warranty will never cover, but... We have a customer right now that is trading in a 2010 after a year due to on going issues. Excessive number of repairs, and they are mostly different issues each time and International is suppose to be "helping out" with the trade. I will try to find out more. Cases like this are kinda "secret" or "underground", simply because there are no policies and it goes case by case...

...

My opinion...with the 8 times in 117000 miles I have been in the shop (for more than 1 or 2 days per repair) I hope this engine and this truck puts Navistar out of business!! They need to go back to building tractors and corn combines and stop building trucks.

...

I'd say your Opinion is justified . And it only gets better once the warrantee is done, it's all on you. There is no good way out from under that pos..... Yard sale, scrap or give it back to the dealer that sold it to you.

...

well i broke down again today in rhode island. 4th time since i started here 4 months ago. this time i was leaving my stop in providence road island jumped onto 195 west and looked back and saw smoke and coolant flying everywhere. at the same time i started to smell it and the low coolant dash warning came on. pulled it over and killed it. coolant and smoke everywhere. had to wait awhile before i could see if in fact it was a hose or what. blown top radiator hose. it was rubbing against a spring clamp from a neighboring hose. road service tried to order replacement hose and they said international said there were only 13 in the usa and none around here. lol so they jerry rigged a universal 3 ft peice of hose up for me and refilled coolant. got me back to the yard. had to stop at blue beacon tho to wash that pig. the turbo is also making a bad whistling chirpy noise when climbing hills. it doesnt sound good. sounds like its bout to blow lol. either way i told my job that this was bs and i need a more reliable truck. they are putting me in a cascadia i think.

...



The whole as appears more fully from copies of extracts from the Truckers Report website at [www.thetruckersreport.com](http://www.thetruckersreport.com), produced herein *en l'asse* as **Exhibit R-29**;

53.7 A complaint filed on October 10, 2013 against Respondent Navistar International demonstrates that Navistar was aware of the Design Defect and the negative results that resulted from its tests of the MaxxForce Engine's design. The complaint alleged securities violations and listed several "Confidential Witnesses" ("CWs"), many of whom discussed problems with the EGR technology that were known, or at the very least, made known to Navistar, the whole as appears more fully from a copy of the Consolidated Amended Complaint for Violation of the Federal Securities Laws (Civ. No. 1:13-cv-2111) filed on October 10, 2013, produced herein as **Exhibit R-30**;

53.8 For example, the Consolidated Amended Complaint (Exhibit R-30), included the following allegations:

- (a) CW2, identified in the complaint as a former "Chief Engineer for the Engine Group on several Navistar truck and engine launches," noted problems with, and expressed concerns about, the EGR technology, and presented these concerns to Navistar International's then-President and CEO, Daniel Ustian, who nonetheless directed them to pursue the EGR solution;
- (b) CW3, identified in the complaint as "a project development team lead for Navistar in its Fort Wayne, Indiana facility", claims to have been asked to assist in developing a fall-back SCR solution in case the EGR solution was unsuccessful. The proposal and business case that was put together presented significant data on the difficulties of the EGR solution in comparison to the SCR solution. However, in 2009, Navistar executives issued an order to cease and desist development of the SCR backup plan;
- (c) CW5, identified in the complaint as a former "Navistar...Chief Engineer", allegedly told his supervisors that the EGR technology was not achievable given fuel economy and performance parameters; the stage of EGR development at the time; and that the entire engineering community was saying that the physics of EGR was not possible;
- (d) CW8, identified in the complaint as a "Project Manager and Senior Project Manager at Navistar from 1997 through 2007," noted significant problems, in particular with the diesel particulate filter in the EGR engines that would "stop up and shut down the engine as more exhaust flowed through the engine." This increase in exhaust gas recirculation also lowered fuel economy, decreased durability, and increased cooling demands on the engine. CW8 said there was a "horrific" investment made by the Company to qualify the cooling systems to support the EGR solution;



- (e) CW12, identified in the complaint as “Navistar’s Senior Vice President, North American Sales Operations,” claims that Mr. Ustian told him directly not to discuss an alternate solution to the EGR technology or he would be fired;
- (f) CW13, identified in the complaint as a “Navistar” employee from July 2008 to April 2013 and holding various Vice President and Manager roles throughout that time period, claims that there were many internal discussions about the problems with the EGR system and that “[b]y mid-2011, the EGR solution engines were experiencing significant warranty issues.” Mr. Ustian and other management had access to these reports detailing the warranty issues;
- (g) CW16, identified in the complaint as a “Navistar” employee from 2007 until 2012, claims that it became apparent in 2011 that Navistar was experiencing an increase in failure of components of the EGR engines. The increase in failures was linked to an increase in exhaust gas flowing through the engine, and the resulting soot buildup;
- (h) CW18, identified as a “Navistar” employee since July 2001, stated that Navistar “did not do a good enough job of forecasting warranty issues” and that the warranty problem was initially believed to be related to the EGR valve. However, even after the EGR valve’s fix, warranty issues persisted through 2012, allegedly as a result of failure of the EGR cooler;

53.9 Accordingly, before the first Vehicle equipped with a MaxxForce Engine was ever sold or leased, Navistar knew about the Design Defect;

53.10 In addition, Navistar has paid out millions of dollars in warranty claims to repair and/or replace defective parts in the Vehicles relating to the Advanced EGR system; however, it continued to tout its EGR technology as the future of emissions technology and omitted to disclose that the Design Defect was not correctable. As outlined below, Navistar blamed the manifestations of the Design Defect and warranty claims on manufacturing issues (which they claimed to have resolved) and continued to market their Vehicles as reliable;

53.11 In finally electing to switch to the SCR technology, Navistar chose not to use the term “SCR” specifically, but instead to use the term “ICT+” – in-cylinder technology plus (Exhibit R-9);

53.12 Even after announcing that it was switching to SCR technology, Navistar continued to sell the Engines and omitted to disclose to buyers that resale market demand for the Vehicles would be low;

53.13 In August 2012, in discussing Navistar’s decision to equip their Vehicles with SCR and abandon Advanced EGR, Jack Allen, North American Truck Group President downplayed any problems with the Advanced EGR Engine Vehicles:



Customers should not be hesitant to purchase an EGR-only MaxxFoer-equipped truck between now and March, Allen said. And likewise, he predicted concerns over the resale value of EGR-only MaxxFoer-equipped trucks will prove to be temporary.

“The judge didn’t void the trucks,” he said of [an appellate court ruling involving whether the EPA followed proper procedures in implementing a certain policy]. “Check out the Website about trucks sold under interim rule. Nothing will happen. And as for used truck values? We feel the secondary market will be very receptive to a truck built without SCR. Our MaxxFoer fuel economy is great. Our performance is great. And we have more than 50,000 of those engines out there.”

The whole as appears more fully from a copy of the Commercial Carrier Journal article entitled “Navistar devises plan to counter losing EGR gamble” dated August 23, 2012, produced herein as **Exhibit R-31**;

53.14 The trucking industry is well aware of the problems with the Navistar Engines. Not only were the Vehicles equipped with these Engines worth far less at the time of purchase and/or lease than they would have been with an engine free from design defects, the Vehicles have a significantly diminished value on the resale market compared with competitors’ vehicles with similar kilometrage and are very difficult to re-sell. Because their problems are so widely-known now, the various truck marketplaces are backing away from anything 2008 or newer with a Navistar nameplate – their trade-in and resale values have sunk like a rock (Exhibit R-23);

53.15 Customers who bought the Vehicles with MaxxFoer Engines are now stuck with an unfixable Design Defect, dwindling or expired warranties, and a greatly diminished market for resale or trade-in of the used Vehicles, the whole as appears more fully from copies of extracts from the Richie Bros. Auctioneers website at [www.rbauktion.com](http://www.rbauktion.com), produced herein *en liasse* as **Exhibit R-32**;

53.16 The printout of the auction sale results for the Respondents’ Vehicles with the MaxxFoer Engine between 2010 and 2013 as compared to the auction sale results of non-party Volvo vehicles (which had utilized SCR technology) (Exhibit R-32), reveals the significant diminution in value of the Vehicles as follows:

- (a) The price summary for the Navistar Vehicles sold since 2015 reveals that the median price that these Vehicles were sold at was at \$15,500, whereas, the price summary for the Volvo vehicles sold since 2015 reveals that the median price that these vehicles sold at was \$22,500 – the median price that the Vehicles sold for was \$7,000 less than the Volvo vehicles, representing a 45.2% diminution;



(b) The price summary for the Navistar Vehicles sold since 2015 reveals that the highest price that these Vehicles were sold at was at \$89,000, whereas, the price summary for the Volvo vehicles sold since 2015 reveals that the highest price that these vehicles sold at was \$150,000 – therefore the highest price Vehicle sold for \$61,000 less than the highest price Volvo vehicle, representing a 68.5% diminution;

53.17 While the median<sup>14</sup> price may be useful for some applications, in comparing the mean results of the auction prices of the first 30 Vehicles as compared to the Volvo vehicles, the Vehicles sold, on average, for \$12,883.33 USD, while the Volvo vehicles sold, on average, for \$24,932.47 USD (almost double);

53.18 In holding the model year, the mileage and the weight capacities relatively similar, it is possible to make a comparison of the value of the Vehicles with that of the Volvo vehicles. In taking 2 Vehicles from each model year (being 2010, 2011, 2012, and 2013) and comparing the selling price with those of the Volvo vehicles from the same model years, mileage, and weight capacities, it is clear that the Volvo vehicles had a far greater resale value, the whole as appears more fully from a copy of 2 charts detailing the vehicles and their selling prices, produced herein *en liasse*, as **Exhibit R-33**;

53.19 The auction results also reveal, that the Volvo vehicles were driven, on average, substantially more kilometres than the Vehicles and that their selling prices were substantially higher than that of the Vehicles. In attempting to compare the two vehicles, it was difficult to find Volvo vehicles with the lower kilometrage that the Vehicles had and even where the kilometrage was 5 times higher than that of the Vehicles, the Volvo vehicles were still sold at a much higher price;

53.20 Further, even if an interested buyer were unaware of the problems with the Vehicles, the vast majority of the Vehicle auction listings specify that “NO EMISSIONS PROVIDED SEE BIDDER AGREEMENT” (Exhibit R-32);

**(f) Navistar’s Representations**

53.21 Despite Navistar’s knowledge of the Design Defect, it failed to inform the Petitioner and the Class and it represented that the MaxxFace Engines were free of defects; were fit for heavy-duty trucking, and that any problems experienced with the Engines could and would be repaired by an authorized Navistar service center;

53.22 On October 31, 2007, a Navistar press release stated the following:

---

<sup>14</sup> The median is the middle value in the list of prices, while the mean is the average of all the prices computed by adding up all the numbers and dividing it by the amount.





- MaxxForce™ brand diesel engines will meet the stringent U.S. federal 2010 emissions standards for all its core applications without the use of selective catalytic reduction (SCR) systems,
- “Our ability to achieve our goals without adding customer cost and inconvenience is a competitive advantage for International”,
- All MaxxForce on-highway diesel engines used in International's core applications will be fully certified to the EPA 2010 emission standards,
- By focusing on three core goals: providing environmentally sound solutions with improved performance, never sacrificing reliability or durability and preserving the fuel economy advantage of diesel, International continues to be a frontrunner in the production of near-zero emissions diesel engines and a leader in the diesel industry's efforts to improve the nation's air quality,

The whole as appears more fully from a copy of the Respondents' Press Release entitled “International Trucks and Engines Will Comply with 2010 Emissions Standards without SCR” dated October 31, 2007, produced herein as **Exhibit R-34**;

53.23 Another Navistar press release dated January 6, 2009 represented that: “Navistar wants to clean the air” by launching an “education campaign” to clarify the issues surrounding the 2010 emissions technologies. Jack Allen, president of North American Truck Group stated: “Because we're the only truck and engine maker that can offer a solution without complex after-treatment, we need to be aggressive in giving the industry all the facts” and that “all MaxxForce-powered 2010-model trucks and buses will fully comply with EPA emissions standards on January 1, 2010”, the whole as appears more fully from a copy of the Respondents' Press Release entitled ““No Hassle in 2010” - Navistar Launches Emissions Education Campaign for Vehicle Buyers Weighing 2010 Options” dated January 6, 2009, produced herein as **Exhibit R-35**;

58.24 Navistar press releases from 2009 represented that the MaxxForce Advanced EGR Engines were a “no-hassle, business-as-usual solution that will deliver lower total operating costs for customers” (Exhibit R-15). The press releases also stated that prior to launching sales of Navistar vehicles with Advanced EGR solutions, Navistar test vehicles had “logged millions of driving miles in real-world conditions” (Exhibit R-15);

53.25 Navistar represented that “SCR is a transitional, stop-gap approach that customers will want to avoid”, the whole as appears more fully from a copy of the Respondents' document entitled “What You Need to Know About 2010 Emissions – “Answers to Frequently Asked Questions”, produced herein as **Exhibit R-36**;



53.26 Navistar represented that its Vehicles would deliver “performance, reliability, durability, low cost of ownership, and ease of maintenance” and that it offered a “proven in-cylinder solution” to the 2010 Emissions Standard. In addition, it represented that “EGR is a simple and proven technology”, that “service technicians understand and know how to service EGR based products”, and that it would be “fully compliant in 2010”. While it touted the benefits of EGR technology, its downgraded SCR, the whole as appears more fully from a copy of a document entitled “2010 Emissions Facts” from the Respondents’ website at [www.maxxforce.com](http://www.maxxforce.com), produced herein as **Exhibit R-37**;



53.27 Navistar represented that its MaxxForce Engines offered an “overall operating cost advantage”, that it had “9 million miles of experience”, that they were ready for EPA 2010 compliance, and that “MaxxForce Advanced EGR is compliant from the moment you turn the key”, the whole as appears more fully from a copy of the Respondents’ product brochure entitled “Let’s Clean the Air” dated 2009, produced herein as **Exhibit R-38**;



# PROVEN FOR 9 MILLION

## VERY CLEAN MILES

53.28 In a product pamphlet, Navistar represented that the MaxxForce Engine “reduces operational expenses”, that “SCR could have a significant affect [*sic*] on trade-in values if newer EGR technology becomes the technology of choice and companies migrate to this option in the future”, “Several of our competitors have not been telling the truth when it comes to 2010 emissions. So it’s time to clear the air”, “Our products will be fully compliant with EPA emissions standards in 2010 and beyond”, and that “The 2010 engines will have completed 5.5 million miles of field test miles...”, the whole as appears more fully from a copy of the Respondents’ Product Pamphlet entitled “Facts about MaxxForce Advanced EGR”, produced herein as **Exhibit R-39**;

53.29 Navistar represented that the MaxxForce Engine would ensure that business was “Always Performing” offering the “Four Pillars” of “Outstanding Fuel Economy”, “Excellent Power Characteristics”, “Low Noise, Vibration And Harshness”, “High Strength Without Added Weight”, and that EGR technology was far superior to SCR technology, the whole as appears more fully from copies of extracts from the Respondents’ website at [www.maxxforce.com](http://www.maxxforce.com), produced herein *en liasse* as **Exhibit R-40**;

53.30 Navistar represented that its MaxxForce 15 Engine offered “outstanding fuel economy”, “proven performance”, “full compliance without compromise”, “component life increased”, and “value and reliability redefined”, and “product excellence”, the whole as appears more fully from copies of two product brochures for the MaxxForce 15 Engine, produced herein *en liasse* as **Exhibit R-41**;

53.31 The Respondents represented that its Advanced EGR technology offered the optimal solution to the 2010 EPA Emissions Standard in a product brochure that flaunted the various benefits that offered as compared to SCR, the whole as appears more fully from a copy of the Respondents’ brochure entitled ‘MaxxForce – International Diesel Power’, produced herein as **Exhibit R-42**;

53.32 A PowerPoint presentation by Steve Perkins, Senior Sales Specialist at Navistar, represented much of the same as above as well as that the EGR Cooler/EGR Valve were durable and reliable and that with an 100 Vehicle Fleet, 15 million



test miles had been run since 2008, the whole as appears more fully from a copy of the PowerPoint presentation entitled “Always Performing”, produced herein as **Exhibit R-43**;

53.33 The slides from a September 2010 presentation to the Public Equipment Manager’s Association (PEMA) again espoused the benefits of EGR over SCR representing that Navistar would meet the 2010 EPA Emissions Standard, that its Advanced EGR was “the derivative of a proven technology”, the whole as appears more fully from a copy of the PowerPoint presentation entitled “MaxxForce Advanced EGR ... PEMA Sep 2010 Meeting [*sic*]”, produced herein as **Exhibit R-44**;

54. Navistar represented to the Petitioner and to the Class that its Engines were “built for performance, reliability, durability and fuel economy”, that they are “rock-solid” and “time-tested”, that the “engine, which retains the platform’s legendary reliability and durability, ensure [] trucks and [] business will be “Always Performing””, and that “[t]he resulting durability and performance, providing low cost of ownership and high residual value”, the whole as appears more fully from a copy of extracts from the Respondents’ websites at [www.navistarpartsandservice.com](http://www.navistarpartsandservice.com) and [www.maxxforce.com](http://www.maxxforce.com), produced herein *en liasse* as **Exhibit R-14**;



55. The Respondents represented that the Engines offered an “in-cylinder solution” with “high structural strength” and “durable block and head designs” and that they are “reliable”, “durable” with a superior “resale value” and are “serviceable”;





56. Navistar marketed the MaxxForce Advanced EGR System as a superior alternative to the systems installed by other truck engine manufacturers to comply with the 2010 EPA Emissions Standard (i.e. selective catalytic reduction or SCR), the whole as appears more fully from a copy of the Navistar Press Release entitled “Navistar Demonstrates Readiness with 2010 Emissions” dated February 3, 2009 and from a copy of the Navistar Press Release entitled “Navistar on Track with 2010 Engines as Final Testing Nears Completion” dated July 13, 2009, produced herein *en liasse* as **Exhibit R-15**;
57. The Respondents represented to customers that they were selling the “best performing engine backed by the commitment of Navistar Engine Group...” and that “Navistar Customers benefit with high performance, high efficiency and low diesel emissions”, the whole as appears more fully from a copy of the Navistar Engine Group 75<sup>th</sup> Anniversary Booklet entitled “Diesel – Looking Back. Moving Forward” dated 2008 and from a copy of a media extract from the Respondents’ website at [www.media.navistar.com](http://www.media.navistar.com), produced herein *en liasse* as **Exhibit R-16**;
58. Navistar represented to the Petitioner and to the Class:
- a) That the MaxxForce Engines meet the 2010 EPA Emissions Standards for NO<sub>x</sub>;
  - b) That the MaxxForce Engines were free of defects in material and workmanship;
  - c) That following repair by an authorized service center, the MaxxForce Engines would be free of defects in material and workmanship;
  - d) That Navistar had an extensive network of authorized service centers that would promptly provide parts and trained technicians needed to fix any problems with the MaxxForce Engines;



- e) That the MaxxFace Engines would pass without exception in the market and were fit for the purposes of transporting goods, on the highway;
- f) That the MaxxFace Advanced EGR used “proven technologies” including advanced fuel injection, air management, electronic calibrations controls and proprietary combustion technologies to meet the 2010 EPA Emissions Standard for on-highway diesel engines (Exhibit R-15), the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar Announces 2010 Emissions Pricing on International Trucks” dated July 28, 2009, produced herein as **Exhibit R-45**;
- g) That Navistar had “logged millions of miles of real-world experience before the launch of these engines”, the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar Demonstrates Readiness with 2010 Emissions” dated February 3, 2009, from a copy of the Respondents’ Press Release entitled “IC Bus Continues Toward 2010 Readiness with Advanced EGR Engine” dated July 29, 2009, and from a copy of the OEN Off-Highway article entitled “Engine Technologies: Ready for Next Year” dated July 16, 2014, produced herein *en liasse* as **Exhibit R-46**;
- h) “We are on track with our strategy of 2010 emissions compliance through the use of our EGR-only solution” providing customers with a “simple and straightforward solution that places the responsibility of emissions compliance on us, the manufacturer, not the customer” (Exhibit R-45);
- i) “Low combustion temperatures are one of the keys to Navistar’s Advanced MaxxFace EGR system for meeting EPA 2010 clean-air standards without burdening commercial truck operators with liquid urea based selective catalytic reduction (SCR) after-treatment”, the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar’s Pure Power Technologies Acquires Holley EGR Valve Technology” dated January 19, 2010, produced herein as **Exhibit R-47**;
- j) “MaxxFace Advanced EGR is the only no-hassle, in cylinder solution for 2010 emissions. MaxxFace engines eliminate the hassle of SCR training, additional maintenance and the handling of liquid urea. MaxxFace Engines deliver: Reliability, Durability, Power, Performance [and] Fuel Economy”;
- k) That the Advanced EGR provides long-term system performance;
- l) That Advanced EGR has “lower operating costs” due to less unscheduled downtime;



- m) “MaxxFace Advanced EGR Engines offer a customer-friendly alternative to SCR that will also deliver lower total operating costs for customers” (Exhibit R-45); and
- n) That the Vehicles equipped with Advanced EGR would have a “much higher residual value” on the used truck market than trucks equipped with SCR, the whole as appears more fully from a copy of the Respondents’ Brochure entitled “Prostar Beats the Competition in Fluid Economy” produced herein as **Exhibit R-48**;

59. Navistar made these representations with the intention that they be relied upon by customers and they were material to the customers’ decisions to purchase the MaxxFace Engines and/or the Vehicles;

59.1 Navistar’s “Maintenance Information Guide” stated: (i) that the MaxxFace Advanced EGR had “lower operating costs” and “less hassle”; (ii) that the MaxxFace Advanced EGR resulted in “optimal performance and low cost of ownership”; (iii) that the design of MaxxFace Advanced EGR resulted in “better fuel efficiency,” “more power to the wheels and less soot out the exhaust,” and “improved combustion”; (iv) that the “Dual-path EGR cooling provides optimized cooled EGR ... [that] allows long-term system performance”; (v) that the MaxxFace Engine had “Premium Reliability”; (vi) that the “MaxxFace Engine can be counted on to show up for work every day”; and (vii) that the MaxxFace Engine was “Always Performing”, the whole as appears more fully from a copy of the MaxxFace Maintenance Information Guide, produced herein as **Exhibit R-49**;

59.2 Navistar press releases regarding the MaxxFace Engines quoted Ramin Younessi, group vice president of product development and business strategy, as stating that the MaxxFace Engines were “some of the cleanest and most energy-efficient diesel engines ever produced” (Exhibit R-15);

59.3 Navistar press releases also quoted Jim Hebe as stating that the MaxxFace 15 engine with Advanced EGR “gives customers the ultimate combination in durability and power”, the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar Introduces ProStar+ with MaxxFace 15” dated March 31, 2011, produced herein as **Exhibit R-50**;

59.4 Navistar also made a number of statements regarding the lower cost of ownership and superior fuel economy of the MaxxFace Engines, when compared to other engines equipped with an SCR system. Those statements include, but are not limited to, the following:

- (a) At a conference call for investors, analysts, and media representatives on December 22, 2010, Ustian stated, “The fuel economy of [the MaxxFace 13-litre engine] will be better and there will be no change in heat rejection at the same time, so this product will be even better”, the whole as appears more



fully from a copy of the Complaint in *United States Securities and Exchange Commission v. Daniel C. Ustian* – Civil Action No. 16-cv-3885, dated March 31, 2016, produced herein as **Exhibit R-51**;

- (b) At a conference call for investors, analysts, and media representatives on January 25, 2011, Ustian stated, “Well, the facts are now out, our products are out there and they’re delivering actually a little bit better than what we said on fuel economy, durability, the whole thing...” Jack Allen (President, North American Truck Group) then stated: “The MaxxFORCE 7 is doing phenomenal. We’re seeing 9% better fuel economy than the prior model. The MaxxFORCE 13, as I’ve said the fuel economy is at parity or better than anything in the market and we’ll be applying for our 0.2 certification here in the next couple of months” (Exhibit R-30);
- (c) Navistar released a press release on July 19, 2010 claiming that the ProStar Vehicle is the industry leader in “fluid economy” stating that “the test results were clear. In the comparison of fluid economy, the International ProStar+ with MaxxFORCE 13 Advanced EGR consistently outperformed the competing trucks 1% to 2.5%”, the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Independent tests prove International ProStar+ with MaxxFORCE 13 Advanced EGR beats competition” dated July 19, 2010, produced herein as **Exhibit R-52**;
- (d) In the press release (Exhibit R-52), Jim Hebe was quoted as saying “If liquid urea SCR trucks can’t compete on fluid economy, then why would customers want to deal with the cost and hassle of adding and maintaining after-treatment equipment, finding and filling up with liquid urea and retraining technicians?”;

59.5 Navistar also made a number of statements regarding its Vehicles’ reliability, maintenance and repairs. Those statements include, but are not limited to, the following:

- (a) On March 9, 2011, during a conference call to discuss Navistar’s first quarter 2011 financial results (Exhibit R-30), Ustian stated:

“Now let’s talk about in-cylinder 0.2. One of our challenges, perhaps as difficult a challenge as the technology itself, was the marketing side of our solution, which is in-cylinder. Since we were the only ones out there, there’s a lot coming at us with oh, this can’t work.

And of course, now we’re out in the marketplace, and that’s over. That argument’s over. We’re out there in the marketplace. We’re exceeding what we had committed to in terms of performance and fuel economy and all that. So that’s over.





Well, we want to get in front of the 0.2 now, because we can anticipate – here's the next one coming out that 0.2 can't be done. So what we did is we submitted to the EPA certification of 0.2 to take that argument away. We don't plan on using this for a while, but we're going to have it out there on the shelf, that says that it can be done, and we can meet the standards and get all the performance features, as well.

So that's what we've done. When you hear about that, it's not that it's coming into production tomorrow. It's just to get it out there and take all of that argument away”;

- (b) On April 5, 2011, Navistar issued a press release announcing that it had received certification for two engines and added: “In addition, Navistar also recently submitted its MaxxForce 13 at 0.2g NOx for EPA certification, once again reiterating its prime technology path in meeting the 0.20g NOx standard through in-cylinder technologies”. By including the MaxxForce 13 Engine in the press release, Navistar created the misleading impression that it was commercially competitive and could be put into production (Exhibit R-75), the whole as appears more fully from a copy of the Respondents' Press Release entitled “Navistar Receives EPA Certification for MaxxForce DT Mid-Range Diesel Engine at 0.39g NOx” dated April 5, 2011, produced herein as **Exhibit R-53**;
- (c) On June 7, 2011, during a conference call to discuss Navistar's second quarter 2011 financial results (Exhibit R-30), Ustian stated, “...we haven't heard any signs of any even discussion on it other than the benefits that we get from EGRs, lower weights and not having to deal with urea. But as far as any discussion on SCR versus EGR, I mean those things were passed a long time ago”;
- (d) On September 7, 2011, during a conference call with analysts to discuss its financial results for the third quarter of 2011 (Exhibit R-30), Andrew J. Cederoth (Navistar's Executive VP and CFO) stated, “This technology is proving extremely viable providing fuel economy and performance on par with the best SCR competitors. Customer acceptance is excellent with over 60,000 vehicles built at 0.5 grams NOx or better. As we develop 0.20g NOx capability our goal of continuing to improve performance and fuel economy at this emissions level is being realized”;
- (e) On January 31, 2012, during a conference call for “Analyst Day” (Exhibit R-30), Allen stated, “It is the most customer friendly and we are providing equal or better performance than the SCR systems without any of the cost, without the maintenance or without the hassle of SCR”;

59.6 Navistar also represented the following:



- (a) “We believe SCR is a transitional-stop gap approach”, the whole as appears more fully from a copy of extracts from Navistar International’s 1<sup>st</sup> Quarter Operation Updated dated March 18, 2008, produced herein as **Exhibit R-54**;
- (b) In a 2009 press release, Navistar indicated that its share of the class 8 vehicle market was improving with ProStar and LoneStar and that it was driving ahead with advancements to its EGR technology which “will be introduced into every MaxxForce™ engine. Navistar is fully prepared to meet 2010 with its EGR technology...”, the whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar Provides Guidance on 2009 Net Income; Expected to Be \$5.10 to \$5.60 Per Diluted Share” dated January 5, 2009, produced herein as **Exhibit R-55**;
- (c) In another 2009 press release, Navistar represented the following:

One of the key ingredients to Navistar’s success for 2010 and beyond is its emissions strategy -- Exhaust Gas Recirculation (EGR) technology powered by its MaxxForce(R) engine -- as it is expected to provide the company with a competitive advantage. “We anticipate EGR will provide our customers with a simple and straightforward solution that places the burden of emissions compliance on the manufacturer, not the customer,” Ustian said.

The whole as appears more fully from a copy of the Respondents’ Press Release entitled “Navistar Posts Strong 1Q Earnings” dated March 11, 2009, produced herein as **Exhibit R-56**;

- (d) Navistar represented that “The new emission compliant products are more complex, contain higher material costs and, consequently, repair costs have recently begun to exceed those we have historically experienced. In the past, our engines typically had a longer model life cycle that afforded us the opportunity to refine both the design and manufacturing of the product to reduce both the volume and the severity of warranty claims... We have continued our efforts to contain direct material costs through a combination of design changes, material substitution, alternate supplier resourcing, global sourcing, and price performance to mitigate direct material price increases we have experienced”, the whole as appears more fully from a copy of extracts from Navistar’s Quarterly Report for the period ending April 30, 2009 and from a copy of the reply letter sent from Navistar to the SEC dated June 23, 2009, produced herein *en liasse* as **Exhibit R-57**;
- (e) In its 2009 Annual Report, Navistar represented the following:

“We are controlling our destiny by developing a competitive advantage in emissions technology:



Years ago, we saw that our customer-friendly, in-cylinder NOx solution MaxxForce Advanced EGR, offered a major differentiation opportunity.

While our competitors settled for the older technology of liquid urea-based Selective Catalytic Reduction (SCR), we chose to continue investing in MaxxForce Advanced EGR to meet the U.S. EPA's 2010 NOx standard.

Because of this investment, we are the only company able to meet 2010 requirements without large, complex aftertreatment systems.

...

MaxxForce Advanced EGR engines are also environmentally friendly and will deliver fuel economy that in most cases is equal to or better than that of past engines.”

The whole as appears more fully from a copy of extracts from Navistar's Annual Report for the fiscal year ending October 31, 2009, produced herein as **Exhibit R-58**;

- (f) In a 2010 press release, Navistar represented that their “EGR message is resonating with the marketplace as evidenced by our continued strong market share levels...the breadth, depth and value of our product family is now being enhanced by an EGR solution that is gaining acceptance with the marketplace” and it represented that it submitted several MaxxForce engine types to the EPA for certification, the whole as appears more fully from a copy of the Respondents' Press Release entitled “Navistar Reports 1Q \$17M Net Income Despite Continued Weak Industry” dated March 9, 2010, produced herein as **Exhibit R-59**;
- (g) In its 2010 Annual Report, Navistar acknowledged that several class actions had been filed against itself as well as Ford Motor Co. in the U.S. alleging that the 2003-2007 Ford vehicles powered by the 6.0L Power Stroke diesel engine supplied by Navistar had design and manufacturing defects. Navistar also represented the following:

“We continue to evaluate our emissions strategies on a platform-by-platform basis to achieve the best long-term solution for our customers in each of our vehicle applications. Our continued investment in research and development includes the further enhancement of our advanced EGR technology and the ongoing development of reliable, high-quality, high-performance and fuel-efficient products.

...



In 2010, all of our MaxxForce engines were certified to be compliant with 2010 emissions standards through the use of credits and 0.5 NOx emissions.

...

In conjunction with our EGR strategy for compliance with the 2010 emissions standards, we only offer vehicles equipped with MaxxForce engines in the U.S. and Canada. For our Class 8 heavy and severe service lines, we offer our MaxxForce 11 and 13 liter engines, and will launch our MaxxForce 15 engine in 2011.”

The whole as appears more fully from a copy of extracts from Navistar’s Annual Report for the fiscal year ending October 31, 2010, produced herein as **Exhibit R-60**;

- (h) In the first quarter of 2011, Navistar represented that “Our Engine group’s market share continues to improve for our MaxxForce™ 11L and 13L EGR engines. We also launched our MaxxForce 15L EGR engine in the first quarter” and discussed the development of new greenhouse gas emission and fuel economy standards that would begin in 2014. In addition, Navistar discussed the status of the U.S class actions as 10 additional class actions had been filed and were scheduled to argue for multi-district litigation, the whole as appears more fully from a copy of extracts from Navistar’s Quarterly Report for the period ending January 31, 2011, produced herein as **Exhibit R-61**;
- (i) In the second quarter of 2011, Navistar represented that “Advanced Exhaust Gas Recirculation (“EGR”), combined with other strategies, is our solution to meet ongoing emissions requirements. Advancements in EGR technology have resulted in reductions in emissions of nitrogen oxides (“NOx”) from 1.2 or more grams per brake horsepower-hour through 2009 to 0.5 grams in 2010, to as low as 0.39 grams in 2011, with additional reductions in process. Our engines meet current EPA certification requirements because of emissions credits we earned from 2007 through 2009 via the early adoption of technologies that reduced NOx levels beyond what was then mandated”, the whole as appears more fully from a copy of extracts from Navistar’s Quarterly Report for the period ending April 30, 2011, produced herein as **Exhibit R-62**;
- (j) In the third quarter of 2011, Navistar represented that “Our Truck segment benefited from continued increases in worldwide unit chargeouts, including improved U.S and Canada School bus and Class 6 through 8 medium and heavy truck (“traditional”) volumes, and we expect further improvements in our fourth quarter” and reiterated its previous quarterly report (Exhibit R-61), the whole as appears more fully from a copy of extracts from Navistar’s



Quarterly Report for the period ending July 31, 2011, produced herein as **Exhibit R-63**;

(k) In its 2011 Annual Report, Navistar represented the following:

“...we are the only OEM capable of fully integrating our own engines throughout our entire product lineup. And we continue to believe we have a significant advantage, thanks to MaxxForce® Advanced EGR. This technology uses in-cylinder combustion alone, avoiding the hassles of liquid urea. And most importantly, our customers don't have to change a thing.

This strategy also makes possible our leadership in fluid economy, which is based on diesel fuel plus liquid urea consumed. This is the new standard of comparison for the industry, and independent test results show our trucks have a 1 percent to 2.5 percent advantage in this area. And remember, Navistar is the only manufacturer in the world meeting today's emissions standards without the added weight and maintenance of NOx aftertreatment systems.

...

2010 Emissions Standards—We have chosen EGR, combined with other technologies, as our solution to meet the 2010 emissions standards. We believe coupling EGR with other emissions strategies gives our products advantages over our competitors' liquid-based urea SCR solution and enables us to maintain flexibility in meeting emission requirements. Our 2010 emissions strategy places the burden and responsibility of meeting the 2010 emissions standards on the Company versus our competitors' liquid-based urea SCR solution that places that burden on the customer. We believe that our customer-friendly solution provides our products with a significant competitive advantage in North America, because most truck and engine manufacturers have chosen liquid-based urea SCR as the solution to meet 2010 emission standards. We continue to invest in our EGR technology, combined with other strategies, to meet current EPA emission requirements in North America and Euro V emissions requirements in South America, as well as evaluate our emissions strategies on a platform-by-platform basis to achieve the best long-term solution for our customers in each of our vehicle applications. Our continued investment in research and development includes the further enhancement of our advanced EGR technology to reach 0.2 NOx emissions as well as the ongoing development of reliable, high-quality, high-performance, and fuel-efficient products.



In 2011 and 2010, our engines met EPA and CARB certification requirements because of emissions credits we earned from 2007 through 2009 via the early adoption of technologies that reduced NOx levels beyond what was then mandated. The rate of usage of these emissions credits is dependent upon a variety of factors, including sales, product mix and improvements in technologies. For some categories of engines we make, we expect to use our remaining emissions credits some time in 2012. We plan to submit certification applications to both EPA and CARB in the near future. We believe that our engines meet both agencies' certification requirements..."

The whole as appears more fully from a copy of extracts from Respondent Navistar International's 2011 Annual Report, produced herein as **Exhibit R-64**;

- (l) In the first quarter of 2012, Navistar represented that "Our consolidated net sales and revenues rose 11% in the first quarter of 2012, as compared to the prior year. The increase in our consolidated net sales and revenues was driven by the performance from our Truck segment, which grew 20% predominantly due to an increase in our "traditional" markets and improved worldwide truck volumes. The net sales from our Engine segment also increased by 10%, primarily due to higher intercompany sales of our Big-Bore engines", "We formally submitted our 0.2g NOx in-cylinder engine certification data for our 13L engine to the United States Environmental Protection Agency ("EPA") on January 31, 2012...", "...some categories of our engines currently are and will continue to: (i) meet current EPA certification requirements via the use of NCPs ..., through the use of emission credits we earned from 2007 through 2009", the whole as appears more fully from a copy of extracts from Navistar's Quarterly Report for the period ending January 31, 2012, produced herein as **Exhibit R-65**;
- (m) In the second quarter of 2012, Navistar acknowledged that (i) a 6.0L Power Stroke diesel engine class action had been commenced in Quebec and (ii) it had received a notice of violation from the EPA pertaining to approximately 7,600 diesel engines produced in 2010, and it represented that "...we have not yet been able to obtain 0.20g certification for any of our HDD<sup>15</sup> engines. Currently, we are able to sell our trucks which incorporate HDD engines and sell our engines by using emission credits or paying non-conformance penalties ("NCPs")...we estimate that we will fully consume these credits for heavy HDD engines during 2012", the whole as appears more fully from a copy of extracts from Navistar's Quarterly Report for the period ending April 30, 2012, produced herein as **Exhibit R-66**;
- (n) In the third quarter of 2012, Navistar acknowledged that it had received an inquiry from the SEC seeking documents dating back to November 1, 2010

<sup>15</sup> HDD is heavy-duty diesel and means the Engines.



relating to various accounting and disclosure issues and represented that “in January 2012, the EPA published a Notice of Proposed Rulemaking for a final NCP rule (the “Final Rule”), which would make NCPs available in model years 2012 and later for emissions of NO<sub>x</sub> above the 0.20g limit and would supersede the Interim Final Rule”. Navistar also represented that it “announced in July 2012 that we are changing our engines’ emission strategy from an EGR only strategy to a strategy incorporating both EGR and SCR after-treatment systems (“In-Cylinder Technology Plus” or “ICT+”). We plan to apply ICT+ to our medium and heavy duty engines”, the whole as appears more fully from a copy of extracts from Navistar’s Quarterly Report for the period ending July 31, 2012, produced herein as **Exhibit R-67**;

- (o) Navistar represented the following in its October 2012 and March 2013 prospectuses:

“We market our commercial products primarily through our extensive independent dealer network in North America, which offers a comprehensive range of services and other support functions to our end users. Our commercial trucks are distributed in virtually all key markets in North America as well as select markets outside of North America through our distribution and service network comprised, as of October 31, 2011, of 783 U.S. and Canadian dealer and retail outlets<sup>16</sup>..”,

...

We failed to achieve Environmental Protection Agency (“EPA”) certification of this technology path to meet 2010 EPA emission standards for our heavy duty engines and as a result, in June 2012, we decided to change the direction of our engine emissions strategy. We are now aggressively pursuing the technology path followed by others in the industry by adding SCR components to our engines and our vehicles. We expect to introduce these products to market beginning in December 2012.

In addition to modifying our technology path to meet emissions regulations, we decided to discontinue investment in certain heavy duty engines and instead purchase these engines from a proven and established engine OEM supplier and discontinue product development on our MaxxForce 15-L Big-Bore engine. We expect to introduce trucks with these engines to the market beginning in December 2012. We believe the offering of a proven and market-accepted 15-L engine combined with our trucks will allow us to increase the number of customers who purchase our vehicles, which will enhance our share of the Class 8 market.

---

<sup>16</sup> In the March 2013 prospectus, this number increased to 784.



...

With the anticipated introduction of Cummins ISX15 offering, we decided to cease future production of our MaxxForce 15-L engines in fiscal 2013.

...

Our warranty costs have been higher in fiscal 2012 compared to prior years as a result of increased engine volumes due to the exclusive use of our MaxxForce Big-Bore engines in our “traditional” product offerings, as well as higher estimated warranty costs per unit. We recognized material charges for adjustments to pre-existing warranties of \$123 million and \$104 million in the first and second quarters of fiscal 2012, respectively. These adjustments related to the unanticipated increase in warranty spend for certain 2007 and 2010 emission standard engines. Component complexity associated with meeting the emission standards has contributed to higher repair costs than historically experienced. While we continue to improve the design and manufacturing of our engines to reduce the volume and severity of warranty claims, preliminary warranty data for the fourth quarter of fiscal 2012 has shown an increase over prior periods that could result in additional pre-tax charges for adjustments to pre-existing warranties of \$60 million to \$75 million.

The whole as appears more fully from a copy of extracts from Navistar’s Preliminary Prospectus supplements dated October 24, 2012 and March 27, 2013, produced herein *en liasse* as **Exhibit R-68**;

- (p) In the third quarter of 2013, Navistar acknowledged receipt of a notice of violation and proposed settlement from the California Air Resources Board in April 2013 and that in June 2013, it had made a settlement offer. It equally acknowledged a shareholder class action alleging securities fraud naming itself as well as its former CEO Daniel Ustian as defendants, the whole as appears more fully from a copy of extracts from Navistar’s Quarterly Report for the period ending July 31, 2013, produced herein as **Exhibit R-69**;
- (q) Navistar’s Annual Report for the fiscal year ended 2013 (Exhibit R-19) represented the following:

“A fundamental component of our prior strategy was to leverage Advanced Exhaust Gas Recirculation (“EGR”), which we believed to have certain advantages, as part of a proprietary engine technology path. We previously believed that our proprietary engine technology would eliminate the need for additional aftertreatment components on our vehicles, including urea-based Selective Catalytic Reduction (“SCR”). However, in July 2012, we announced a change to our engine emissions strategy. We aggressively





pursued the technology path followed by others in the industry by adding SCR components to our engines and our vehicles, and as a result, in 2013, we received Environmental Protection Agency (“EPA”) certification of certain of our MaxxForce engines that incorporate an SCR after-treatment system.

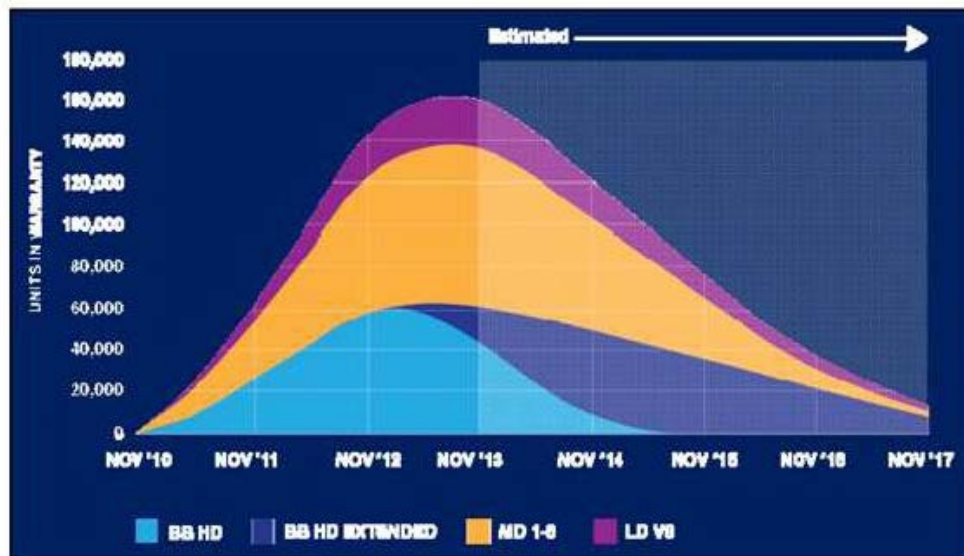
...

A key element of our operating strategy is to renew our focus on our primary markets and regain market share following the transition from our EGR only engine technology to a SCR engine technology.

...

Emissions regulations in the U.S. and Canada have resulted in rapid product development cycles, driving significant changes from previous engine models. In 2010, we introduced changes to our engine line-up in response to 2010 emissions standards (“2010 Emission Engines”). Component complexity and other related factors associated with meeting emissions standards have contributed to higher repair costs that exceeded those that we have historically experienced;

- (r) In its 2013 Earnings Presentation, Navistar represented that there was a new leadership team, that it had received EPA certification for its new engines that had incorporated SCR, that it was “halfway through maximum exposure of EGR only engines” and that the “majority of units will exit warranty by end of 2015”;



The whole as appears more fully from a copy of Navistar’s 2013 Earnings Presentation dated December 20, 2013, produced herein as **Exhibit R-70**;



- (s) On June 4, 2015, Navistar released a press release announcing a net loss of \$64 million, which was better than the previous quarter loss of \$297 million, the whole as appears more fully from a copy of the Respondents' Press Release entitled "Navistar Reports Second Quarter Results" dated June 4, 2015, produced herein as **Exhibit R-71**;
- (t) In a September 3, 2014 Navistar Q3 Earnings Presentation, Navistar represented that its "warranty spend and expense" were continuing to come down, the whole as appears more fully from a copy of Navistar's Q3 Earnings Presentation dated September 3, 2014, produced herein as **Exhibit R-72**;
- (u) In its 2011 Annual Report, Navistar represented the following:

"A fundamental component of our prior strategy was to leverage advanced Exhaust Gas Recirculation ("EGR"), which we believed to have certain advantages, as part of a proprietary engine technology path. We previously believed that our proprietary engine technology would eliminate the need for additional after-treatment components on our vehicles, including urea-based Selective Catalytic Reduction ("SCR"). However, in July 2012, we announced a change to our engine emissions strategy. We aggressively pursued the technology path followed by others in the industry by adding SCR components to our engines and our vehicles, and as a result, in 2013, we received U.S. Environmental Protection Agency ("EPA") certification of certain of our MaxxForce engines that incorporate an SCR after-treatment system.

...

Component complexity and other related factors associated with meeting emissions standards have contributed to higher repair costs that exceeded those that we have historically experienced.

...

In 2014, we incurred a loss from continuing operations before income taxes of \$556 million, compared to a loss from continuing operations of \$974 million in 2013. The improvement in our comparative results in 2014 was primarily driven by lower adjustments to pre-existing warranties and reduced structural costs, partially offset by higher goodwill impairment charges.

...

During 2014, our used truck inventory increased to approximately \$300 million from \$155 million in 2013 (net of reserves to \$260 million from \$140 million in 2013) due, in part, to an increase in used truck trade-ins in connection with sales of newer models.



The whole as appears more fully from a copy of extracts from Respondent Navistar International's 2014 Annual Report, produced herein as **Exhibit R-73**;

- (v) In a presentation prepared for "Analyst Day" on February 4, 2015, Navistar represented that between 2008 and 2012, it experienced revenue growth and that between 2012 and 2014, it experienced an urgent turnaround from EGR to SCR, the whole as appears more fully from a copy of an extract from the Navistar presentation entitled "2015 Analyst Day" dated February 4, 2015, produced herein as **Exhibit R-74**;

59.7 To go back to 2011, immediately prior to the filing of its 2011 Annual Report (Exhibit R-64), Navistar had met with the EPA where Navistar was informed that its Engine would not meet the EPA Emissions Standard. In fact, EPA staff emailed Navistar immediately after the meeting with "important takeaways" from the meeting, including notifying Navistar that "[t]he engine described today by the Navistar team for certification in February [2012] does not appear to meet" the EPA's certification requirements, the whole as appears more fully from a copy of the "Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Finding, and Imposing a Cease-and-Desist Order" dated March 31, 2016, produced herein as **Exhibit R-75**;

59.8 In addition to making misleading statements regarding its Advanced EGR technology and, in order to reassure the public, Navistar submitted a certification application to the EPA in early 2011 for an engine that it knew was not ready for production and sale and/or lease to customers and the EPA never approved the application for certification (Exhibit R-75);

59.9 Navistar continued to make false statements in its filings with the Securities and Exchange Commission (the "SEC"), in press releases and in presentations to investors that created the misimpression that the certification process was proceeding and failed to disclose the serious difficulties that it was experiencing (Exhibit R-75);

59.10 While Navistar was touting the supposed benefits of Advanced EGR, it was also criticizing the system that actually did work – SCR. Navistar has been vocally critical of SCR as a North-American emissions solution going so far as calling it a "licence to pollute". Jim Hebe, Senior Vice President of North American Sales Operations frequently criticized competitors' SCR offering, and was quoted as saying SCR "could be the biggest false-start in trucking history". Surprisingly, Navistar did employ the SCR technology in South America, the whole as appears more fully from a copy of the Today's Trucking article entitled "Exclusive: Hebe's T.O. take on economy, engine regs, and truckers on the ropes" dated February 27, 2009 and from a copy of the Today's Trucking article entitled "Navistar OK



with SCR engines – in S. America” dated August 25, 2009, produced herein *en liasse* as **Exhibit R-76**;

59.11 In addition, Dee Kapur, President of the Truck Group, said “there may be some applications for SCR, but if so, we think it's a stop-gap solution, and it will be marooned in the future” and that it would ultimately be abandoned by all manufacturers in favor of Advanced EGR, the whole as appears more fully from a copy of the Fleet Owner article entitled “Kapur nixes SCR” dated January 22, 2008 and from a copy of the Today’s Trucking article entitled “Special Report: Two-tiered market for 2010 engines?” dated January 22, 2008, produced herein *en liasse* as **Exhibit R-77**;

59.12 According to its public filings, Navistar spent upwards of \$30 million USD per year on advertising intended to reach consumers and to induce them to purchase and/or lease the Vehicles;

60. Navistar was aware of, but failed to disclose to the Petitioner and Class Members, the following material facts and circumstances:

- a) That the MaxxForce Advanced EGR engines would not meet the 2010 EPA Standards, and could not be repaired to do so;
- b) That its Advanced EGR technology was defective, would not reach the 2010 EPA standards, was plagued with numerous engine and emission component failures due to the excessive heat stress caused by the Advanced EGR which could not be corrected;
- c) That Navistar had been declared a “technological laggard” by the EPA and had sought relief from the EPA for the non-compliance of the MaxxForce Engine;
- d) That the Navistar MaxxForce Engines were experiencing higher than anticipated warranty repairs;
- e) That the warranty repairs of the Advanced EGR engines was neither curing nor correcting the defects in the MaxxForce Engines;
- f) That the MaxxForce Engines were not reliable or durable, and would not operate reliably for the useful life of the engine;
- g) That the Design Defect would manifest itself without warning;
- h) That Navistar is and has been long aware of the Design Defect;
- i) That the MaxxForce Engines were not durable and would not operate for the useful life of the engine without repeated and frequent repairs;



- j) That the MaxxForce Engines were consuming as much as 50% of the combustion intake air with recirculated exhaust gas;
- k) That the MaxxForce Engines were not able to properly manage the increased heat and heat stress generated by the Advanced EGR technology;
- l) That Navistar had requested delay and exemption from the 2010 Emissions standard because its Advanced EGR system would not meet the 2010 NOx standard of 0.20 gm/bhp-hr; and
- m) That customer engine failures were caused by the Advanced EGR system technology and that such failure could not be remediated, cured or corrected;

60.1 Contrary to Navistar's representations regarding the fitness, durability, and low operating costs of MaxxForce Engines, the Petitioner and the Class experienced numerous repeated breakdowns related to the Design Defect. Navistar was aware of numerous complaints regarding the EGR system, the potential dangers related to the EGR system, how the exhaust pipes between the EGR valve and exhaust manifold leak, allowing exhaust fumes into the cab, and how Navistar failed to repair the problem despite the Vehicle operators' repeated complaints to and visits at Navistar-authorized service centers;

**(g) Navistar's Authorized Dealers and the Navistar Network**

60.2 Navistar manufactures and distributes its products through a nationwide and network of authorized dealers (the "Navistar Network"), the whole as appears more fully from a copy of an extract from the Respondents' website entitled "Locate a Dealer" at [www.internationaltrucks.com](http://www.internationaltrucks.com), produced herein as **Exhibit R-78**;

60.3 These authorized dealers have actual authority from Navistar to act as agents for Navistar in the marketing, advertising, sale, and/or lease of the Vehicles and they rely almost exclusively on materials and training received from Navistar when making representations about the Vehicles to customers;

60.4 Navistar regularly provides authorized dealers with branded literature, signage, and training materials for use in promoting, selling and financing the purchase and/or lease of their Vehicles to customers, the whole as appears more fully from copies of extracts from the Respondents' website at [www.navistareducation.com](http://www.navistareducation.com) and from a copy of the Respondents Study Guide entitled "2010 MaxxForce 11 & 13 – Cleaning Management System – EGR Cooler Cleaning Training Program" dated January 2012, produced herein *en l'iasse* as **Exhibit R-79**;

60.5 In addition, Navistar routinely holds training seminars for authorized dealers in the Navistar Network. During these seminars, Navistar coaches dealers in the



Navistar Network and their sales staff on the best ways to sell the Vehicles to customers, including providing detailed comparisons of competing manufacturers' products and outlining the specific information dealers should emphasize when pursuing a sale;

60.6 Potential customers are also encouraged to visit the Respondents' websites in order to gain information about the Vehicles and the MaxxForce Engines;

60.7 Navistar furnishes the actual specifications of each truck, including fuel efficiency information, rather than relying on the dealers to generate those details for customers interested in purchasing the Vehicles;

**(h) Navistar's Warranties and the Band-Aid Approach**

60.8 The MaxxForce Engines are covered by a number of express written warranties, including:

(a) The Navistar Standard Warranty; and

(b) The Navistar Federal Emission System Warranty;

The whole as appears more fully from a copy of the Navistar Standard Warranty last revised in March 2010 and from a copy of the Engine Operation and Maintenance Manual, produced herein *en liasse* as **Exhibit R-80**;

60.9 Navistar's Emissions Warranties (Exhibit R-80) go beyond the federal standard by issuing a federal emissions warranty that warrants against defects in design, in addition to warranting against defects in materials and workmanship;

61. The powertrain and emissions systems in the MaxxForce Engines are covered by a standard five (5) year or 160,000-kilometre warranty, whichever comes first. Navistar's warranty provides (Exhibit R-80):

Your heavy-heavy duty diesel engine conforms to U.S. Environmental Protection Agency (EPA) regulations for emission systems.

...

All emission control system parts proven defective during normal use will be repaired or replaced during the warranty period. Warranty repairs and service will be done by any authorized International dealer with no charge for parts, labor, and diagnostics.

61.1 Navistar also issued a Maintenance Information Guide that contained representations and descriptions concerning MaxxForce Advanced EGR. Navistar expressly warranted: (i) that the MaxxForce Advanced EGR had "lower operating costs" and "less hassle"; (ii) that the MaxxForce Advanced EGR



resulted in “optimal performance and low cost of ownership”; (iii) that the design of MaxxFace Advanced EGR resulted in “better fuel efficiency,” “more power to the wheels and less soot out the exhaust,” and “improved combustion”; (iv) that the “Dual-path EGR cooling provides optimized cooled EGR ... [that] allows long-term system performance”; (v) that the MaxxFace Engine had “Premium Reliability”; (vi) that the “MaxxFace Engine can be counted on to show up for work every day”; and (vii) that the MaxxFace Engine was “Always Performing” (Exhibit R-49);

61.2 In terms of Engine warranties, (i) the Lonestar Vehicle came with a drivetrain warranty coverage of 36 months or 480,000 kilometres (300 miles), whichever came first, (ii) the Paystar Vehicle came with a 24-month Engine warranty with unlimited kilometrage, (iii) the ProStar Vehicle and the Transtar Vehicle came with a 36-month or 480,000-kilometre (300,000 mile) warranty for under 52,000 lb. rear axles and a 12-month, unlimited kilometrage warranty for over 52 lbs, and (iv) the Workstar Vehicle came with a 24-month, unlimited kilometrage warranty, the whole as appears more fully from a copy of an extract from the Respondents’ website at [ca.internationaltrucks.com](http://ca.internationaltrucks.com), produced herein as **Exhibit R-81**;

62. The Respondents have been aware for several years of the true nature and cause of the Design Defect with the Engines. In particular, Navistar-authorized dealerships around the country have seen sharp increases in repair work since the introduction the MaxxFace EGR system. 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 Respondents. Notwithstanding its knowledge, the Respondents have intentionally withheld from, actively concealed and/or misrepresented to the Petitioner and to the Class Members this material information. Instead, the Respondents made numerous affirmative representations about the high quality and reliability of the Engines;

63. Most owners and lessees of vehicles containing the Engines have had to repair or replace their emission and regeneration systems (as well as other parts damages by the Advanced EGR system failure) 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;

63.1 Moreover, for repairs and/or replacements that were covered under warranty, many were not properly repaired in that Navistar replaced the defective parts/systems with new defective parts/systems, which were substantially certain to fail well before their expected useful life;

64. Additionally, the Design Defect causes the Engines to stop the Vehicles containing the Engines from proceeding, forcing the Vehicle to pull to the side of the road and be towed. This creates a serious safety concern to the drivers of the Vehicles, to the occupants of other vehicles, and to the public;



65. As a result of the Respondents' unfair and deceptive 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;
66. For customers with Vehicles within the standard 160,000-kilometre warranty period for the emission and regeneration system, as discussed above, Navistar 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, Navistar 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 even after the expiration of the warranty, even where Navistar has replaced the system several times – and given the Respondents' knowledge of this concealed Design Defect – any attempt by Navistar to limit its warranty with respect to the Design Defect is unconscionable.

**(i) Summative Remarks**

67. The Petitioner and the Class Members that it seeks to represent suffered damages by purchasing and/or leasing Respondents' Vehicles with the Design Defect and they are therefore entitled to damages;
68. The Respondents placed their Engines into the stream of commerce in Canada and elsewhere with the Design Defect and with the intention and expectation that customers, such as the Petitioner and Class Members, would purchase and/or lease the Vehicles containing them based on their representations and/or omissions relating thereto;
69. The Respondents knew or ought to have known that purchasers and/or lessees of Vehicles equipped with their Engines would not be reasonably able to protect their interests, that such purchasers and/or lessees would be unable to receive a substantial benefit from the Engines and that customers would be relying on the Respondents' representations to their detriment;
70. Canadian customers were never compensated for damages incurred as a result of purchasing and/or leasing the Vehicles with the Design Defect;
71. As a result of the Respondents' unfair and deceptive business practices, the Petitioner and Class Members, have suffered an ascertainable loss of money and/or property and/or loss in value;





72. Consumers were induced into purchasing and/or leasing Vehicles containing the defective Engines through the use of false and misleading representations, thereby vitiating their consent and entitling them to claim:

- a) A refund for the purchase price of the Vehicles or otherwise the overpayment for the purchase price or lease payments of the Vehicles which contain a Design Defect,
- b) A refund of out-of-pocket expenses for repairs and/or 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) A refund of out-of-pocket costs associated with towing, including future costs of towing,
- e) The loss of use of the Vehicles and expenditures for rental vehicles,
- f) Compensation for the diminished value of their Vehicles,
- g) Lost profits and revenue from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Respondents' mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects), including loss of the use of other tangible property such as trailers and other equipment which cannot be used when the Vehicle is out of service;
- h) The cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines,
- i) Any other financial loss suffered as a result of the Design Defect,
- j) Pain and suffering, trouble and inconvenience, and
- k) Punitive or exemplary damages;

#### **D) The British Columbia Litigation**

72.1 On June 24, 2014, a parallel proceeding was filed in the Supreme Court of British Columbia against the same Respondent and charging substantially similar allegations (*N&C Transportation Ltd. v. Navistar International Corporation et al*, Court File No. VLC-S-S-144960) (the "BC Action");



72.2 On November 16, 2016, the BC Action was certified as a class proceeding in the Supreme Court of British Columbia, with the following class definition:

Class definition

All persons resident in Canada that purchased heavy duty Class B tractor trailer trucks using advanced exhaust gas recirculation technology (“EGR”) that purported to meet the emission requirements introduced by the United States Environmental Protection Agency (the “EPA”) applicable as of 2010 (the “EPA 2010 Requirements”) and did not use EGR in combination with selective catalytic reduction technology (“SCR”) which trucks were designed, tested manufactured, and marketed by the defendants, Navistar International Corporation, Navistar Inc. and Navistar Canada Inc. (the “Navistar EGR Trucks”) from January 2009 to the date of certification (the “Class Period”).

The Navistar EGR Trucks are equipped with “MaxxForce 11”, “Maxxforce 13” or “Maxxforce 15” engines and include the following Navistar truck brands: “Paystar”, “Workstar”, “Transtar”, “9900i”, “Lonestar”, and “ProStar”.

...

The whole as appears more fully from a copy of the Honourable Mr. Justice Skolrood’s Reasons for Judgment on Certification dated November 16, 2014 (*N&C Transportation Ltd. et al. v. Navistar International Corporation et al.*, 2016 BCSC 2129), produced herein as **Exhibit R-82**;

**E) The U.S. Litigation**

72.3 In the United States, many lawsuits were filed against Navistar International Corporation and Navistar, Inc. advancing claims that the Advanced EGR emission control system is defective, resulting in repeated engine failures and frequent repairs. On December 17, 2014, 13 actions were consolidated into Multi-District Litigation (MDL) No. 2590 in the Northern District of Illinois, the whole as appears more fully from a copy of the Transfer Order in *In Re: Navistar MaxxForce Engines Marketing, Sales Practices and Products Liability Litigation*, dated December 17, 2014, produced herein as **Exhibit R-83**;

72.4 On September 22, 2016, a First Amended Consolidated Class Action Complaint was filed in the court record, the whole as appears more fully from a copy of the First Amended Consolidated Class Action Complaint in *In re Navistar MaxxForce Engines Marketing, Sales Practices and Products Liability Litigation* (case No. 1:14-cv-10318) dated September 22, 2016, produced herein as **Exhibit R-84**;



## **II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER**

73. On November 8, 2011, the Petitioner leased a 2012 International ProStar+ 122 6x4 General Freight Long Haul (Sleeper) truck<sup>17</sup> with Navistar's MaxxFace 13 Engine from Camions International Rive-Nord 2700 Étienne-Lenoir, in Laval, Quebec for a total cost of approximately \$148,672.12 including taxes payable in monthly installments of \$2,700 including taxes, the whole as appears more fully from a copy of an extract from the Lease Agreement dated November 8, 2011, produced herein as **Exhibit R-17**;
74. A substantial factor in the Petitioner's purchasing decisions was Navistar's extensive promotional and advertising campaign focusing on the superior quality, reliability, durability, fuel economy, lower operating costs and dealer support;
75. At the time of sale, the Petitioner was under the impression that it was purchasing a Vehicle that was free of any design defects; unbeknownst to it, it overpaid for the purchase price as the Vehicle was in fact suffering from the Design Defect;
- 75.1 Also at the time of sale, the Petitioner was given a descriptive of his warranty, the whole as appears more fully from a copy of a document entitled "ProStar+ Series Standard Limited Warranty", produced herein as **Exhibit R-85**;
76. Soon after purchasing this Vehicle, the Petitioner began experiencing substantial, continuous, and identical problems with the MaxxFace Advanced EGR system. Some of the necessary repairs and replacements were covered by the original manufacturer's limited warranty, while others were not (requiring payment in full);
77. Petitioner experienced numerous breakdowns of the Engine, specifically with the EGR system, which had been occurring on a monthly basis. The Engine in the Vehicle experienced repeated issues resulting from the Design Defect that prevent the Engine from working properly and which prevented him from being able to properly perform his work;
78. In addition, there have been five (5) recalls relating to the Vehicle due to it being in excess of the limited established by the EPA in order to bring them in compliance and the Petitioner has been forced to relinquish use of his truck for over two (2) weeks relating thereto;
79. Most recently, in March of 2014, the truck required repairs and/or replacements forcing the Petitioner to pay an approximate total of \$1,200 in out-of-pocket expenses as it was not covered by the original manufacturer's limited warranty as well as \$800 in towing costs;

---

<sup>17</sup> Vin No. 3HSDSJ2CN614140.



80. These problems were exacerbated because they required the truck to be brought in for lengthy repairs and the Petitioner was unable to use its Vehicle for significant amounts of time. Specifically, to date, the Petitioner has been unable to use its truck for approximately one (1) month, totalling approximately \$10,000 in lost profits;
81. Neither the Respondents, nor any of their authorized dealers or other representatives related the Design Defect to the Petitioner and it was thus unaware of its existence. To the contrary, Petitioner was told by Respondents' representatives that the problems would be rectified;
82. To date, the Petitioner has experienced numerous problems with the truck, which has resulted in significant expenditures as well as serious inconvenience. The total monetary expenditures, including repairs, replacements and towing that it was forced to spend out-of-pocket, totals an approximate \$2,000;
- 82.1 In October 2015, the Petitioner's Vehicle was re-possessed as he could no longer make his lease payments, which was due to the Design Defect and its many manifestations;
83. In addition, Petitioner was injured at the point-of-sale as the purchase price reflected a truck that were represented to be free of any defects and it suffered a prejudice in that it overpaid in reliance upon this misrepresentation and/or omission of fact;
84. Petitioner has recently discovered, while researching online, that the Respondents had been engaging in widespread deception and misrepresentations and that several class actions were filed in Canada and in the United States due to the Design Defect and due to the Respondents' failure to disclose, despite longstanding knowledge of its existence and predisposition to constant failure, the whole as appears more fully from a copy of the Class Action Complaints, produced herein, *en liasse*, as **Exhibit R-18**;
85. It was at this moment in time that the Petitioner was finally made aware that it had purchased a truck that was plagued by a Design Defect;
86. Petitioner has suffered ascertainable loss as a result of the Respondents' omissions and/or misrepresentations associated with the Design Defect, including, but not limited to, the purchase price of the Vehicle or otherwise overpayment for the Vehicle, out-of-pocket expenses for repairs and/or replacements, including future costs of repair, out-of-pocket loss associated with towing costs, loss of use of the Vehicle while it was being serviced, compensation for the diminished value of its Vehicle because the problems with the Engine became notoriously defective in the industry, lost profits, pain and suffering, trouble and inconvenience, and punitive or exemplary damages;



87. Had Petitioner known about the Design Defect, it would either have not purchased the Vehicle;
88. Petitioner's experiences mirror those of thousands of other owners and lessees of the Vehicles containing the defective Engines. 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;
89. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
90. In consequence of the foregoing, Petitioner is justified in claiming damages;

**III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP**

91. Every member of the Class has purchased and/or leased trucks, buses and other heavy-duty Vehicles containing the defective Engines;
92. Had the Respondents disclosed the truth about the Engines, reasonable consumers would not have bought the Vehicles or would not have paid such a high price;
93. Each member of the Class is justified in claiming at least one or more of the following as damages:
- a) A refund for the purchase price of the Vehicles or otherwise the overpayment for the purchase price or lease payments of the Vehicles which contain a Design Defect,
  - b) A refund of 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) A refund of out-of-pocket costs associated with towing, including future costs of towing,
  - e) The loss of use of the Vehicles and expenditures for rental vehicles,
  - f) Compensation for the diminished value of their Vehicles,



- g) Lost profits and revenue from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Respondents' mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects), including loss of the use of other tangible property such as trailers and other equipment which cannot be used when the Vehicle is out of service,
  - h) The cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines,
  - i) Any other financial loss suffered as a result of the Design Defect,
  - j) Pain and suffering, trouble and inconvenience, and
  - k) Punitive or exemplary damages;
94. Respondents engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from Class Members;
95. All of these damages to the Class Members are a direct and proximate result of the Respondents' conduct;

#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

- A) The composition of the Class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings
96. Petitioner is unaware of the specific number of persons who purchased and/or leased the Vehicles; however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
97. Class Members are numerous and are scattered across the entire province;
98. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the Class Members themselves could afford such individual litigation, it would place an unjustifiable burden on the courts. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;
- 98.1 This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity;



99. Also, a multitude of actions instituted in the same or different judicial districts risks having contradictory judgments on issues of fact and law that are similar or related to all members of the Class;
100. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the Class to obtain mandates and to join them in one action;
- 100.1 Further a class action avoids the duplication of discovery and will conserve the resources of the parties, their counsel, and the courts;
101. 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;
- B) The claims of the members of the Class raise identical, similar, or related issues of law or fact
102. Individual questions, if any, pale by comparison to the numerous common questions that are significant to the outcome of the litigation;
103. The damages sustained by the Class Members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct relating to the alleged Design Defect in the Vehicles' Advanced EGR emission control system that was used in the MaxxForce Engines;
104. The claims of the members raise identical, similar or related issues of fact or law, namely:
- a) Are the Engines defective, non-merchantable, and/or subject to premature failure in the course of their normal use?
  - b) Did the Design Defect cause damages to the Petitioner and to the members of the Class?
  - c) Did the Respondents 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?
  - d) Did the Respondents know or should they have known about the Design Defect?
  - e) Did the Respondents misrepresent or fail to adequately disclose to consumers the true defective nature of the Engines?



- f) Did the Respondents breach their express and/or implied warranty by not providing proper repairs and/or replacement of the Engines during the warranty period?
- g) Were Navistar-authorized dealerships unable to properly repair the Design Defect, such that Navistar failed to honour its warranty obligations to properly repair the Engine during the warranty period?
- h) Were EGR related failures covered by the Navistar Standard Warranty and/or the Navistar Federal Emission System Warranty?
- i) Did the Respondents 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?
- j) Are the Respondents responsible for all related costs (including, but not limited to, (i) the purchase price of the Vehicles or otherwise the overpayment for the purchase price or lease payments of the Vehicles which contain a Design Defect , (ii) 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, (iii) the fair replacement value of the of the defective parts and/or the costs of rectifying the defects, (iv) towing costs for the Vehicles, including the cost of future towing, (v) the loss of use of the Vehicles and expenditures for rental vehicles, (vi) the diminished value of the Vehicles, (vi) lost profits and revenue from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Respondents' mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects), including loss of the use of other tangible property such as trailers and other equipment which cannot be used when the Vehicle is out of service, (vii) the cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines, (viii) Any other financial loss suffered as a result of the Design Defect, and (ix) pain and suffering, trouble and inconvenience to Class Members as a result of the problems associated with the Vehicles), and in what amount?
- k) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair practices and/or to force the Respondents to notify, recall, repair and/or replace Class Members Engines and/or Vehicles, which have not yet been recalled, free of charge?
- l) Are the Respondents responsible to pay punitive damages to Class Members and in what amount?





105. The interests of justice favour that this application be granted in accordance with its conclusions;

#### **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

106. The action that the Petitioner wishes to institute on behalf of the members of the Class is an action in damages, injunctive relief, and declaratory judgment;

107. The conclusions that the Petitioner wishes to introduce by way of an application to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct, particularly so with respect to their designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting the Engines as compliant with the EPA Standard and as free from a Design Defect;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

ORDER the Defendants to notify, recall, repair and/or replace Class Members Engines and/or Vehicles, which have not yet been recalled, free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the Class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the application to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;



CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the Class;

A) The Petitioner requests that it be attributed the status of representative of the Class

108. Petitioner is a member of the Class;

109. Petitioner is ready and available to manage and direct the present action in the interest of the members of the Class that it wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux actions collectives*, as the case may be, and to collaborate with its attorneys;

110. Petitioner has the capacity and interest to fairly, properly, and adequately protect and represent the interest of the members of the Class;

111. Petitioner has given the mandate to its attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

112. Petitioner, with the assistance of its attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the Class and to keep them informed;

112.1 Petitioner has given instructions to its attorneys to put information about this class action on its website and to collect the coordinates of those Class Members that wish to be kept informed and participate in any resolution of the present matter, the whole as will be shown at the authorization hearing;

113. Petitioner is in good faith and has instituted this action for the sole goal of having its rights, as well as the rights of other Class Members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

114. Petitioner understands the nature of the action;

115. Petitioner's interests are not antagonistic to those of other members of the Class;



115.1 Petitioner is prepared to be examined out-of-court on its allegations (as may be authorized by the Court) and to be present for Court hearings, as may be required and necessary;

115.2 Petitioner has spent time researching this issue on the internet and meeting with its attorneys to prepare this file. In so doing, it is convinced that the problem is widespread;

115.3 The Petitioner, with the assistance of its attorneys, has maintained a webpage at [www.clg.org](http://www.clg.org) wherein other Class Members can and have entered their coordinates to join the class action and be kept up-to-date on its progress and development, the whole as appears more fully from a copy of a redacted chart of potential Class Members who have inputted their information through the webpage, produced herein as **Exhibit R-86**;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

116. A great number of the members of the Class reside in the judicial district of Montreal and in the appeal district of Montreal;

117. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

118. The present application is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present application;

**AUTHORIZE** the bringing of a class action in the form of an application to institute proceedings in damages, injunctive relief, and declaratory judgment;

**APPOINT** the Petitioner as representative of the persons included in the Class herein described as:

- all persons, entities or organizations resident in Quebec who purchased and/or leased trucks, buses and other heavy-duty vehicles with a model year 2010 through 2013 Navistar 11, 13 and 15-litre MaxxForce Advanced EGR diesel engine (collectively, the "MaxxForce Engines" or "Engines"), or any other group to be determined by the Court;

**IDENTIFY** the principal issues of fact and law to be treated collectively as the following:



- a) Are the Engines defective, non-merchantable, and/or subject to premature failure in the course of their normal use?
- b) Did the Design Defect cause damages to the Petitioner and to the members of the Class?
- c) Did the Respondents 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?
- d) Did the Respondents know or should they have known about the Design Defect?
- e) Did the Respondents misrepresent or fail to adequately disclose to consumers the true defective nature of the Engines?
- f) Did the Respondents breach their express and/or implied warranty by not providing proper repairs and/or replacement of the Engines during the warranty period?
- g) Were Navistar-authorized dealerships unable to properly repair the Design Defect, such that Navistar failed to honour its warranty obligations to properly repair the Engine during the warranty period?
- h) Were EGR related failures covered by the Navistar Standard Warranty and/or the Navistar Federal Emission System Warranty?
- i) Did the Respondents 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?
- j) Are the Respondents responsible for all related costs (including, but not limited to, (i) the purchase price of the Vehicles or otherwise the overpayment for the purchase price or lease payments of the Vehicles which contain a Design Defect , (ii) 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, (iii) the fair replacement value of the of the defective parts and/or the costs of rectifying the defects, (iv) towing costs for the Vehicles, including the cost of future towing, (v) the loss of use of the Vehicles and expenditures for rental vehicles, (vi) the diminished value of the Vehicles, (vi) lost profits and revenue from the inability to utilize the Vehicles equipped with the defective Engines (caused by the long delays as the Respondents'



- mechanics repeatedly and unsuccessfully attempted to diagnose and/or repair the Design Defects), including loss of the use of other tangible property such as trailers and other equipment which cannot be used when the Vehicle is out of service, (vii) the cost of purchasing additional Vehicles and or/parts necessitated by the repeated problems with the Engines, (viii) Any other financial loss suffered as a result of the Design Defect, and (ix) pain and suffering, trouble and inconvenience to Class Members as a result of the problems associated with the Vehicles), and in what amount?
- k) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair practices and/or to force the Respondents to notify, recall, repair and/or replace Class Members Engines and/or Vehicles, which have not yet been recalled, free of charge?
- l) Are the Respondents responsible to pay punitive damages to Class Members and in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct, particularly so with respect to their designing, manufacturing, testing, distributing, delivering, supplying, inspecting, marketing, leasing and/or selling and warranting the Engines as compliant with the EPA Standard and as free from a Design Defect;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

ORDER the Defendants to notify, recall, repair and/or replace Class Members Engines and/or Vehicles, which have not yet been recalled, free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;



CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the application to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the Class;

**DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

**ORDER** the publication of a notice to the members of the group in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in LA PRESSE, the MONTREAL GAZETTE, and LE SOLEIL;

**ORDER** that said notice be available on the Respondents' websites as well as Facebook page(s) and twitter accounts with a link stating "Notice to Owners/Lessees of trucks, buses and other heavy-duty vehicles with a model year model year 2008 through 2013 Navistar 11, 13 and 15 litre MaxxForce Advanced EGR diesel engine and/or MaxxForce 7, MaxxForce DT, MaxxForce 9 and MaxxForce 10 mid-range diesel engines";

**ORDER** that said notice be sent by individual letters emailed and/or mailed to Class Members by using the Respondents' customer list;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

**THE WHOLE** with costs, including all publication and dissemination fees.



Montreal, June 3, 2017

(s) Jeff Orenstein

---

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner

**CONSUMER LAW GROUP INC.**

1030 rue Berri, Suite 102  
Montréal, Québec, H2L 4C3  
Telephone: (514) 266-7863  
Telecopier: (514) 868-9690  
Email: jorenstein@clg.org

