

Court File No.:

10-18-1311-00

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**THOMAS JOHNSON and HAMZAH KHALAF**

**Plaintiffs**

- and -

**BAYERISCHE MOTOREN WERKE AG, BMW OF NORTH AMERICA, LLC, BMW  
CANADA INC., ROBERT BOSCH INC., ROBERT BOSCH GMBH and ROBERT BOSCH  
LLC**

**Defendants**

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**TO THE DEFENDANTS:**

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.



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

Date: March 27, 2018

Issued by   
Local Registrar

Address of court office: Superior Court of Justice  
7765 Hurontario Street  
Brampton, ON L6W 4T1

**TO: BAYERISCHE MOTOREN WERKE AG**  
Petuelring 130  
Munchen, Bayern, Germany 80700

**AND TO: BMW OF NORTH AMERICA, LLC.**  
300 Chestnut Ridge Rd  
Woodcliffe Lake, New Jersey, U.S.A. 07677

**AND TO: BMW CANADA INC.**  
50 Ultimate Drive  
Richmond Hill, Ontario L4S 0C8

**AND TO: ROBERT BOSCH GMBH**  
Postfach 30 02 20  
Stuttgart, Germany 70442

**AND TO: ROBERT BOSCH LLC**  
38000 Hills Tech Drive  
Farmington Hills, Michigan, U.S.A. 48331

**AND TO: ROBERT BOSCH INC.**  
6955 Creditview Road  
Mississauga, Ontario L5N 1R1

**A. DEFINED TERMS**

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

- (a) “**Advanced Diesel with BluePerformance**” means the engine and engine technology installed in the **Vehicles**;
- (b) “**Auxiliary Emissions Control Device**” or “**AECD**” means any element of design in a vehicle that senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of an emissions control system;
- (c) “**BMW AG**” means Bayerische Motoren Werke AG;
- (d) “**BMW Canada**” means BMW Canada Inc.;
- (e) “**BMW Defendants**” means collectively **BMW AG, BMW US and BMW Canada**;
- (f) “**BMW Representations**” means the representations and omissions described at paragraphs 42, 43, and 53(a) and (b);
- (g) “**BMW US**” means BMW of North America, LLC;
- (h) “**Bosch Defendants**” means collectively Robert Bosch GmbH, Robert Bosch, LLC and Robert Bosch Inc.;

- (i) “**Bosch Representations**” means the representations and omissions described at paragraphs 33, 47 and 48;
- (j) “**CEPA**” means the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, as amended;
- (k) “**CFR**” means the Code of Federal Regulations of the United States, as amended;
- (l) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
- (m) “**Class**” or “**Class Members**” means all persons in Canada, except for **Excluded Persons**, who own, owned, lease or leased one of the **Vehicles**;
- (n) “**Competition Act**” means the *Competition Act*, RSC 1985, c C-34;
- (o) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A;
- (p) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (q) “**Defeat Device**” means one or more **AECDS** that alone or in combination reduce the effectiveness of the emissions control system under conditions that may reasonably be expected to be encountered in common vehicle operation and use, unless:
  - (i) those conditions are substantially included in the emissions test procedures of the United States or Canadian governments;
  - (ii) it is needed to protect the vehicle against damage or accident; and
  - (iii) its use does not go beyond the requirements of engine starting;

- (r) “**Defendants**” means the **BMW Defendants** and the **Bosch Defendants**;
- (s) “**Emissions Standards**” means the regulations on vehicle and engine emissions set out in Title 40, chapter I, subchapter C, part 86, of the **CFR** and made under **CEPA** in the *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2, as amended;
- (t) “**EPA**” means the United States Environmental Protection Agency;
- (u) “**EP Act**” means the *Environmental Protection Act*, RSO 1990, c E.19, as amended, including ON Reg 361/98;
- (v) “**EPA Certificate**” means a certificate of conformity to US federal standards issued by the **EPA** under Title 40, chapter I, subchapter C, part 86, of the **CFR**;
- (w) “**Equivalent Consumer Protection Statutes**” means the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, the *Fair Trading Act*, RSA 2000, c F-2, the *Consumer Protection Act*, SS 1996, c C-30.1, the *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, the *Business Practices Act*, CCSM, c B120, the *Consumer Protection Act*, CQLR, c P-40.1, the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, the *Consumer Protection Act*, RSNS 1989, c 92 and the *Business Practices Act*, RSPEI 1988, c B-7, all as amended;
- (x) “**Excluded Persons**” means:
  - (i) the **Defendants** and their officers and directors;

- (ii) the authorized motor vehicle dealers of the **BMW Defendants** and the officers and directors of those dealers; and
  - (iii) the heirs, successors and assigns of the persons described in subparagraphs (i) and (ii);
- (y) “**NOx**” means nitrogen oxides;
- (z) “**Plaintiffs**” mean Thomas Johnson and Hamzah Khalaf;
- (aa) “**Representations**” means the **BMW Representations** and the **Bosch Representations**;
- (bb) “**Software**” means the collection of **Defeat Devices** contained in the **Vehicles** that was designed, manufactured and installed to reduce the effectiveness of the **Vehicles’** emissions control systems under ordinary driving conditions; and
- (cc) “**Vehicles**” means the following BMW vehicles equipped with **Advanced Diesel with BluePerformance**:

<b>Model</b>	<b>Model Years</b>
BMW X5 xDrive35d	2009-2013
BMW 335d	2009-2011

**B. RELIEF SOUGHT**

2. The Plaintiffs, on their own behalf and on behalf of all Class Members, seek:

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

- (b) a declaration that the Defendants conspired and agreed with each other and with other unknown co-conspirators to develop and install illegal Defeat Devices in the Vehicles to mislead Canadian consumers, regulators, purchasers and lessees of the Vehicles;
- (c) a declaration that the BMW Defendants violated *CEPA* by importing the Vehicles into Canada;
- (d) a declaration that the Vehicles emit NOx at levels exceeding the Emissions Standards;
- (e) a declaration that the Defendants were negligent in the engineering, design, development, research, manufacture, regulatory compliance, marketing, distribution, sale or lease of the Vehicles and the Vehicles' diesel and emission components;
- (f) a declaration that the Defendants made certain Representations regarding the Vehicles that were false, and that these Representations were made negligently;
- (g) a declaration that the BMW Defendants breached the express and implied warranties in relation to the Vehicles;
- (h) a declaration that the Defendants engaged in conduct contrary to Part VI of the *Competition Act*;

- (i) a declaration that the BMW Defendants engaged in unfair practices contrary to Part III of the *Consumer Protection Act* and the equivalent provisions in the Equivalent Consumer Protection Statutes;
- (j) a declaration that it is not in the interests of justice to require notice be given pursuant to section 18(15) of the *Consumer Protection Act* (and pursuant to any parallel provisions of the Equivalent Consumer Protection Statutes) and waiving any such notice requirements;
- (k) an order rescinding the purchases of the Vehicles and any financing, lease or other agreements related to the Vehicles;
- (l) a reference to decide any issues not decided at the trial of the common issues;
- (m) statutory damages pursuant to *CEPA*, the *Competition Act*, the *Consumer Protection Act* and the Equivalent Consumer Protection Statutes in an amount to be determined by this Honourable Court;
- (n) restitution for unjust enrichment in an amount equivalent to the purchase price of the Vehicles;
- (o) general damages for negligence, negligent misrepresentation, unjust enrichment, breach of warranty, conduct that is contrary to the *Consumer Protection Act* and Equivalent Consumer Protection Statutes, and conduct that is contrary to Part VI of the *Competition Act*, in the amount of \$100,000,000;
- (p) punitive damages and/or aggravated damages in the amount of \$20,000,000;



- (q) pre-judgment interest compounded and post-judgment interest pursuant to the *CJA*;
- (r) investigative costs pursuant to section 40 of *CEPA* and section 36 of the *Competition Act*;
- (s) costs of this action pursuant to the *CPA*, or alternatively, on a full or substantial indemnity basis plus the cost of administration and notice pursuant to section 26(9) of the *CPA* plus applicable taxes; and
- (t) such further and other relief as this Honourable Court may deem just.

### **C. NATURE OF THE ACTION**

3. The Defendants conspired to create and install illegal emissions software in the Vehicles. These devices render the emission control systems of the Vehicles ineffective and constitute one or more Defeat Devices, which are banned under Canadian and US law.

4. The Defeat Devices in the Vehicles sense whether the Vehicles are undergoing emissions testing. Outside of the test environment, the Defeat Devices reduce or turn off emissions controls. While the Vehicles pass emissions tests, the Vehicles emit unlawful quantities of noxious gases and particulate matter during their common operation and use. But for the Defeat Devices, the Vehicles' excessive emissions would have prevented them from obtaining regulatory approval.

5. The BMW Defendants designed, manufactured and distributed the Vehicles. The Bosch defendants supplied the Defeat Devices. The BMW Defendants implemented the Defeat Devices

in the Vehicles before importing the Vehicles into Canada to be marketed, sold and leased to Class Members.

6. The Defendants promoted the Vehicles' trademarked "Advanced Diesel with BluePerformance" engine technology, which the Defendants misleadingly marketed as fuel-efficient and powerful, clean and environmentally friendly. These representations were not true. The Defendants knew that these attributes enhanced the value of the Vehicles in the minds of customers. As a result, the Vehicles were sold at significant markups to Class Members.

7. The Defendants were negligent in designing, manufacturing and installing the Defeat Devices in the Vehicles. They negligently made misrepresentations to Class Members and violated Canadian environmental, competition and consumer protection statutes.

8. The Defendants' unlawful conduct caused the Plaintiffs and Class Members to suffer damages for which the Defendants are liable.

#### **D. THE PLAINTIFFS AND THE CLASS**

4. The plaintiff, Thomas Johnson, is an individual residing in London, Ontario. As of the date of the issuance of this Statement of Claim, he owned one of the Vehicles, namely an X5 equipped with Advanced Diesel with BluePerformance.

5. The plaintiff, Hamzah Khalaf, is an individual residing in London, Ontario. As of the date of the issuance of this Statement of Claim, he owned one of the Vehicles, namely a 335d equipped with Advanced Diesel with BluePerformance.

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

**E. THE DEFENDANTS**

**a. BMW Defendants**

7. BMW AG is a German car manufacturer headquartered in Munich in the province of Bavaria, Germany. BMW AG and its wholly owned subsidiaries are responsible for the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles.

8. BMW Canada is a federally incorporated company, directly or indirectly owned and controlled by BMW AG, with its head office in Richmond Hill, Ontario. It does not manufacture automobiles in Canada, but is involved with, has responsibilities and provides direction for the research, design, development, engineering, manufacture, regulatory compliance, marketing, distribution, sale and lease of the Vehicles throughout Canada.

9. At all material times, BMW Canada was the sole distributor of the Vehicles in Canada. It sold the Vehicles through its dealer and retailer network, which were controlled by the BMW Defendants and were their agents.

10. BMW US is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Woodcliff Lake, New Jersey. It is a wholly-owned subsidiary of BMW AG. BMW US is involved with, has responsibilities for and provides direction on the research, design, development, engineering, manufacture, regulatory compliance, marketing, distribution, sale and lease of the Vehicles in North America.

11. The emissions testing of the Vehicles in the United States was facilitated by BMW AG, BMW Canada and BMW US, and such testing was relied upon by Canadian regulatory authorities, Class Members and the general public.

12. The business of each of BMW AG, BMW Canada and BMW US are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the research, design, development, engineering, manufacture, regulatory compliance, marketing, distribution, sale and lease of the Vehicles and for the purposes of the claims described herein.

**b. Bosch Defendants**

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

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

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

16. Bosch GmbH, directly and/or through its North American subsidiaries, Bosch LLC and Bosch Inc., at all material times, researched, designed, manufactured, engineered and supplied elements of the Defeat Devices to the BMW Defendants for use in the Vehicles.

17. The Bosch Defendants operate within the “Bosch Group” of companies. The business of each of the Bosch Defendants are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the research, design, manufacture, engineering, marketing,

sale and/or distribution of the Software and the components that enabled its use, and for the purposes of the claims described herein.

**F. DIESEL EMISSIONS**

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

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

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

21. Among other things, the lean-burning nature of diesel engines and the high temperatures and pressures of the combustion process result in vastly increased levels of NO<sub>x</sub> and other pollutants, as compared to the levels in gasoline engine exhaust. NO<sub>x</sub> emissions are dangerous air pollutants that are harmful to humans and the environment. The release of NO<sub>x</sub> emissions contributes to, among other things, the formation of acid rain and ground level ozone. Exposure to NO<sub>x</sub> causes or contributes to, among other health issues, serious forms of respiratory illness, and poses a particular threat to the elderly, children, and people with asthma.

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

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

#### **G. CANADIAN EMISSION LAWS AND REGULATIONS**

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

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

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

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

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

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

30. In addition to, and separate from, the Defeat Devices, the Vehicles generally emit pollutants, including NO<sub>x</sub>, in amounts that exceed the limits set out in Emissions Standards during real-world operation in many circumstances.

31. The emissions from the Vehicles during common driving conditions exceed Canadian and American laws and regulations and allow emissions (including NO<sub>x</sub>) and pollution at dangerous levels, which affect the health and safety of Canadians. Among other failures, the Defendants failed to warn the Class Members of the foregoing, notwithstanding that the Defendants knew or ought to have known that the Vehicles and their emissions systems did not

comply with Emissions Standards and defeated the common, safe environmental outcomes contemplated by Federal, Provincial and Territorial laws and regulations.

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

#### **H. ROLE OF THE BOSCH DEFENDANTS**

33. The Bosch Defendants form one of the leading automotive suppliers globally, and were so throughout the period relevant to this proceeding. They heavily campaigned and lobbied for diesel vehicles and were the *sine qua non* of the rapid expansion of diesel engine vehicles in Europe and later in North America. They held themselves out as “the world’s leading manufacturer of diesel injection systems” and played a “decisive” role in the expansion of the diesel vehicle market, supplying the diesel control components, as specified below, of numerous cars and trucks including the Vehicles.

34. The Bosch Defendants researched, designed, developed, tested, configured, manufactured, engineered and supplied the Vehicles’ diesel engine control unit. This diesel engine control unit is the Bosch Defendants’ Electronic Diesel Control Unit 17 (“**Bosch EDC17**”). Bosch EDC17 is the computer that manages the emission components of the Plaintiffs’ Vehicles and of the Vehicles of all Class Members. It enables the Software to detect conditions when emissions controls can be deactivated or turned down without detection.

35. The Bosch Defendants also marketed “clean diesel” in Canada. They, on their own and/or through trade organizations, represented to the public and to regulators the benefits of “clean



diesel.” These marketing activities increased the demand and premium price paid for diesel vehicles in Canada.

## **I. DEFENDANTS CONSPIRED TO CREATE AND USE DEFEAT DEVICES**

36. The Bosch Defendants embedded sales and engineering personnel at customer offices and facilities throughout the world, including with the BMW Defendants, to work directly on the design, sale, calibration, and configuration of the parts that they supplied. Additionally, the BMW Defendants frequently engaged in discussions with the Bosch Defendants regarding calibrations of the emission control technology of the Vehicles.

37. The Bosch Defendants created the Defeat Devices by writing all the computer code for Bosch EDC17 and by customizing Bosch EDC17 so as to allow the Vehicles to simulate passing regulatory emission tests. Bosch EDC17 enables the Vehicles to detect when they are not in the emissions certification test cycles and to turn down, or turn off, emissions controls. These Defeat Devices cause the Vehicles to emit an average of 3 times, and up to 20 times, the permissible limit for NO<sub>x</sub> pollutants during highway conditions and 8.5 times, and up to 27 times, the limit during city driving. The BMW Defendants could not meet the Emissions Standards without the Bosch Defendants’ Defeat Devices.

38. The Bosch Defendants were aware that the BMW Defendants used their emission control technology as a defeat mechanism. The Bosch Defendants knew and intended that the Vehicles be marketed, distributed, warranted, sold and leased throughout Canada.

39. The Defendants knowingly, intentionally or negligently incorporated into the Vehicles certain AECs that were not disclosed to regulators. These AECs are, or amount to one or

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

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

#### **J. REPRESENTATIONS**

41. The BMW Defendants' marketing efforts focused on highlighting the Vehicles' purported performance, fuel efficiency and clean emissions benefits.

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

- (a) the Vehicles met or exceeded all relevant Federal, Provincial and Territorial emissions regulations;
- (b) the Vehicles met certain specified fuel economy ratings and that those ratings had been accurately reported to regulators;
- (c) the Vehicles produce a certain specified amount of NO<sub>x</sub> and those NO<sub>x</sub> ratings had been accurately reported to regulators;

- (d) the Vehicles have “clean” diesel technology where “BluePerformance consistently reduces nitrogen oxide emissions for a minimum environmental impact”;
- (e) the Vehicles have “even greater acceleration and more low-end pulling power than ever. All while making cleaner emissions a reality”; and
- (f) the Vehicles “not only provide sports-car-like acceleration and driveability, but offer up a whole new level of fuel efficiency and emission reduction.”

43. In addition, the BMW Defendants consistently failed to state any or all of the following facts:

- (a) the Vehicles were not free from dangerous defects;
- (b) the Defeat Device(s) in the Vehicles created inaccurate emissions testing results;
- (c) the Defeat Device(s) in the Vehicles was designed to create false emissions testing results;
- (d) the Defeat Device(s) significantly reduce the effectiveness of NOx reduction systems during ordinary driving conditions;
- (e) the Defeat Device(s) in the Vehicles did mislead those persons who tested emissions in the Vehicles;
- (f) the Vehicles emit more pollutants than the testing of the Vehicles indicated;
- (g) the Vehicles emit more pollutants than the BMW Defendants had publicly stated;

- (h) the Vehicles' performance capabilities are only possible if the emissions controls are turned down or deactivated; and
- (i) the Vehicles' fuel economy and fuel consumption is only possible if the emissions controls are turned down or deactivated.

44. These representations, which include the omissions, were made by the BMW Defendants to the Plaintiffs and the Class Members directly or through their dealer-agents.

45. These representations were false.

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

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

- (a) "Bosch supplies...clean-diesel fuel technology for cars and trucks";
- (b) Bosch EDC17 "controls every parameter that is important for effective, low-emission combustion";
- (c) Bosch EDC17 "offers a large number of options such as the control of particulate filters or systems for reducing nitrogen oxides";

- (d) vehicles equipped with the Bosch Defendants' diesel technology meet or exceeded the "strictest" emissions regulations;
- (e) vehicles equipped with the Bosch Defendants' diesel technology have "low fuel consumption" and "more efficient fuel combustion";
- (f) "[i]n comparison to a typical diesel made in 1990, the particulate output [of vehicles equipped with the Bosch Defendants' diesel technology] today is around 98 percent lower. In the case of nitrogen-oxide, the reduction quota of 96 percent is at a similarly high level"; and
- (g) vehicles equipped with the Bosch Defendants' diesel technology are environmentally friendly, environmentally compliant, "clean", "conserve our natural resources and thus contribute toward saving the planet."

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

49. The Bosch Defendants made these representations and omissions to the Plaintiffs and the Class Members directly or through their agents and co-conspirators including the BMW Defendants.

50. These representations were false.

51. Instead of delivering on their promise that the diesel-powered Vehicles would provide superior fuel-efficiency and performance coupled with clean emissions, the Defendants decided

to create the appearance of low emissions by installing the Software in the Vehicles. By installing the Software, the Vehicles' emissions only complied with Emissions Standards in testing conditions, but exceed Emissions Standards under common driving conditions.

#### **K. BREACH OF EXPRESS AND IMPLIED WARRANTIES**

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

53. Without limiting the generality of the foregoing, BMW Canada provided the Class Members with a uniform written warranty that covered any repair connected to a manufacturer's defect in material or workmanship and, among other things:

- (a) specifically warranted that the Vehicles' emission control systems were designed, built and equipped to conform with all relevant Federal, Provincial and Territorial regulatory emissions requirements;
- (b) warranted that the Vehicles' emission control systems were free from defects in materials and workmanship that would cause the Vehicles to fail to conform with relevant emissions requirements or otherwise;
- (c) specifically noted that any failure of a warranted regulated emission part could cause a Vehicle to fail to conform with Federal emissions requirements; and

(d) warranted (to original purchasers and lessees as well as subsequent purchasers) that BMW Canada would remedy any non-conformity that resulted in a Vehicle failing a Federal, Provincial, or Territorial emissions control test.

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

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

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

57. The BMW Defendants have breached their warranties to the Plaintiffs and Class Members, and as a result the Plaintiffs and Class Members have suffered damages for which the BMW Defendants are liable.

#### **L. NEGLIGENT MISREPRESENTATION**

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

- (a) their design and manufacture of the Vehicles, the Advanced Diesel with BluePerformance engine and engine technology, Bosch EDC17, the engine control units, the emissions control mechanisms and other parts contained in the Vehicles;
- (b) their skill, experience and expertise in the design and manufacturing of automotive diesel engines and vehicles generally;
- (c) the fact that Class Members had no means of knowing or investigating the existence or use of the Defeat Device(s); and
- (d) the Defendants' complete control of the promotion and marketing of the Vehicles, and the need for Class Members to rely on the Representations and integrity of the Defendants in respect of the Vehicles and their attributes.

59. The Defendants owed a duty of care to the Plaintiffs and the Class Members. It was intended by the Defendants and reasonably foreseeable that the Class Members would reasonably rely, to their detriment, upon the Representations when purchasing or leasing the Vehicles and would suffer loss.

60. The Plaintiffs and Class Members reasonably relied on the Representations in deciding whether to purchase or lease the Vehicles. Their reliance can be inferred on a class-wide basis from the purchase or lease of the Vehicles. Had the Representations not been made, the Vehicles would not have been permitted for sale in Canada, the Class Members could not have made the purchase or lease and would not have paid the higher price charged for Vehicles equipped with Advanced Diesel with BluePerformance.



61. The Representations were false and were made negligently.

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

#### **M. NEGLIGENCE**

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

64. The Defendants knew and it was reasonably foreseeable that the Class Members would trust and rely on the Defendants' skill and integrity in purchasing or leasing the Vehicles. The Defendants also knew and it was reasonably foreseeable that, if the Vehicles contained defects or were not compliant with Emissions Standards, the value of the Vehicles would diminish and the Vehicles could be subject to recalls, which would cause the Class Members to suffer loss.

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

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

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

#### **N. UNLAWFUL MEANS CIVIL CONSPIRACY**

68. The Defendants and other unknown co-conspirators unlawfully agreed and conspired to research, design, develop, manufacture and install the Defeat Devices, to market, distribute, sell and lease the Vehicles containing the Defeat Devices, and to deceptively conceal their existence in the Vehicles.

69. The Defendants' conduct was unlawful, as contrary to US and Canadian laws.

70. The Defendants' conduct was directed towards the Plaintiffs and the Class. The Defendants knew or should have known that harm to the Plaintiffs and the Class was likely.

#### **O. STATUTORY RIGHTS OF ACTION**

##### **a. *CEPA***

71. The BMW Defendants imported and/or sold the Vehicles into Canada in violation of *CEPA* and the Emissions Standards. Had the BMW Defendants not violated *CEPA* and the Emissions Standards, the Class Members either would not have bought the Vehicles or the Vehicles would have been free from dangerous defects that caused a diminution of their value.

The Class Members have therefore suffered damages as a result of the BMW Defendants' contravention of *CEPA* and the Emissions Standards.

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

**b. *COMPETITION ACT***

73. The Defendants made the Representations to the public and in so doing breached section 52 of the *Competition Act* because the Representations:

- (a) were made for the purpose of promoting the supply or use of the Vehicles and the diesel technology contained therein for the business interests of the Defendants;
- (b) were made to the public; and
- (c) were false and misleading in a material respect.

74. The Plaintiffs and the Class Members relied on the Representations in purchasing or leasing the Vehicles to their detriment. The Plaintiffs and the Class Members would not have purchased or leased the Vehicles without the Representations made in breach of section 52.

75. The Defendants' breach of section 52 of the *Competition Act* caused loss and damage to the Plaintiffs and the Class Members. Pursuant to section 36 of the *Competition Act*, the Defendants are liable to pay these damages plus investigative costs resulting from this breach.

**c. *CONSUMER PROTECTION ACT AND EQUIVALENT CONSUMER PROTECTION STATUTES***

76. The BMW Defendants are located in Ontario for the purposes of the *Consumer Protection Act*.

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

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

79. The BMW Representations constituted unfair, unconscionable and/or otherwise prohibited practices under the *Consumer Protection Act* and Equivalent Consumer Protection Statutes, given that, among other things, the BMW Defendants knew, or ought to have known, that:

- (a) the BMW Representations were false, misleading and deceptive;
- (b) the Vehicles did not have the performance characteristics, uses, benefits or qualities as set out in the BMW Representations;
- (c) the Vehicles were not of the particular standard, quality or grade as set out in the BMW Representations;

- (d) the Vehicles did not provide the specific price advantage as set out in the BMW Representations;
- (e) the BMW Defendants used exaggeration, innuendo and/or ambiguity as to a material fact and failed to state a material fact in respect of the Vehicles;
- (f) the price for the Vehicles grossly exceeded the price at which similar goods or services were readily available to like consumers;
- (g) the Class Members were unable to receive all expected benefits from the Vehicles;
- (h) the consumer transactions were excessively one-sided in favour of the BMW Defendants;
- (i) the terms of the consumer transactions were so adverse to the Class Members as to be inequitable; and/or
- (j) because of such further conduct concealed by the BMW Defendants and unknown to the Plaintiffs.

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

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

82. The Class Members are entitled, to the extent necessary, to a waiver of any notice requirements under the *Consumer Protection Act* or of the Equivalent Consumer Protection Statutes, particularly as the BMW Defendants have concealed the actual state of affairs from the Class Members.

#### **P. UNJUST ENRICHMENT**

83. The BMW Defendants caused the Class Members to pay money for a dangerous and illegal product, which contrary to *CEPA*, the *Competition Act*, the *Consumer Protection Act* and Equivalent Consumer Protection Statutes, they should not have paid for or, in the alternative, for which they should have paid less than they did.

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

85. The Class Members suffered a deprivation corresponding to the BMW Defendants' enrichment.

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

#### **Q. DAMAGES**

87. As a result of the conduct pleaded above, the Plaintiffs and Class Members have suffered damages corresponding to the reduced value of the Vehicles, the premium paid for "clean" diesel engine technology, and the repair or replacement of the Vehicles' components.

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

89. Each Class Member paid a premium of at least \$4,000 on their Vehicle, as BMW Canada charged more for its diesel-powered vehicles than comparable gasoline-powered vehicles. As a result of the Defendants' unfair and deceptive business practices, and their failure to disclose that under common operating conditions the Vehicles are not "clean" diesels, Class Members have suffered losses.

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

91. If BMW Canada recalls the Vehicles and degrades their engine performance and fuel efficiency in order to make the Vehicles compliant with Emissions Standards, Class Members will be required to spend additional sums on fuel and will not obtain the performance characteristics of their Vehicles when they were purchased.

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

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

#### **R. WAIVER OF TORT**

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

95. This remedy is appropriate for the following reasons, among others:

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



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

## **S. RELEVANT STATUTES**

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

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

- (i) *Consumer Protection Act*, SS 1996, c C-30.1, as amended, and the regulations thereto, sections 5, 6, 7, 8, 14, and 16;
- (j) *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, as amended, and the regulations thereto, sections 2, 4, 6-16, 19-22, 24-33, 36, 37, 39, 91 and 93;
- (k) *Business Practices Act*, RSPEI 1988, c B-7, as amended, and the regulations thereto, sections 1, 2, 3 and 4;
- (l) *Consumer Protection Act*, RSNS 1989, c 92, as amended, and the regulations thereto, section 28;
- (m) *Civil Code of Québec*, CQLR c CCQ-1991, as amended, and the regulations thereto;
- (n) *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, as amended, and the regulations thereto;
- (o) *Environmental Protection Act*, RSO 1990, c E.19, as amended, and the regulations thereto, sections 21, 22, and 23;
- (p) *Climate Change and Emissions Management Act*, SA 2003, c C-16.7, as amended, and the regulations thereto, section 60;
- (q) *Motor Vehicle Act*, RSBC 1996, c 318, as amended, and the regulations thereto, sections 47, 48, 49, and 50;

- (r) *The Climate Change and Emissions Reductions Act*, CCSM, c C135, as amended, and the regulations thereto, sections 13 and 14;
- (s) *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, as amended, and the regulations thereto, sections 51, 52, 53, and 54;
- (t) *Environmental Quality Act*, CQLR c Q-2, as amended, and the regulations thereto, sections 51, 52, and 53;
- (u) *Clean Air Act*, SNB 1997, c C-5.2, as amended, and the regulations thereto, section 46;
- (v) *Environment Act*, SNS 1994-95, c 1, as amended, and the regulations thereto, sections 111 and 112;
- (w) *Environmental Protection Act*, RSPEI 1988, c E-9, as amended, and the regulations thereto, section 25;
- (x) *Environmental Protection Act*, SNL 2002, c E-14.2, as amended, and the regulations thereto, section 22;
- (y) *Environmental Protection Act*, RSNWT (Nu) 1988, c E-7, as amended, and the regulations thereto, section 34;
- (z) *Environment Act*, RSY 2002, c 76, as amended, and the regulations thereto, section 145; and
- (aa) *Negligence Act*, RSO 1990, c N.1, as amended and the equivalent Provincial and Territorial legislation.

## **T. SERVICE**

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

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

**March 27, 2018**

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Court File No.:

CV-18-1311-00

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at BRAMPTON

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

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