C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action Division)
SUPERIOR COURT

NO. : 500-06-000920-187

ADAM CHARLES BENJAMIN

Plaintiff

v.

VW CREDIT CANADA INC.

TOYOTA CREDIT CANADA INC.

HONDA CANADA FINANCE INC.

MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION

BMW CANADA INC.

NISSAN CANADA FINANCIAL SERVICES INC.

CANADIAN ROAD MANAGEMENT COMPANY

Defendants

DEFENCE OF DEFENDANT CANADIAN ROAD MANAGEMENT COMPANY

IN RESPONSE TO PLAINTIFF'S ORIGINATING APPLICATION, DEFENDANT, CANADIAN ROAD MANAGEMENT COMPANY ("FORD CREDIT"), RESPECTFULLY SUBMITS THE FOLLOWING:

1. It denies the allegations set forth at paragraphs 1 and 2 of Plaintiff's Originating Application (the "**Application**"), given that even if Articles 1437 and 1872 of the *Civil Code of Québec* ("**CCQ**") and/or Section 12 of the *Consumer Protection Act* ("**CPA**") apply, which is further denied, Ford Credit has not contravened these provisions in any manner.

2. As regards the allegations set forth at paragraph 3 of the Application, it refers this Honourable Court to the Court of Appeal judgment dated October 4, 2022, and denies anything not in conformity therewith.

3. It denies the allegations set forth at paragraph 4 of the Application.

4. It denies the allegations set forth at paragraphs 5, 6 and 7 of the Application, adding that the Plaintiff was merely a surety to the Assignment Agreement and assigned lease, and as such, his rights and obligations never crystallized.

5. As regards the allegations set forth at paragraph 8 of the Application, it refers this Honourable Court to Exhibit P-2, and denies anything not in conformity therewith.

6. It denies the allegations set forth at paragraph 9 of the Application.

7. It denies as drafted the allegations set forth at paragraph 10 of the Application.

8. It ignores the allegations set forth at paragraphs 11 to 31 of the Application.

9. As regards the allegations set forth at paragraphs 32 and 33 of the Application, it refers this Honourable Court to Exhibit P-10 and denies anything not in conformity therewith.

10. It takes act of the admission set forth at paragraph 34 of the Application.

11. It denies as drafted the allegations set forth at paragraph 35 of the Application.

12. It denies the allegations set forth at paragraphs 36, 37 and 38 of the Application.

13. It denies as drafted the allegations set forth at paragraphs 39 to 42 of the Application and refers this Honourable Court to the applicable lease agreements while denying anything not in conformity therewith.

14. It ignores the allegations set forth at paragraph 43 of the Application.

15. As regards the allegations set forth at paragraph 44 of the Application, it refers this Honourable Court to Article 1852 of the CCQ.

16. It denies as drafted the allegations set forth at paragraph 45 of the Application.

17. It denies the overly broad and introductive allegations set forth at paragraphs 46 to 50 of the Application, while adding that contractual content should not be determined by journalists.

18. It denies the allegations set forth at paragraphs 51 to 57 of the Application given they are in any event entirely irrelevant to this case.

19. As regards the allegations set forth at paragraphs 58, 59 and 60 of the Application, it refers this Honourable Court to the actual leases of Ford Vehicles and denies anything not in conformity therewith.

20. It denies the overly broad and general allegations set forth at paragraphs 61 to 65 of the Application.

21. As regards the allegations set forth at paragraph 66 of the Application, it refers this Honourable Court to Exhibits P-18 and P-19, and denies anything not in conformity therewith, and prays act of the Plaintiff's admission that it is the new assignee of a Ford vehicle lease that is charged the Assignment Fee, and not the assignor.

22. It denies the allegations set forth at paragraphs 67, 68 and 69 of the Application, as well as the exactitude and admissibility of the chart referred to at pages 14 to 19 of the Application, in so far as it is concerned.

23. It ignores the allegations set forth at paragraphs 70 to 77 of the Application.

24. It denies as drafted the allegations set forth at paragraph 78 of the Application.

25. It takes act of the admission set forth at paragraph 79 of the Application, which confirms that the information contained in this chart makes it totally unreliable.

26. It denies the overly broad and general allegations set forth at paragraphs 80 to 83 of the Application, while referring this Honorable Court to the lease assignments involving Ford Vehicles.

27. As regards the allegations set forth at paragraphs 84 and 85 of the Application, it refers this Honourable Court to the class definition and denies anything not in conformity therewith.

28. It denies the allegations set forth at paragraphs 86 to 88 of the Application.

29. As regards the allegations set forth at paragraphs 89 to 92 of the Application, it refers this Honourable Court to said Articles of the CCQ and denies anything not in conformity therewith, taking act of the Plaintiff's admission that the obligation set forth at Article 1872 CCQ is not of public order.

30. It denies the allegations set forth at paragraphs 93 to 113 of the Application.

31. As regard the allegations set forth at paragraphs 114 and 115, it refers this Honourable Court to the CCQ, and denies anything not in conformity therewith.

32. It denies the allegations set forth at paragraphs 116 to 125 of the Application, insofar as it is concerned.

33. It ignores the allegations set forth at paragraph 126 of the Application.

34. It denies the allegations set forth at paragraphs 127 to 148 of the Application.

35. As regards the allegations set forth at paragraphs 149 and 150 of the Application, it refers this Honourable Court to Exhibit P-38 and denies anything not in conformity therewith.

36. It ignores the allegations set forth at paragraphs 151 and 157 of the Application.

37. It takes act of the admissions set forth in paragraph 158 of the Application that M. Pantoni asked the Plaintiff to act as a guarantor because his personal credit was limited, while adding that the Plaintiff's allegation that he was also asked to act as a co-assignee is false given it is patently incongruent in fact and in law.

38. As regards the allegations set forth at paragraph 159 of the Application, it refers this Honourable Court to Exhibit P-1, and denies anything not in conformity therewith, adding that the Plaintiff's proposition that he was both an assignee and a surety to the Assignment Agreement is patently false in fact and incongruent in law, as the Plaintiff could evidently not guarantee his own obligations.

39. As regards the allegations set forth at paragraph 160 of the Application, it refers this Honourable Court to Exhibit P-1 and denies anything not in conformity therewith.

40. It denies the allegations set forth at paragraph 161 of the Application.

41. It takes act of the admission set forth at paragraph 162 of the Application, while adding that this is one of many factors demonstrating that the Plaintiff was merely a surety and not an assignee to the Assignment Agreement.

42. It denies the allegations set forth at paragraph 163 of the Application.

AND IN FURTHER DEFENCE TO PLAINTIFF'S APPLICATION, BUT WITHOUT PREJUDICE TO THE FOREGOING, DEFENDANT FORD CREDIT RESPECTULLY SUBMITS THE FOLLOWING:

I. THE DEFENDANT FORD CREDIT AND THE INDEPENDENT FORD DEALERS

43. Canadian Road Management Company is a wholly-owned subsidiary of Ford Credit Canada Company ("**Ford Credit**"), which provides financing and leasing products to customers who purchase or lease Ford and Lincoln vehicles (the "**Ford Vehicles**").

44. Ford Credit is not involved in the sale or distribution of Ford Vehicles, nor do they own or operate any Ford dealership.

45. There are currently 84 authorized dealers of Ford Vehicles which carry business in Québec (the "**Ford Dealers**"). None of the Ford Dealers are owned by Ford Credit or any other associated or related entity.

46. Indeed, since April 5, 2015 (i.e. the Class Period), all authorized Ford Dealers were independent franchises that were neither owned, operated nor affiliated with Ford Credit or Ford Motor Company of Canada, Limited.

47. Ford Credit is an independent and distinct entity from the dealers who process the lease assignment applications.

II. FORD CREDIT LEASES AND LEASE ASSIGNEMENT PROCESS

48. As appears notably from Exhibits P-2 and P-8, Ford Credit leases contain the following provision during the Class Period:

> (25) (…) You will not assign or sublease any interest in the Vehicle and/or Lease or permit any other person to have other than occasional use of the Vehicle without Credit Ford's prior written consent.

49. As such, the original lessee cannot assign his vehicle lease unless he obtains Ford Credit's prior written consent. Ford Credit has no interest or benefit in transferring the lease when it already has an approved lessee in good standing who has committed to fulfilling the terms of the lease until term.

50. These leases do not mention the amount of the transfer fee a since it is a mere possibility at that juncture and, more importantly, the lessee is never actually charged any transfer fee, as explained in greater detail below.

51. When the original lessee/assignor wants to complete a lease assignment, Ford Credit and Ford Dealer representatives must adhere to a detailed lease assignment process, which includes the completion and return to Ford Credit of the required lease assignment agreement signed by all parties. Communicated herewith as **Exhibits DF-1** and **DF-2** are sample long-term lease assignment agreements respectively for Ford and Lincoln model vehicles completed in 2017 for individual consumers whose personal information has been redacted.

52. Pursuant to Ford Credit's lease assignment procedures, it is the new lessee/assignee who is charged the Assignment Fee pursuant to a distinct and subsequent lease assignment agreement.

53. All of Ford Credit's distinct lease assignment agreements, which are only entered into when such transfers are processed, contain a clear, express and unequivocal clause pursuant to which the new lessee/assignee accepts and agrees to pay the Assignment Fee explicitly set forth therein.

54. As appears notably from Exhibit P-1, Ford Credit lease assignment agreements contain the following provision:

Frais de transfert :	450,00	$
TPS / TVH :	22,50	$
TVQ :	44,89	$
TOTAL :	517,39	$

> De plus, le cessionnaire accepte de payer les frais de transfert susmentionnés, y compris les taxes, pour couvrir le coût du transfert.

55. At all relevant times since April 5, 2015, all Ford Dealers were instructed and authorized by Ford Credit to charge the assignee a maximum fee of $450 (excluding taxes) to process the assignment of a Ford Vehicle lease.

56. The lease assignment process and the Assignment Fees charged in connection therewith have remained the same for the entire Class Period.

57. Ford Credit has never authorized or charged any lease assignment fee that exceeded the $450 amount stipulated in the lease assignment agreements.

58. Of the total Assignment Fees collected in connection with lease assignments, Ford Dealers are instructed to remit $225 to Ford Credit and retain an equivalent amount for their efforts in processing the vehicle assignment requests.

59. In light of the terms of these lease assignment agreements, there is no veritable sub-class of Ford Credit lease assignor customers, since these assignors have never been charged any lease Assignment Fee and have no interest whatsoever in the fee per se.

III. <u>INAPPLICABILITY OF ARTICLE 1872 CCQ</u>

60. It is also abundantly clear that Article 1872 CCQ is not available to Ford Credit lease assignees since they necessarily and clearly opted out of and/or waived the right to invoke an Article 1872 CCQ remedy, when agreeing to the express terms of the assignment agreements and signing same.

61. The execution of the assignment agreement is blatant evidence of the assignee's unequivocal acceptance to pay the amount of $450 to Ford Credit.

IV. <u>ABSENCE OF ANY CONTRAVENTION UNDER SECTION 12 CPA</u>

62. Plaintiff's recourse also fails to establish any fee non-disclosure recourse under Section 12 of the CPA, which provides:

> 12. No costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract.

63. Again, with respect to Ford Credit leases, the Assignment Fee is charged to the assignee (and not the assignor) in a distinct contract from the original lease such that no contravention of Section 12 CPA is possible, let alone established.

64. Neither Ford Credit assignees nor assignors could be members of the consumer sub-class as they could never avail themselves of any fee non-disclosure cause of action under Section 12 CPA.

65. The disclosure of the Assignment Fee in the distinct Ford Credit assignment agreements was eminently precise and clear as to its purpose. It fully conformed to any disclosure requirement.

66. Hence, no demonstration of any plausible and representative Ford Credit consumer nondisclosure claim has been made either.

V. <u>THE ASSIGNEMENT FEES CHARGED WERE NEITHER UNREASONABLE NOR ABUSIVE</u>

67. Subsidiarily, the Plaintiff has patently failed to establish that the transfer fee charged to Ford Vehicle assignees is unreasonable, shockingly excessive or exploitative by any legal standard or requirement.

68. Ford Credit only receives 50% of the $450 transfer fee. This portion of the transfer fee globally covers the operational, fixed and development costs incurred by Ford Credit in connection with the multiple employee steps and analysis required to address lease transfers.

69. Some lease assignment requests are abandoned or declined and lead to expense which is never paid for by these lessees or prospective assignees.

70. The remaining 50% of this fee is used by Ford Dealers to offset their own expense and costs when processing lease assignments.

71. Ford Dealers, which are distinct entities as established earlier herein, have the discretion to waive their 50% share of the fee, for any reason they deem advisable to do so. It is thus false to affirm these contracts are not negotiable.

72. When the assignment fee of Ford Credit ($450) is considered in the competitive context alleged by the Plaintiff, it is equally clear that this fee was and remains entirely reasonable in any event.

VI. <u>THE CLASS PLAINTIFF'S JUDICIAL ADMISSION THAT AN ASSIGNMENT FEE OF $500 OR LESS IS REASONNABLE</u>

73. Settlement transactions must be publicly and transparently approved in the context of a class action to ensure they are fair, reasonable and binding upon putative members.

74. The Class Plaintiff relied in part on the sworn declaration of Mr Alan H. Bird, President of SCI, dated August 19, 2019, in order to approve a settlement with this former Defendant.

75. This sworn declaration of Mr. Bird established that the total cost to SCI Lease Corp. for each lease transfer was approximately $397.11 + $186.53 = $583.64.

76. Plaintiff invoked this transaction was fair and reasonable, as follows:

> 10. Behavioural Modification
>
> SCI also agrees that it will modify its leases to include language substantially in the following terms:
>
> *You [the lessee] recognize that the fees of $500 represent the reasonable expenses that SCI will incur for the lease transfer. You renounce through this agreement to the possibility of invoking art. 1872 of the Civil Code of Quebec with respect to the transfer fees charged to you by virtue of the present section.*
>
> (our emphasis)

the whole as appears from the SCI Settlement Agreement signed on October 2, 2019, approved by the Superior Court by judgment dated February 5, 2020 in this Court record.

77. Moreover, in the sworn declaration of Larry Marion, president of Canadian Dealer Lease Service Inc., dated April 11, 2023 filed in support of the Application to Approve a Class Action Settlement with CDLSI, the affiant affirmed that the $350 flat fee *charged for each lease assignment costs fails to cover all of CDLSI's assignment costs, with the result that lease assignments are processed at a loss to CDLSI, given that the cost of processing lease assignments represents at least $411.94. Since 2013, CDLSI has nevertheless elected to keep the fee constant at $350 because of competitive pressures within the automobile leasing industry*, the whole as appears from said sworn declaration filed in support of the CDLSI Re-Amended Settlement Agreement approved by judgment of the Superior Court dated September 3, 2023, in this Court record.

78. The Class Plaintiff ought not be permitted to invoke that an assignment fee of $500 is reasonable when settling his action with some Defendants, and to subsequently urge on the merits that the same or lesser assignment fee charged by the other Defendants is unreasonable, exploitative and abusive.

79. To do so amounts to the judicial endorsement of pseudo recriminations and unmeritorious windfalls which not only defy common sense but undermine the credibility and objectives of class relief.

VII. THE PLAINTIFF REPRESENTATIVE CLAIM IS INCONGRUENT AND DEVOID OF ANY LEGAL INTEREST

80. The following defences regarding the unfoundedness of the Class Plaintiff's claim were raised before and following class authorization but were deemed better suited for a merits inquiry at trial.

A. Absence of interest as a surety

81. The Assignment Fee invoked was never paid on behalf of the Plaintiff since he was merely a surety and not an assignee pursuant to the Ford Credit Assignment Agreement filed as Exhibit P-36.

82. In its Motion to Institute Proceedings, the Plaintiff alleges the following:

> 7. À titre de cessionnaire, <u>le Demandeur a assumé tous les droits, intérêts et obligations du bail de véhicule initialement contractés par le cédant et il s'est vu facturer des frais à l'occasion de cette cession</u>, comme il sera plus amplement décrit dans les présentes, et tel qu'il appert notamment de la Convention de Transfert du Bail du Demandeur avec la défenderesse Compagnie de gestion Canadian Road datée du 19 novembre 2018 et signé le 3 décembre 2018 (le « Contrat de cession du Demandeur »), communiqué au soutien des présentes comme pièce P-1.
>
> (our emphasis)

83. However, the same Motion to Institute Proceedings further alleges the Plaintiff was also a surety:

> 158 Au cours de leurs discussions pour effectuer la cession du Bail Ford-Roker, <u>M. Pantoni a demandé au Demandeur d'agir à titre de cocessionnaire et garant</u>, car sa capacité de crédit personnel était lors limitée. Le Demandeur a accepté cette demande et a agi à titre de cocessionnaire et garant du Bail Ford-Roker.
>
> (our emphasis)

84. The Class Plaintiff's proposed contractual recourse as a hybrid assignee/surety was and remains incongruent in law, as he could evidently not guarantee his own obligations.

85. The Class Plaintiff's incorrect designation as a co-assignee in the Assignment Agreement could not transform his admitted role and signature as surety.

86. As a matter of law, Article 2352 CCQ mandates that any transformation from surety into a solidary debtor invariably requires an express solidary qualification. The Assignment Agreement did not contain such express qualification. Unlike the original lease, the Assignment Agreement was not a commercial contract within the meaning of 1525 CCQ. Thus, it was not possible to presume solidarity either.

87. It is Mr. Pantoni who exclusively insured, used, and paid for the leased vehicle since the assignment, as freely admitted by the Class Plaintiff. The post contractual conduct of the Class Plaintiff squarely contradicts any intent to assume the lease obligations as a co-assignee.

88. When signing the Assignment Agreement, the Plaintiff merely intended to confirm his suretyship of Mr. Pantoni's lease obligations and nothing else.

89. A surety is not bound to fulfil the obligation of the debtor until a default occurs. Hence, the Plaintiff could only be called upon to pay any leasehold sum in the event the assignee (Mr. Pantoni) defaulted.

90. The surety designation was limited to an assumption of the original lease terms. This surety could only be invoked once the payment of the Assignment Fee charged to the new assignee was effected and, if and only if, the latter defaulted. No such default occurred.

B. Only Ford Assignees are the designated payees of the transfer fee

91. According to Ford Credit's procedures, only the new assignee of a Ford Credit lease was charged the Assignment Fee.

92. The foregoing is expressly admitted by the Plaintiff at paragraph 66 of this Motion to institute proceedings:

> "66. En outre, la défenderesse Société de Crédit Ford stipule dans ses Clauses de cession que locataire ne peut céder le bail de véhicule sans le consentement du locateur, mais ne mentionne aucune autre condition, tel qu'il appert du Bail Ford, communiqué au soutien des présentes comme pièce **P-18**. <u>Or dans les faits, des Frais de cession sont exigés et facturés au cessionnaire du bail de véhicule à l'occasion du contrat de cession de bail auquel interviennent le cédant</u>, le cessionnaire, et la Société de location, le tout tel qu'il appert des contrats de cession communiqués en liasse au soutien des présentes comme pièce **P-19**.
>
> (our emphasis)

93. The Plaintiff had no basis under the Assignment Agreement to invoke that he had been charged an Assignment Fee. As such, the Plaintiff could not claim the reimbursement of a sum he was never asked to or obliged to pay. Indeed, the identity of the payer of a fee is irrelevant as a matter of law.

94. Consequently, no third-party payment arrangement without substitution of debtors could alter who Ford Credit had contractually chosen to charge for the payment of the fee.

95. Here, the accountholder is Mr. Pantoni and it mattered not a wit whether Cie Roker or anyone else paid the Assignment Fee on his behalf so long as he remained the debtor.

96. Ford Credit was by the very terms of Article 1555 CCQ *in fine* entitled to insist that payment of the Assignment Fee be made by or on behalf of its new lessee.

97. Given the assignment, Ford Credit had a clear interest to insist that its new lessees paid for such transfers and was perfectly entitled to structure its contracts in this manner. Whether a proposed surety or any third party paid the Assignment Fee on behalf of the new lease assignee was and remains irrelevant.

98. In the instant case, the Class Plaintiff never paid the Assignment Fee himself. Nor was Cie Rocker's payment of the Assignment Fee ever made on his behalf.

99. Cie Roker instead paid the Assignment Fee for the benefit of the new assignee, Mr. Pantoni, and not on behalf of the Plaintiff.

C. Plaintiff bad faith attempt to fabricate his standing and interest

100. Remarkably, paragraph 7 of the Motion to Institute Proceedings amounts to an attempt to mislead the Court into presuming that the Class Plaintiff had been invoiced and therefore had paid the Assignment Fee to Ford Credit, when the Plaintiff knew full well that Cie Roker had instead done so.

101. In short, the Class Plaintiff attempted to hide that Cie Roker had paid the Assignment Fee to Ford Credit when the Assignment Agreement was signed. He instead invited the Court to presume he had paid the Fee even though he was fully aware this was not the case.

102. The Class Plaintiff's belated reimbursement of Cie Rocker was at the very least irrelevant and could not alter the fact that Cie Roker had paid the Assignment Fee to Ford Credit on behalf of Mr. Pantoni over two months earlier.

103. The Plaintiff had no conceivable or *bona fide* interest to personally assume the lease Assignment Fee paid by Cie Roker on behalf of Mr. Pantoni.

104. The Plaintiff's obligations as a surety could not arise before the lease assignment was authorized, on December 6, 2018, and before a default was committed thereunder by Mr. Pantoni.

105. Thus, the Plaintiff's belated, unnecessary and uninterested reimbursement of Cie Roker, if any, was entirely irrelevant.

106. It is illuminating in this respect that according to the Plaintiff, his alleged reimbursement of Cie Roker was made on February 6, 2019, the exact same day on which the Plaintiff was added as an Applicant to the Motion for authorization to institute a class action. On that day, over two months had passed since the execution of the Assignment Agreement. This timing was not the result of pure happenstance.

107. Thus, the Plaintiff's alleged reimbursement of the Assignment Fee was an ill-conceived twelfth-hour attempt to mask an untenable cause of action and to fabricate standing.

108. It will bring the administration of justice into disrepute to confer any credence to the supposed representative cause of action of the Plaintiff. Absent a default under his assigned lease, only Mr. Pantoni could invoke a recourse in respect of his Assignment Fee.

109. Evidently, these incongruent claims of the Plaintiff cannot lawfully anchor the proposed class proceedings.

VIII. <u>CONCLUSION</u>

110. Plaintiff's claim against Ford Credit is thus devoid of any factual or legal basis and should be dismissed with costs.

WHEREFORE, MAY IT PLEASE THIS HONORABLE COURT:

DISMISS Plaintiff's Originating Application;

MAINTAIN the Defence of the Defendant Canadian Road Management Company;

THE WHOLE with costs.

Montréal, July 12, 2024

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C A N A D A

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Defendants

LIST OF EXHIBITS IN SUPPORT OF THE DEFENCE OF DEFENDANT CANADIAN ROAD MANAGEMENT COMPANY

Exhibit DF-1 Sample long-term lease assignment agreement for a Ford model vehicle completed in November 2017 for individual consumers (redacted)

Exhibit DF-2 Sample long-term lease assignment agreement for a Lincoln model vehicle completed in February 2017 for individual consumers (redacted)

Montréal, July 12, 2024

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(Class Action Division)
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ADAM CHARLES BENJAMIN

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CANADIAN ROAD MANAGEMENT COMPANY

Defendants

DEFENCE OF DEFENDANT CANADIAN ROAD MANAGEMENT COMPANY AND LIST OF EXHIBITS

ORIGINAL

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