

**C A N A D A**

**PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL  
LOCALITY OF MONTRÉAL**

**SUPERIOR COURT  
(Class Action)**

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No: 500-06-000837-175

**GARAGE POIRIER & POIRIER INC.**

and

**ALEX BOUFFARD**

Petitioners

-v.-

**FCA CANADA INC.**

and

**FCA US LLC**

and

**VM MOTORI NORTH AMERICA, INC.**

and

**ROBERT BOSCH INC.**

and

**ROBERT BOSCH NORTH AMERICA  
CORPORATION**

and

**ROBERT BOSCH LLC**

Respondents

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**APPLICATION FOR AUTHORIZATION TO ADDUCE RELEVANT EVIDENCE  
(574 CCP)**

TO THE HONOURABLE JUSTICE CHANTAL CORRIVEAU OF THE SUPERIOR COURT, ACTING AS THE DESIGNATED JUDGE IN THE PRESENT CASE, THE RESPONDENTS FCA CANADA INC., FCA US LLC, AND VM MOTORI NORTH AMERICA, INC. RESPECTFULLY SUBMIT AS FOLLOWS:

1. The Respondents FCA Canada Inc. and FCA US LLC (collectively "**FCA**") and Respondent VM Motori North America Inc. ("**VM Motori**"), hereby seek the authorization of this Honourable Court to adduce relevant evidence pursuant to article 574, paragraph 3 of the *Code of Civil Procedure*, RLRQ c C-25.01 ("**CCP**").

2. More specifically, FCA and VM Motori seek this Honourable Court's authorization to adduce as relevant evidence the following:
  - a) A Sworn Statement of Stuart Shaw, Manager for Vehicle Safety and Regulatory Compliance, at FCA Canada Inc., dated February 12, 2021 and the Annexes A to DD in support thereof, a copy of which is filed herewith as **Exhibit FCA-1A**;
  - b) The transcript of the cross-examination of David Checkel dated November 15, 2019, a copy of which is filed herewith as **Exhibit FCA-2**;
  - c) The transcript of the cross-examination of Brandon Schaufele dated December 10, 2019, a copy of which is filed herewith as **Exhibit FCA-3**.

**I. THE NEW APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION & TO APPOINT THE PETITIONERS AS REPRESENTATIVES**

3. On January 13, 2017, Petitioners Garage Poirier & Poirier Inc. and Alexis Bouffard (the "**Petitioners**") filed an *Application to Authorize the Bringing of a Class Action & to Appoint the Petitioners as Representatives* which was amended on September 8, 2017, then on March 6, 2018 wherein Robert Bosch Inc., Robert Bosch GmbH, Robert Bosch LLC and VM Motori North America Inc. were added as Respondents, and then again for a third time on June 12, 2020 ("**Third Amended Authorization Application**").
4. Finally, on November 16, 2020, pursuant to a case management order of this Honourable Court to redraft the almost 100-page Third Amended Authorization Application, the Petitioners filed a *New Application to Authorize the Bringing of a Class Action & to Appoint the Petitioners as Representatives* (the "**New Authorization Application**"). The Petitioners seek the authorization to represent the following proposed class:

"All persons, entities or organizations resident in Quebec that purchased and/or leased one or more of the Subject Vehicles [...], or any other group to be determined by the Court;"
5. By way of the New Authorization Application, the Petitioners advance some 65-pages of allegations and disclose the same 114 Exhibits as the Third Amended Authorization Application. For the most part, the New Authorization Application seeks to import judgments, declarations, expert reports and exhibits filed in the U.S. Litigation *In re: Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation*, bearing Court number MDL No. 2777 in the United States District Court for the Northern District of California, which was settled between the parties (the "**U.S. Litigation**"), and in the Ontario certification proceeding in *Maginnis and Magnaye v. FCA Canada Inc. et al.*, bearing court number CV-17-567691-CP, which was dismissed by the Honourable Justice Edward Belobaba on September 18, 2020 (the decision is currently under appeal

and is scheduled to be heard on April 29, 2021) (the “**Ontario Action**”), a copy of which is filed herewith as **Exhibit FCA-4**.

6. The New Authorization Application alleges that the Respondents engaged in designing, manufacturing, marketing, advertising, distributing, leasing and selling of certain vehicles that were equipped with illegal software known as a “Defeat Device” which were designed to mislead consumers and regulators about their emissions and which allegedly affected the represented fuel economy and performance of the vehicles. The “Subject Vehicles” include model years 2014 to 2016 Ram 1500 vehicles equipped with a 3.0-litre EcoDiesel engine and model years 2014 to 2016 Jeep Grand Cherokee vehicles equipped with a 3.0-litre EcoDiesel engine.
7. As a result of the alleged “surreptitious use” of the Defeat Devices and false and/or misleading representations regarding emissions, fuel consumption and vehicle performance the Petitioners claim that they over-paid for their vehicles, that these same vehicles now have a reduced resale value, that they have overpaid and continue to overpay for fuel and that they have suffered other unspecified troubles and inconveniences.
8. The Petitioners further seek an injunctive remedy compelling FCA to buy back the Subject Vehicles or otherwise, free of charge, remove the Defeat Devices while ensuring that the Subject Vehicles conform to the promised performance and fuel economy guarantees.
9. With regard to the Petitioners’ particular situations, which the Court must analyze to determine if the proposed class action meets the criteria for authorization under article 575 CCP, it is alleged that:
  - a) On March 31, 2015, Petitioner Garage Poirier purchased a used 2014 Ram 1500 Laramie Longhorn Crew Cab 4x4 EcoDiesel pick-up truck (VIN 1C6RR7WM4ES352033) from Trois Diamants Autos (1987) Ltée at 3035 Chemin Gascon, in Mascouche, Quebec, for a purchase price of \$46,000.00 plus taxes (para. 206 of the New Authorization Application);
  - b) In May of 2016, Petitioner Bouffard purchased a used 2016 Dodge Ram 1500 Outdoorsman EcoDiesel pick-up truck from Blainville Chrysler at 249 Boulevard de la Seigneurie West, in Blainville, Quebec for a purchase price of \$44,500.00 plus taxes (para. 216 of the New Authorization Application);
  - c) Petitioner Garage Poirier & Poirier Inc. alleges to have purchased its Subject Vehicle “based on its advertised fuel economy and based on its appearance”, while Petitioner Alexis Bouffard alleges to have purchased his Subject Vehicle “based on its advertised fuel economy, torque, and power”. Both Petitioners “assumed that it met all federal regulations” (paras. 207 and 217 of the New Authorization Application);

- d) At the time of the Petitioners' respective purchases, the Respondents represented that the vehicle bought by Petitioner Garage Poirier & Poirier Inc. had a fuel consumption of 12.1 litres per 100 kilometres in city driving and 8.0 litres per 100 kilometres on the highway (para. 208 of the New Authorization Application), and that the vehicle bought by Petitioner Alexis Bouffard had a fuel consumption of 11.6 litres per 100 kilometres in city driving and 8.4 litres per 100 kilometres on the highway (para. 218 of the New Authorization Application);
- e) Both Petitioners noticed that their Subject Vehicles were consuming more fuel than was represented and that the fuel consumption was much higher than they would have expected given the Respondents' representations relating to the vehicle's fuel efficiency (paras. 209 and 219 of the New Authorization Application);
- f) Petitioner Garage Poirier & Poirier Inc. received the notice regarding the reprogramming of the emission control system software ("**Campaign V16**") in April/May 2019 (Exhibit R-107 in support of the New Authorization Application) and had its emission control system reprogrammed. Petitioner Garage Poirier & Poirier Inc. alleges that the notice "did not inform of the potential for performance issues and lower fuel economy" (para. 212 of the New Authorization Application);
- g) Petitioner Garage Poirier & Poirier Inc. also received, in April 2020, a further notice from FCA informing him of another improvement to be made on its Subject Vehicle ("**Campaign VA7**") (Exhibit R-114 in support of the New Authorization Application) (para. 213 of the New Authorization Application); and
- h) The Petitioners claim that they over-paid for their vehicles, that these same vehicles now have a reduced resale value, that they have overpaid and continue to overpay for fuel and that they have suffered other unspecified troubles and inconveniences. (paras. 214 and 221 of the New Authorization Application).

## II. THE RELEVANCE OF THE SWORN STATEMENT OF STUART SHAW

- 10. FCA and VM Motori seek this Honourable Court's permission to file the Sworn Statement of Stuart Shaw, Manager for Vehicle Safety and Regulatory Compliance at FCA Canada Inc. (Exhibit FCA-1A), and the annexes in support thereof, in order to complete and correct certain allegations of the New Authorization Application.
- 11. Indeed, the Petitioners allege that the fuel economy of the Subject Vehicles was originally misstated by the Respondents, and then adversely affected by the reprogramming of the emission control system software (Campaign V16 and Campaign VA7), which would have allegedly impaired their vehicle's fuel

economy and performance, including torque and power (e.g. paras. 126, 191, 192, 194, 195, 196, 203, 209, 219 of the New Authorization Application).

12. The Sworn Statement of Stuart Shaw and its supporting annexes A to DD (Exhibit FCA-1A) serve to correct these erroneous allegations and to provide all of the relevant and necessary information regarding Campaign V16, Campaign VA7, and the fact that there was no change in average fuel economy, vehicle performance or other key attributes of the Subject Vehicles before and after the reprogramming offered by FCA.
13. More specifically, the Sworn Statement of Stuart Shaw and its supporting annexes A to DD (Exhibit FCA-1A) confirms that:
  - a) Both Campaign V16 and Campaign VA7 were offered free of charge by FCA and were approved by the United States Environmental Protection Agency (“EPA”) and the California Air Resources Board (“CARB”);
  - b) As confirmed by EPA and CARB, the reprogramming of the emission control system software (Campaign V16 and Campaign VA7) is not expected to change any of the Subject Vehicles’ key attributes, such as reliability, durability, vehicle performance, drivability, engine noise or vibration, or other driving characteristics; and
  - c) As confirmed by EPA and CARB, the reprogramming under campaigns V16 and VA7 has not affected the average fuel economy of the Subject Vehicles, and accordingly the official fuel economy ratings of the Subject Vehicles incorporating the software modifications under Campaign V16 and VA7 remain exactly the same as the original fuel economy ratings that were approved by the regulators prior to the commencement of the “Defeat Device” allegation in 2017
  - d) As of January 25, 2021, nearly 80% of the Subject Vehicles in the province of Quebec have received the reprogramming of the emission control system software (Campaign V16 and Campaign VA7).
14. The Sworn Statement of Stuart Shaw and the supporting annexes A to DD (Exhibit FCA-1A) thus serve to complete and correct the otherwise erroneous allegations of the New Authorization Application regarding Campaign V16 and Campaign VA7 and the fuel efficiency and performance of the Subject Vehicles. It provides the Court with the complete factual matrix regarding the allegations advanced by the Petitioners in this regard and will assist this Honourable Court in its analysis of the authorization criteria, and specifically in its determination of whether the Petitioners have established an appearance of right pursuant to article 575 (2) CCP.

### III. THE RELEVANCE OF THE TRANSCRIPTS OF THE CROSS EXAMINATION OF DAVID CHECKEL AND BRANDON SCHAUFEELE

15. FCA and VM Motori further seek this Honourable Court's permission to file the transcript of the cross-examination of Dr. M. David Checkel dated November 15, 2019 (Exhibit FCA-2), and transcript of the cross-examination of Brandon Schaufele dated December 10, 2019 (Exhibit FCA-3), in order to complete and supplement certain allegations and evidence already filed in support of the New Authorization Application.
16. Indeed, the expert report and supplementary expert report of Dr. M. David Checkel, and the expert report of Brandon Schaufele and Adam Fremeth, all of which were filed in the recently dismissed Ontario Action, are attached as exhibits in support of the New Authorization Application:
  - a) The Affidavit of Dr. M. David Checkel, P.Eng., sworn March 29, 2017 in *Maginnis et al. v. FCA Canada Inc. et al*, Court File No. CV-17-567691-00CP, is filed as Exhibit R-67 in support of the New Authorization Application (the "**Checkel Affidavit**");
  - b) The Supplemental Affidavit of Dr. M. David Checkel, P.Eng., sworn September 16, 2019 in *Maginnis et al. v. FCA Canada Inc. et al*, Court File No. CV-17-567691-00CP, is filed as Exhibit R-108 in support of the New Authorization Application (the "**Checkel Reply**"); and
  - c) The Affidavit of Brandon Schaufele, PhD, sworn March 1, 2019 in *Maginnis et al. v. FCA Canada Inc. et al*, Court File No. CV-17-567691-00CP, is filed as Exhibit R-93 in support of the New Authorization Application (the "**Shaufele Affidavit**").
17. FCA is of the view that the Checkel Affidavit, the Checkel Reply and the Schaufele Affidavit, are not relevant for the purposes of the debate on the authorization of the proposed Quebec class action. However, given that the Petitioners have filed and seek to rely on the Checkel Affidavit, the Checkel Reply and the Schaufele Affidavit to support and substantiate the allegations advanced in the New Authorization Application, FCA submits that the transcript of the cross-examination of David Checkel (Exhibit FCA-2) and the transcript of the cross-examination of Brandon Schaufele (Exhibit FCA-3) are necessary evidence to complete, correct and clarify the allegations advanced by the Petitioners, and to ensure that the Court is provided with a fair and full picture of these witnesses' evidence.
18. For example, David Checkel was the Plaintiffs' engineering expert in the Ontario Action who notably gave "opinions" on the key vehicle attributes and fuel consumption further to the Campaign V16 reprogramming.
19. The transcript of his cross-examination (Exhibit FCA-2) reveals that he conceded and admitted, amongst other things, that:

- a) The only documents he relied on as support for his conclusions with regard to the responsiveness and fuel economy of the Subject Vehicles resulting from the Campaign V16 reprogramming in the Checkel Reply are certain anonymous and unsubstantiated comments by unknown persons on internet user forums;
  - b) He never tested, inspected or even drove any of the Subject Vehicles before forming the opinions he set out in the Checkel Reply;
  - c) He has no expertise in software development or engineering, and has no experience working for a manufacturer of mass-produced vehicles, or for a manufacturer of engine controls systems for mass-produced vehicles, or for a company that develops or calibrates software for mass-produced vehicles; and
  - d) He expressed his opinions primarily as a mechanical engineer with some general familiarity with respect to diesel engines.
20. The transcript of the cross-examination further reveals that David Checkel conceded that EPA and CARB have “excellent testing facilities” and the EPA Fuel Economy Ratings for the Subject Vehicles have remained unchanged following the Campaign V16 reprogramming.
21. In light of the above, the transcript of the cross-examination of David Checkel (Exhibit FCA-2) serves to supplement and correct the allegations in relation to which the Checkel Affidavit and the Checkel Reply are filed as support (e.g. paras. 191, 195 of the New Authorization Application).
22. Brandon Schaufele and Adam Fremeth were the experts retained by the Plaintiffs to propose a methodology for quantifying damages in the Ontario Action.
23. The transcript of Brandon Schaufele’s cross-examination (Exhibit FCA-3) reveals that he conceded and admitted, amongst other things, that:
- a) He is not an expert in the automobile industry generally, and that neither he nor Adam Fremeth has any formal education or relevant work experience in the automobile industry;
  - b) His affidavit provides no evidence of harm or loss to any class member; rather, for the purpose of his affidavit, he **assumed harm**;
  - c) His and Adam Fremeth’s proposed methodologies for calculating loss would not calculate a specific loss incurred by a specific class member. Rather, their proposed methodologies are only based on averages: they would purport to calculate whether consumers, *on average*, paid a premium for the Subject Vehicles or whether the resale value of the Subject Vehicles, *on average*, has been reduced as a result of the

publicization of the alleged wrongdoing. As such, the methodologies would not capture variation at the individual level;

- d) He agrees that some purchasers of used Subject Vehicles may have been unaware of the regulatory action in the US, such that the resale value of those particular vehicles would not have been negatively impacted by the alleged wrongdoing; and
  - e) He did not take any steps to confirm whether the data required to perform his proposed analyses actually exist, and therefore he cannot make any claims as to whether the proposed methodologies are in fact valid.
24. Like the transcript of the cross-examination of David Checkel (Exhibit FCA-2), the transcript of the cross-examination of Brandon Schaufele (Exhibit FCA-3) serves to supplement and correct the Schaufele Affidavit and the allegations that they support (paras. 166, 167 of the New Authorization Application).
  25. Both transcripts (Exhibit FCA-2 and FCA-3) are thus useful and necessary in that they provide this Honourable Court with a complete and fair picture of the evidence filed by the Petitioners in support of certain allegations contained in the New Authorization Application.
  26. The importance of the transcripts (Exhibits FCA-2 and FCA-3) is further exemplified by the recent judgment dismissing the Ontario Action (Exhibit FCA-4), which specifically identifies the evidentiary flaws of the Checkel Affidavit and the Checkel Reply that the Plaintiffs file as support for the allegations advanced in the New Authorization Application.
  27. The transcripts of the cross-examinations of David Checkel and Brandon Schaufele (Exhibits FCA-2 and FCA-3) will help this Honourable Court in its analysis of whether the allegations and cited Exhibits of the New Authorization Application meet the criteria for the authorization of the proposed class action, and specifically with regard to the appearance of right requirement at article 575 (2) CCP.
  28. In light of the above, it is in the interests of justice and the parties that FCA and VM Motori be authorized to submit the relevant evidence described in the present Application in order to complete, correct and clarify the allegations in the New Authorization Application, and to provide this Honourable Court with a comprehensive and fair picture of the allegations necessary for its analysis of the criteria for authorization pursuant to article 575 CCP.
  29. The relevant evidence, which FCA and VM Motori seeks this Court's authorization to submit, also satisfies the principle of proportionality required by article 18 and 19 CCP.
  30. The present Application is well founded in fact and in law.



**FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:**

**GRANT** the present motion;

**AUTHORIZE** the Respondents FCA Canada Inc., FCA US LLC, and VM Motori North America, Inc. to file :

- a) A Sworn Statement of Stuart Shaw, Manager for Vehicle Safety and Regulatory Compliance, at FCA Canada Inc., dated February 12, 2021, and the Annexes A to DD in support thereof, a copy of which is filed herewith as **Exhibit FCA-1A**;
- b) The transcript of the cross-examination of David Checkel dated November 15, 2019, a copy of which is filed herewith as **Exhibit FCA-2**;
- c) The transcript of the cross-examination of Brandon Schaufele dated December 10, 2019, a copy of which is filed herewith as **Exhibit FCA-3**.

**THE WHOLE** without legal costs, unless the present Application is contested.

Montréal, this February 12, 2021

*Fasken Martineau DuMoulin*

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**NOTICE OF PRESENTATION**

**ADDRESSEE(S):**

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**TAKE NOTICE** that the present *Application for Authorization to Adduce Relevant Evidence* will be presented for adjudication before the honourable justice Chantal Corriveau S.C.J. of the Superior Court, sitting in civil practice division for the district of Montréal on **March 22, 2021**, by videoconference in a virtual room to be determined.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montréal, this February 12, 2021

*Fasken Martineau DuMoulin*

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**C A N A D A**

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CORPORATION**

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Respondents

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**LIST OF EXHIBITS**

**EXHIBIT FCA-1A:** Sworn Statement of Stuart Shaw, Manager for Vehicle Safety and Regulatory Compliance, at FCA Canada Inc., dated February 12, and Annexes A to DD

**ANNEX A** The original EPA Fuel Economy Rating for the 2014 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel

**ANNEX B** The original EPA Fuel Economy Rating for the 2015 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel

- ANNEX C** The original EPA Fuel Economy Rating for the 2016 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel
- ANNEX D** The original EPA Fuel Economy Rating for the 2014 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX E** The original EPA Fuel Economy Rating for the 2014 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX F** The original EPA Fuel Economy Rating for the 2015 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX G** The original EPA Fuel Economy Rating for the 2015 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX H** The original EPA Fuel Economy Rating for the 2016 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX I** The original EPA Fuel Economy Rating for the 2016 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX J** The original EPA Fuel Economy Rating for the 2016 Ram 1500 HFE 2WD 3.0 L, Turbo Diesel
- ANNEX K** The re-issued EPA Fuel Economy Rating for the 2014 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel
- ANNEX L** The re-issued EPA Fuel Economy Rating for the 2015 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel
- ANNEX M** The re-issued EPA Fuel Economy Rating for the 2016 Jeep Grand Cherokee 4WD 3.0L, Turbo Diesel
- ANNEX N** The re-issued EPA Fuel Economy Rating for the 2014 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX O** The re-issued EPA Fuel Economy Rating for the 2014 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX P** The re-issued EPA Fuel Economy Rating for the 2015 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX Q** The re-issued EPA Fuel Economy Rating for the 2015 Ram 1500 4WD 3.0 L, Turbo Diesel

- ANNEX R** The re-issued EPA Fuel Economy Rating for the 2016 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX S** The re-issued EPA Fuel Economy Rating for the 2016 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX T** The re-issued EPA Fuel Economy Rating for the 2016 Ram 1500 HFE 2WD 3.0 L, Turbo Diesel
- ANNEX U** The EPA webpage describing the 2017 Ratings Methodology Change
- ANNEX V** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2014 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX W** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2014 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX X** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2015 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX Y** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2015 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX Z** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2016 Ram 1500 2WD 3.0 L, Turbo Diesel
- ANNEX AA** A comparison of the pre-2017 Ratings Methodology Change MPG and post-2017 Ratings Methodology Change MPG for the 2016 Ram 1500 4WD 3.0 L, Turbo Diesel
- ANNEX BB** The EPA/CARB- approved VA7 customer notification, that was mailed to affected vehicle owners/lessees in the United States

- ANNEX CC** The Updated Disclosure Statement given to all owners/lessees of Subject Vehicles in the United States who receive the Updated AEM
- ANNEX DD** Current EPA Fuel Economy Ratings for each of the Subject Vehicles
- EXHIBIT FCA-2:** Transcript of the cross-examination of David Checkel dated November 15, 2019
- EXHIBIT FCA-3:** Transcript of the cross-examination of Brandon Schaufele dated December 10, 2019
- EXHIBIT FCA-4:** *Maginnis and Magnaye v. FCA Canada Inc. et al. (CV-17-567691-CP)*: dismissal by Hon. Justice Edward Belobaba dated September 18, 2020

Montréal, this February 12, 2021

*Fasken Martineau DuMoulin*

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**APPLICATION FOR AUTHORIZATION TO  
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AND EXHIBITS FCA-1A TO FCA-4**

**(Class Action)**

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ORIGINAL

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