

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class Action)
SUPERIOR COURT

NO: 500-06-000720-140

4037308 CANADA INC.

Representative Plaintiff

-vs.-

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

Defendants

APPLICATION BY THE REPRESENTATIVE PLAINTIFF FOR:

**(A) APPROVAL OF A CLASS ACTION SETTLEMENT; (B) APPROVAL OF THE
NOTICE OF SETTLEMENT APPROVAL TO CLASS MEMBERS; AND (C)
APPROVAL OF THE CLAIM FORM**

(Arts. 579, 590, and 591 C.C.P., arts. 63, 65, and 69 *Règlement de procédure civile*,
RLRQ, c. C-25, a. 47, and arts. 30 & 32 of the *Loi sur le Fonds d'aide aux actions
collectives*, RLRQ, c. F-3.2.0.1.1)

TO THE HONOURABLE MR. JUSTICE PIERRE-C. GAGNON OF THE SUPERIOR
COURT, DISTRICT OF MONTREAL, DESIGNATED AS CASE-MANAGEMENT JUDGE
OF THE PRESENT MATTER, YOUR REPRESENTATIVE PLAINTIFF STATES AS
FOLLOWS:

A. INTRODUCTION AND BACKGROUND

1. On November 28, 2014, the Petitioner filed a Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative pursuant to article 1002 C.C.P. and following against the Respondents, as appears from the Court file;
2. On June 3, 2017, the Petitioner filed an Amended Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative pursuant to article 574 C.C.P. and following ("Amended Application for Authorization"), as appears from the Court file;
3. The Amended Application for Authorization proposed that the class be defined as:

- All persons, entities or organizations resident in Quebec who purchased and/or leased trucks, buses and other heavy-duty vehicles with a model year 2010 through 2013 Navistar 11, 13 and 15-litre MaxxFace Advanced EGR diesel engine (collectively, the “Vehicles” and the “MaxxFace Engines” or “Engines”), or any other group to be determined by the Court;
4. The Motion for Authorization alleges, *inter alia*, that the certain Navistar Advanced Exhaust Gas Recirculation MaxxFace truck engines are defective, allegedly resulting in repeated engine failures and frequent repairs;
 5. On May 6, 2021, the parties executed a settlement agreement to fully and finally settle all claims asserted in or related to the present class action (the “Settlement Agreement”), as appears from a copy of said Settlement Agreement, produced herein in English and in French as **Exhibit R-1**;
 6. By judgment dated June 22, 2021, this Honourable Court *inter alia*:
 - (i) Authorized the class action for the purposes of settlement only on behalf of the following class described as:

<p>Toutes les personnes, entités ou organisations résidant au Québec qui, au plus tard le 30 avril 2021, ont acheté, autrement que pour la revente, ou loué pour plus de 30 jours, tout véhicule Navistar équipé de moteurs MaxxFace de 11, 13 ou 15 litres certifiés conformes aux normes 2010 de l’EPA, sans utiliser la technologie de réduction catalytique sélective. Les Véhicules Visés sont des véhicules de l’année modèle 2011-2014.</p> <p>Sont exclus du groupe : (1) toutes les entités et les personnes physiques qui ont intenté une action en justice contre les Défendeurs en lien avec le système d’émissions EGR prétendument défectueux installé dans un Véhicule Visé jusqu’à un jugement définitif (en ce qui concerne ces véhicules uniquement); (2) toutes les entités et les personnes physiques qui, par le biais d’un règlement ou d’une autre manière, ont donné à Navistar quittance de leurs</p>	<p>All persons, entities, or organizations resident in Quebec who, on or before April 30, 2021, purchased, other than for resale, or leased for more than 30 days, any Navistar vehicle equipped with MaxxFace 11-, 13-, or 15-litre engines certified to comply with the 2010 EPA standards, without the use of selective catalytic reduction technology. The Class Vehicles are 2011-2014 model year vehicles.</p> <p>Excluded from the Class are: (1) all entities and natural persons that have litigated claims involving Class Vehicles’ allegedly defective EGR emissions system against the Defendants to final, nonappealable judgment (with respect to those vehicles only); (2) all entities and natural persons who, via a settlement or otherwise, delivered to Navistar releases of their claims involving Class Vehicles’ allegedly defective EGR emissions system (with respect to those vehicles only); (3) the Defendants’ employees, officers,</p>
--	---

<p>réclamations en lien avec le système d'émissions EGR prétendument défectueux installé dans un Véhicule Visé (en ce qui concerne ces véhicules uniquement) ; (3) les employés, dirigeants, administrateurs, agents et représentants des Défendeurs, ainsi que les membres de leur famille ; (4) tout Concessionnaire Navistar agréé de véhicules neufs ou d'occasion ; (5) toute personne ou entité ayant acheté un Véhicule du Groupe dans le seul but de le revendre (en ce qui concerne ces véhicules uniquement) ; (6) toute personne ou entité ayant été locataire d'un Véhicule du Groupe pendant moins de 30 jours (en ce qui concerne ces véhicules uniquement) ; et (7) Idealease et Navistar Leasing Co. (les preneurs de Véhicules Visés auprès de ces entités font partie du Groupe).</p>	<p>directors, agents, and representatives, and their family members; (4) any Authorized Navistar Dealer of new or used vehicles; (5) any person or entity that purchased a Class Vehicle solely for the purposes of resale (with respect to those vehicles only); (6) any person or entity that was a lessee of a Class Vehicle for fewer than 30 days (with respect to those vehicles only); and (7) Idea/ease and Navistar Leasing Co. (lessees of Class Vehicles from these entities are part of the Class).</p>
---	---

(ii) Identified for the purposes of settlement, the principal issue of fact and law as:

<p>Les Defendeurs ont-ils violé leurs obligations envers le Groupe ?</p>	<p>Did the Defendants breach their obligations to the Class?</p>
--	--

(iii) Approved the First Class Notice to be published and disseminated in accordance with the notice plan. This was accomplished on August 10, 2021;

(iv) Appointed RicePoint Administration Inc. as the Settlement Administrator on a provisional basis;

(v) Approved the Opt-Out Deadline as October 1, 2021. One opt out was filed prior to the Opt-Out Deadline;

(vi) Set the Objection Deadline as October 1, 2021. The Settlement Administrator received no objections prior to the Objection Deadline;

7. On September 10, 2021 the parties executed a modification to the Settlement Agreement in order to increase the amount of the Defendants' payment to the Cash Fund and the commitment to the Rebate Fund provided in the Settlement Agreement. This increase reflects the increase in the U.S. settlement amounts as a result of the claims process arising from that settlement and serves to enhance the present one

accordingly,¹ as appears from a copy of said Modification to the Settlement Agreement, Transaction, and Release, produced herein as **Exhibit R-2**;

8. By the Present Application, the Representative Plaintiff hereby respectfully asks this Honourable Court, *inter alia*, to:
 - a) Approve the Settlement Agreement (Exhibit R-1) as modified on September 10, 2021 (Exhibit R-2) entered into between the Parties;
 - b) Approve the Second Class Notice to Class Members in both French and English (Exhibits 5 and 6 to the Settlement Agreement) in accordance with the notice plan, produced herein as **Exhibit R-3**;
 - c) Approve the Claim Form in both French and English (Exhibit 7 to the Settlement Agreement), produced herein as **Exhibit R-4**;
9. Class Counsel considers the Settlement Agreement fair, reasonable and in the best interest of the Settlement Class Members, having regard to all the circumstances and the relevant criteria applicable to such approval;
10. The Defendants support Class Counsel's application and agree that the Settlement Agreement is fair, reasonable and in the best interest of the Settlement Class Members;

B. THE SETTLEMENT AGREEMENT

11. The Representative Plaintiff and the Defendants have agreed to the terms of the Settlement Agreement, which is subject to the approval of this Honourable Court, without any admission of liability whatsoever by the Defendants and for the sole purpose of resolving the dispute between the Parties;
12. The following is a summary of the key terms of the Settlement Agreement (as modified):
 - (i) Consideration for Release [sections 1.02 (f) and (ee) and 4.01 of the Settlement Agreement]: The Defendants have agreed to (1) make an all-inclusive common fund payment of \$3,002,280 to the Cash Fund and (2) commit to making available to the Settlement Class in the Rebate Fund rebates with a face value in the aggregate of \$160,122;²
 - (ii) Compensation Options [section 4.03 of the Settlement Agreement]: Members of the Settlement Class may submit a claim for only one of the following options of compensation for each Class Vehicle that members of the

¹ The increase in the U.S. settlement amounts based on approved claims were from \$85 million to \$120 million for the Cash Fund and from \$5.8 million in initial rebate fund to \$6.4 million.

² Previous to the modification of the Settlement Agreement, these amounts had been \$2,614,486 and \$145,360, respectively. This amounts to an approximate 15% increase in value in the Cash Fund and an approximately 10% increase in value to the Rebate Fund.

Settlement Class have owned or leased, subject to the limitations set forth in Section 4.04(2) below for Class Vehicles that one Class Member leased to another:

- (a) Cash Option: This option provides for a payment based on months of ownership or lease of up to \$2,500 per Class Vehicle. Each demonstrated month of ownership or lease through April 2021 is eligible for the following amounts:

Class Vehicle Model Year	Monetary Amount
2011	\$21.01/month
2012	\$23.36/month
2013	\$26.32/month
2014	\$30.12/month

- (b) Rebate Option: For each Class Vehicle owned or leased by a member of the Settlement Class, this member may select a rebate based on months of ownership or lease worth up to \$10,000 towards the purchase of a new Navistar Class 8 heavy duty truck. The rebates will expire after 18 months. The rebates are not transferable and not stackable. Each member of the Settlement Class may receive up to a maximum of ten total rebates, regardless of the number of vehicles purchased or leased. Each demonstrated month of ownership/lease through April 2021 is eligible for the following amounts:

Class Vehicle Model Year	Monetary Amount
2011	\$84.03/month
2012	\$93.46/month
2013	\$105.26/month
2014	\$120.48/month

- (c) Individual Prove-Up Option: For each Class Vehicle owned or leased by a member of the Settlement Class, this member may seek to prove up to \$15,000 of Covered Costs per Class Vehicle as determined by the Settlement Administrator.

“Covered Costs” is defined at section 1.02 (n) of the Settlement Agreement and are summarized here as costs incurred relating to repairs, rental trucks, lost revenue, travel costs, employee wages, permits, and loading/unloading.

The recoverable cost of parts and labour incurred when the Class Vehicle had between 800,000 kms and 1,600,000 kms are capped at \$7,500 for all Covered Events. Parts and labour incurred when the Class Vehicle had 1,600,001 kms or more are not compensated;

- (iii) Claims Process [section 8.03 of the Settlement Agreement]: To obtain compensation, a member of the Settlement Class must submit a timely claim to the Settlement Administrator, meaning, within 180 days following the delivery of the Second Class Notice.

The Settlement Website, www.maxxforcesettlement.ca and www.reglementmaxxforce.ca, will contain an interactive portal that will have a pre-populated online claim portal with known VINs. The purpose of doing so is to make the claim process more user friendly by reducing manual entry errors and ultimately help drive claim rates. The impact is particularly significant in this case as many members have several Class Vehicles;

- (iv) Class Counsel Fees and Costs [section 9.01 of the Settlement Agreement]: means the amount of CAD \$790,600.50, plus applicable taxes, which amount must be approved by the Court at the Settlement Approval Hearing and is to be paid to Class Counsel on account of all fees, costs and disbursements in connection with this action, including, without limitation, any future fees, costs or disbursements to be incurred in connection with monitoring the Settlement during the settlement administration process to be paid out of the Cash Fund;
- (v) Release of Claims [section 5 of the Settlement Agreement]: In consideration of the Settlement, the Plaintiff and each member of the Settlement Class (on behalf of themselves and others specified in the Settlement Agreement), fully, finally and forever release the Defendants (and others included as “Released Parties” under section 1 (ff) of the Settlement Agreement) from all claims...and damages of any kind regarding the subject matter of the present action;

The U.S. Settlement

13. Substantially similar allegations were made in several class actions filed in the United States, which were subsequently consolidated and eventually settled in the case entitled *In Re: Navistar Maxxforce Engines Marketing, Sales Practices and Products Liability Litigation*, MDL Docket No. 2590, U.S. District Court for the Northern District of Illinois (Case No. 1:14-cv-10318), as appears from a copy of the U.S. Settlement Agreement, produced herein as **Exhibit R-5**;
14. The U.S. Settlement Agreement was approved by the Honourable Judge Joan B. Gottschall of the U.S. District Court for the Northern District of Illinois on January 21, 2020, as appears from a copy of the Final Approval Order, produced herein as **Exhibit R-6**;
15. The U.S. settlement was funded with a cash fund of US\$85 million and rebate fund rebates with a face value of US\$50 million. The U.S. settlement contained a “waterfall” provision that allowed up to US\$35 million to move from the rebate fund to the cash fund. In other words, the maximum cash fund was US\$120 million (and in that scenario the rebate fund would be US\$15 million);

16. The waterfall provided protection against oversubscription in the form of two-way waterfalls such that if either the Cash Fund or the Rebate Fund is oversubscribed while the other is undersubscribed, funds from one will be used to cover the shortfall of the other (up to \$120 million in cash), which is exactly what materialized;
17. From the U.S. cash fund, US\$40 million was paid as class counsel fees and costs and US\$25,000 was paid as a service award to each of the 29 named plaintiffs (total of US\$725,000);
18. As for the settlement relief paid to eligible claimants, the same options set out above applied in the U.S. (i.e. cash, rebate, and individual prove-up options) [Exhibit R-6 at pp. 17-20];
19. While the total amount of payment under these categories is consistent in both countries; i.e. \$2,500 cash per vehicle, \$10,000 rebate per vehicle or \$15,000 individual prove-up option; the monthly monetary amount per vehicle is not. This is due to the fact that the Canadian settlement was reached two years after that of the U.S. (here, May 6, 2021 vs. U.S. on May 29, 2019) and therefore, the present settlement category amount is spread over more months (~24 additional months);

Distinct Features of the Canadian Settlement

20. The Canadian settlement was structured to maximize efficiency and compensation to Settlement Class Members by minimizing costs, while ensuring that they receive the same per vehicle compensation as U.S. class members;
21. To negotiate a Canadian settlement roughly comparable to the U.S. settlement, the parties relied on sales data demonstrating that there were 66,518 class vehicles in the U.S. (MaxxFord 11 and 13) as opposed to 8,448 class vehicles in Canada (Maxxford 11, 13, and 15). This meant that the amount of Canadian Class Vehicles as compared to the U.S. was approximately 12.7%;
22. To apportion funding between provinces, the parties relied on Navistar's data of where in Canada the class vehicles were initially delivered—that was the best information available. Based on that data, there are approximately 1,667 Class Vehicles in Quebec, which amounts to 19.7% as compared to the rest of Canada – using these real-world numbers, the US\$120 million cash fund equivalent in Quebec would be \$3,002,280 ($\$120 \text{ million} \times 12.7\% \times 19.7\%$) and the \$6.4 million rebate fund would be \$160,122 ($\$6.4 \text{ million} \times 12.7\% \times 19.7\%$);
23. The amounts in USD\$ for the Compensation Options in the U.S. settlement are the same as the amounts in CAD\$ for the Compensation Options in the Quebec Settlement and no exchange rate was factored in to reflect larger exposure risks faced by defendants in the United States, taking into account jury awards and punitive damages;

24. For example, in some U.S. states, there is a risk for treble damages when a statute exists to award a plaintiff up to three times actual or compensatory damages, which can themselves result from a jury award;
25. This slight difference in the apparent value of the Compensation Options is further mitigated by the fact that fees – Class Counsel Fees and Costs and Settlement Fees and Expenses – are, proportionally speaking, lower in the Quebec Settlement than they were in the U.S. settlement;
26. Proportionally speaking, U.S. class counsel is taking more in attorneys' fees out of the cash fund than Quebec Class Counsel. In the U.S., class counsel fees were awarded at approximately 33% of the cash fund alone, while Class Counsel Fees and Costs in the present case, if approved, would make for 26% of the Cash Fund alone (if we account for applicable taxes, this percentage comes to 30%);
27. In addition, in the U.S., class counsel claimed \$725,000 in plaintiff honorariums, whereas, here, no such request is being made;
28. Therefore, proportionally speaking, there is more money available for claimants in the Quebec Cash Fund than there was in the U.S. cash fund;

C. THE NOTICES (PRE-APPROVAL AND APPROVAL)

29. In accordance with the Settlement Agreement and this Honourable Court's Judgment approving the First Class Notice dated June 22, 2021, notice was effected by August 10, 2021 via mailing to a total putative 1,563 Class Members and was also sent by email to every person who had registered with Class Counsel (at the time this was 320 persons³), by posting on the Settlement Website at: www.maxxforcesettlement.ca/ www.reglementmaxxforce.ca, the whole as appears more fully from a copy of the Notice Report dated October 14, 2021, produced herein as **Exhibit R-7**;
30. If the Settlement is approved, the Second Class Notice will be disseminated as follows:
 - A. The Settlement Administrator shall send the Second Short Form Notice, by first-class mail, proper postage prepaid, to members of the Settlement Class. In addition, the Settlement Administrator shall (1) re-mail any notices returned by Canada Post with a forwarding address as soon as practicable; and (2) by itself or using one or more address research firms, as soon as practicable following receipt of any returned notices that do not include a forwarding address, research such returned mail for more accurate addresses and promptly mail copies of the applicable notice to any more accurate addresses so found.
 - B. The Settlement Administrator shall send the Second Short Form Notice by email

³ This number has grown by 70 persons since the First Class Notice was sent by email and is now 390 persons, who will be sent the Second Class Notice.

to members of the Settlement for whom an email address was located;

- C. Posted on the Settlement Website where Settlement Class Members can view and/or download it;
 - D. The Settlement Administrator will send, via first class mail, the Second Long Form Notice to those persons who so request;
31. As mentioned in footnote 3, 390 self-identified Class Members have registered their email addresses with Class Counsel, these persons will also receive the Second Class Notice by email;
32. The Representative Plaintiff requests that this Honourable Court approve the Second Class Notice (Exhibits 5 and 6 to the Settlement Agreement) as well as the notice plan described hereinabove;

D. APPROVAL OF THE SETTLEMENT AGREEMENT

33. It is respectfully submitted that the Settlement Agreement is fair, reasonable and in the best interest of the Settlement Class Members for the following reasons:
- i) The Probability of Success
34. While the Representative Plaintiff maintains that its action is well-founded and that the allegations contained therein have merit, the Defendants vigorously deny and contest its claims and allegations;
35. It is clear that the parties would have entered into a serious and contradictory debate between experts that may have extended to the existence of a design defect, as to the liability of the Defendants, as to the Defendants' knowledge of the defect, and as to whether there were any misrepresentations in relation thereto;
36. Further, the methodology for the calculation of damages is invariably controversial and oftentimes the subject of competing and expensive expert reports. This would have necessitated economics and statistics experts;
37. Were the Representative Plaintiff to continue to litigate this case, there is of course the risk that it might not succeed in authorizing a class. Further, even if the class action were authorized, there is the possibility that the Representative Plaintiff would not be able to prove a vital element of her claims, for example, that the alleged representations made any material difference in the Class Members; buying decisions;
38. A potential appeal of a decision on the merits in this proceeding would increase litigation costs and cause delay;
39. These risks are abated through the Settlement Agreement which guarantee a good recovery to Settlement Class Members;

40. The settlement allows the Settlement Class to obtain compensation now, rather than continuing to face costly and time-consuming litigation;
41. Navistar contended that it had serious arguments to make to oppose authorization as well as on the merits themselves including the following (although these defences are not admitted and would have been hotly contested by the Plaintiff):
 - Navistar provided all repairs required under its warranty;
 - Many Class Members were able to make use of their Navistar vehicles at a rate comparable to or exceeding competitors' vehicles;
 - Navistar made costly proactive updates to the Class Vehicles that mitigated many of the EGR issues giving rise to class claims;
 - EGR-Only, in spite of any engine failures, was a benefit to Class Members because it was less costly and time consuming to operate than the SCR alternative offered by competitors;
 - At least some class members may have purchased their Class Vehicles at market-depressed prices;
42. If we compare the U.S. experience in the parallel case involving the same factual claims, while exposure risk remains higher with potential jury and punitive awards, there were dozens of non-class individual cases filed against Navistar in the U.S. Of these, there were only three plaintiff-side jury verdicts. One of those verdicts was completely overturned on appeal, and the other two are currently under appeal. In the two jury verdicts on appeal, the compensatory damages award was less than \$13,000 per truck—less than the maximum provided by the settlement's prove-up option. A bench trial in Alabama awarded \$66,000 to the plaintiffs for 10 class vehicles (i.e. \$6,000 per vehicle), although a confidential settlement was reached after the defendants appealed;
43. These three jury cases had included evidence of specific misleading statements to those particular plaintiffs that are unusual and unavailable to the proposed class at large;
44. While the Plaintiff remains confident in the strength of its case and ability to prevail, Navistar has won at least six victories, in whole or part, in other individual actions involving claims similar to those brought here. These are:
 - *Tankstar USA, Inc. v. Navistar, Inc.*, No. 2017AP1907, 2018 WL 6199278 (Wis. Ct. App. Nov. 27, 2018), rev. denied, 386 Wis. 2d 523 (2019): The Wisconsin Court of Appeals affirmed summary judgment in favour of Navistar on the plaintiff's fraud and warranty claims, holding, *inter alia*, that "if the flaw does not keep trucks from substantially operating—both before and after any particular problem arising from the flaw is repaired—there can be no breach of the

essential purpose of a repair and replace warranty”;

- *Best Way Expediting, LLC v. Navistar, Inc.*, No. 335085, 2018 WL 2067789 (Mich. Ct. App. May 3, 2018): The Michigan Court of Appeals affirmed summary judgment in favor of Navistar on all claims. With respect to the plaintiff’s breach of express warranty claim, the court held that the plaintiff failed to “indicate any warrantable repair that [Navistar] did not perform, or performed improperly, or did not perform within a reasonable time.” The plaintiff was also unable to establish its allegation, for purposes of its fraudulent concealment claims, that Navistar’s EGR system is “incompatible with the normal use and conditions of long-haul trucking”;
- *J&R Transport, Inc. v. Navistar, Inc.*, No. LACV084412 (Iowa Dist. Ct., Linn County Feb. 26, 2018): The court granted summary judgment on all but one of the plaintiff’s claims, finding that, “[i]t would be unreasonable to conclude that J&R was, as it claims, deprived of the value of its bargain while also, as the evidence shows, operating the trucks consistent with its typical usage.” The plaintiff voluntarily dismissed its remaining claim and appealed this decision;
- *Service Steel Warehouse, LP v. Navistar, Inc.*, No. 2014-52745 (Tex. Dist. Ct., Harris County Feb. 13, 2018): After a two-week trial, the jury returned a verdict in favor of Navistar on all counts;
- *Illini State Trucking, Inc. v. Navistar, Inc.*, No. 45A03-1608-PL-1860, 2017 WL 2391708 (Ind. Ct. App. June 2, 2017): The Indiana Court of Appeals affirmed the trial court’s dismissal of plaintiff’s claims for fraud and fraudulent concealment. The court found that the plaintiff had failed to establish its claim that Navistar failed to disclose “(1) the trucks would never meet the EPA’s 2010 emission standards, (2) the trucks ‘had severe technical problems that would lead to engine performance and quality issues, including heat, soot, and condensation issues,’ and (3) ‘its engine testing had been inadequate and truncated, late in starting, causing late design changes, immature designs and increased warrant risk.’”;
- *Ross Neely Systems, Inc. v. Navistar, Inc.*, No. 3:13-cv-1587-M-BN, 2015 WL 12939110 (N.D. Tex. May 28, 2015): The district judge adopted the magistrate judge’s recommendation to grant summary judgment on the plaintiff’s fraud, fraud-by-nondisclosure and implied warranty claims. Specifically, the court found that the plaintiff’s allegations that “the repair or replacement of parts under the limited warranty could not ‘fix’ the underlying defect” could not support a claim for breach of express warranty;

A copy of the *J&R Transport, Inc. v. Navistar, Inc.*, No. LACV084412 opinion dated Feb. 26, 2018 and a copy of the *Service Steel Warehouse, LP v. Navistar, Inc.*, No. 2014-52745 opinion dated February 13, 2018 are attached hereto *en liasse* as **Exhibit R-8**;

45. There have been 11 cases in the U.S. that were litigated to judgment. Of these cases, there was an average recovery per vehicle of \$1,411, a copy of a chart detailing these cases is attached hereto as **Exhibit R-9**;
46. The proposed Settlement ensures recovery for every owner/lessee without the risks, costs, and delay of individual litigation;
47. The Settlement Agreement represents a reasonable and just resolution given the facts at play both at the time the action was filed and those subsequent to the filing of the action. The Settlement was negotiated at arm's length by experienced counsel who had the requisite information available to them. The Plaintiffs' case had potential weaknesses, which may have resulted in the action having been unsuccessful if tried on the merits. Given such issues, there was a risk that if the Actions were not settled, they would not have been certified and/or succeed on the merits. These factors guided the parties through the negotiation process to achieve a reasonable resolution of the litigation;

ii) The Amount and Nature of Discovery

48. Class Counsel has performed substantial legal and factual research, including, but not limited to, the concentrated review of the following:
 - a. The Defendants' "delivered-to-use" sales figures across Quebec and Canada and the ratio between U.S. and Canadian sales;
 - b. Thousands of confidential documents from the Defendants regarding internal communications and information on the Class Vehicles and the MaxxForce Engines, from their inception to market introduction and thereafter;
 - c. Information on warranty repairs performed in Quebec, in Canada, and in the U.S.;
 - d. The U.S. legal proceedings and the subsequent settlement agreement reached therein, including its expert reports, certification record, and various judgments rendered therein;
 - e. Information on the claims rate in the U.S. from the administrator and as divided by option category;
49. As a result, Class Counsel was in an advantageous position to assess the relative strengths and weaknesses of the case and to make an informed assessment of the Settlement Agreement as being fair, reasonable, and in the best interest of the Settlement Class Members;

iii) The Terms, Conditions, and Modalities of the Settlement Agreement

50. The details regarding the Settlement Agreement are set out above. Suffice it to say that the Cash Fund of \$3,002,280 is significant especially when taken into

consideration with the Rebate Fund of \$160,122 – all of which were heavily negotiated and which are similar in fairness to the U.S. settlement;

51. In addition, the availability of the Individual Prove Up Option is good benefit and allows Settlement Class Members to recover their documented costs incurred as a result of the design defect (up to \$15,000);
52. In exchange, Class Members release only the economic-loss claims at issue in this class action; they do not release claims for personal injury or damage to property other than to the vehicle itself or its cargo;
53. Measured against any realistic standard, the present Settlement represents not just fair and reasonable resolution of the class action, but an outstanding result for the Class;

iv) The Recommendation of Experienced Counsel

54. Class Counsel, which has extensive expertise in the area of class actions, has negotiated and is recommending the terms and conditions of the Settlement Agreement;
55. Counsel for the Defendants, McCarthy Tétrault LLP, also has extensive experience in the area of class actions;
56. Class Counsel has come to this opinion in the context of having been immersed in the facts and legal issues, and having been involved in an intense and extensive negotiation process;
57. Class Counsel believes that the Settlement Agreement provides substantial relief and benefits to the Settlement Class, particularly so in light of the risks that would arise from continuing the litigation against the Defendants;

v) Approval of the Representative Plaintiff

58. The Representative Plaintiff has been advised of the terms and conditions of the Settlement Agreement and has accordingly provided its instructions to enter into the Settlement on its own behalf and to seek court approval of the Settlement on behalf of all Settlement Class Members;

vi) The Future Expenses and the Probable Length of the Litigation

59. If the case were to proceed in an adversarial fashion, there would undoubtedly be protracted and costly litigation, including expert evidence and potential appeals;
60. It is in the interests of judicial economy, proportionality and the Class Members that they receive compensation as quickly as possible, especially given the amount of time that has already elapsed;

vii) The Number and Nature of any Opt-Outs and/or Objectors

61. The Opt-Out Deadline expired on October 1, 2021 and there has been only 1 Class Member that has excluded himself from the present class action, as appears from a copy of the *Formulaire d'exclusion*, produced herein as **Exhibit R-10**;
62. The Objection Deadline expired on October 1, 2021 and there have been 0 objections filed;
63. Although not determinative, the fact that there was only 1 opt-out and no objections is indicative of significant support for the Settlement among Class Members;

viii) The Good Faith of the Parties and the Absence of Collusion

64. The Settlement was the product of good faith, adversarial, and arm's length negotiations over the course of many months (years);

E. CLASS COUNSEL FEES AND COSTS

65. In accordance with the Settlement Agreement (see article 9) and its modification, Class Counsel Fees and Costs are being requested in amount of CAD \$790,600.50 plus applicable taxes (i.e. 25% of the combined Cash Fund and Rebate Fund);
66. It is respectively submitted that the Class Counsel Fees are fair, reasonable and justified in the circumstances for the reasons that follow;

i) The Mandate Agreement with the Plaintiff/ Class Representative

67. The mandate agreement entered into by the Representative Plaintiff provides for compensation on the basis of a percentage of 30 percent of the amounts recovered or on the basis of a 3.5 times multiplier, whichever is higher:

"3. In accordance with paragraph 2 above, I hereby consent to have my attorneys withhold, retain and keep as payment on any amount of money received on behalf of myself and on behalf of all other members of the class:

- a. all disbursements incurred;

and

- b. attorneys' fees with regard to the present class action of the higher of the following two calculations:

- (i) an amount equal to thirty percent (30%) of the total amount received, including interest, from any source whatsoever, whether by settlement or by judgment;

or

- (ii) an amount equal to multiplying the total number of hours worked on by the attorneys in accordance with their hourly rates, which range between \$375 and \$775 per hour. This amount will then be multiplied by a multiplier of 3.5 to arrive at the total fee.

[The hourly rates are reviewed on an annual basis and are, therefore, subject to possible increases]

- c. all applicable taxes on said amounts in paragraphs (a) and (b)

These attorneys' fees extend to all sums received for and in the name of the whole class affected by the present class action, and are in addition to the judicial fees and/or cost awards that can be attributed by law or the courts to the attorneys;

In the case where a specific amount of money is not awarded collectively or in the aggregate, whether by settlement or by judgment, or where each class member is compensated only for their individual claim, section b. (i) above shall be read to mean thirty percent (30%) of the total value as if every possible class member made such a claim."

68. In accordance with the mandate agreement, the calculations are as follows:

a. Disbursements	\$ 3,265.39
b. 30%	\$ 948,720.60
x	
\$ 3,162,402	
(Settlement value: \$3,002,280 + \$160,122)	
TOTAL	\$ 951,985.99 (plus applicable taxes)

Or

Lawyer	Time Spent	Hourly Rate	Amount
Jeff Orenstein Called to the QC Bar 2002 Called to the ON Bar 2011	668.75	\$575-\$775	\$ 480,256.30
Andrea Grass Called to the NY Bar 2009 Called to the QC Bar 2012 Called to the ON Bar 2013 Called to the CAL Bar 2015	622.5	\$375-\$575	\$ 297,537.50
Josef Fridman Called to the QC Bar 1971	21	\$775	\$ 16,275.00
Totals			\$ 794,068.80
		Multiplier (3.5)	\$ 2,779,240.80

Disbursements			\$ 3,265.39
		Total	\$ 2,782,506.19 (plus applicable taxes)

69. Therefore, the Settlement Agreement provides for less than the Mandate Agreement and reflects a compromise arrived at between the Parties;

ii) Time and Expenses Incurred by Class Counsel

70. As of the date of this Application, the combined dollar value of Class Counsel's unbilled time in prosecuting this litigation is approximately CAD \$794,068.80;

71. Based on past experience and involvement in the post-settlement administration of previous class action settlements, the work involved for Class Counsel's ongoing future obligations to the settlement process beyond the final approval hearing will continue. In particular, Class Counsel estimates that such work will be valued in the region of CAD \$30,000, which will bring the total base to approximately CAD \$824,068.80;

72. As of the date of this Application, Class Counsel has expended CAD \$3,265.39 in disbursements, which have been reasonably incurred in prosecuting this litigation;

73. The fee requested by Class Counsel at this time represents an abatement on the base fee incurred by counsel to date, with the anticipated work to be conducted by Class Counsel leading up to the Settlement Approval hearing and its role during the claims administration not yet accounted for;

iii) The Experience of Class Counsel

74. CLG has specialized in class action litigation since 2010. As such, the vast majority of its work is done on a contingency basis, meaning that for cases that are not successful, the firm receives no payment for work performed, which is quite significant;

75. Mtre Jeff Orenstein has been a member of the Quebec Bar since 2002 and the Ontario Bar since 2011 and has been involved in numerous, complex class actions since 2005. Mtre Josef Fridman has been a member of the Bar since 1971 and acts as counsel to the firm with extensive legal experience. Mtre Andrea Grass has been a member of the Quebec Bar since 2012, the New York Bar since 2009, the Ontario Bar since 2013, and the California Bar since 2015. A copy of the biography of CLG is attached in support of the present Application as **Exhibit R-11**;

iv) The Time and Effort Dedicated

76. Over the past 11 years, Class Counsel has dedicated significant time to the present file, as detailed above, all without any guarantee of payment;

77. At all times, this litigation was complex and risky. Class Counsel conducted extensive legal and factual research in support of this claim and conducted protracted settlement negotiations;
78. The process of finalizing the Settlement Agreement and the related exhibits and other documents continued for many months following the achievement of a settlement in principle. Further work was also undertaken in anticipation of the Notice Approval and Settlement Approval Hearings (including the preparation of the present Application materials);
79. Class Counsel has been, and will continue to be, maintaining regular contact with the Settlement Administrator with respect to the ongoing input and processing of claims and any related future issues;

v) The Difficulties of this Case

80. The questions raised by this action include the following: Were the Class Vehicles defective? Are the Defendants liable? Did the Defendants have knowledge of the defect? Did Class Members rely upon the Defendants in this regard? In addition, various causation issues would have arisen;
81. A very significant amount of time and financial resources would have been necessary to resolve these questions and many many others;

vi) The Importance of the Issue

82. The issues of defective vehicles, particularly those utilized to carry on a business are directly related to the access to justice of many thousands of persons;
83. Often, claims of this nature involve complicated evidentiary and technical issues, but yet relatively small sums of money. Individually, a person would not have the means to obtain justice against large corporations who have considerable financial resources at their disposal;
84. If it were not for this class action, Settlement Class Members would have been unlikely to institute individual actions to recover damages;

vii) The Risk Assumed

85. As is oftentimes the case in class actions, the risk of success or failure is borne entirely by Class Counsel. In the present case, Class Counsel took on the entire case on a contingency basis;
86. This meant that neither the Plaintiff, nor any Class Members were asked to contribute any fees for the time spent on the file, nor for any of the disbursements made on their behalf by Class Counsel;
87. No request for any funding was made to the *Fonds d'aide aux actions collectives*;

88. Further, the Mandate Agreement provides:

“4. The parties agree that neither the Representative nor the members of the class will be required to pay any fees, disbursements, costs or taxes whatsoever, other than those provided for in paragraph 3 of the present Agreement.”

89. Given that in the case of failure, Class Counsel receives nothing, in the case of success, they should be properly compensated for their efforts and for the financial risk that they have assumed;

90. Class Counsel has worked diligently over the past 7 years to advance this litigation to the point of settlement. Class Counsel’s current fee request reflects a mild reduction on the time expended in bringing about the present settlement with the Defendants;

viii) The Professional Services are Unusual and Require Specific Expertise

91. There are only a small number of attorneys who take on class action matters in Quebec and in Canada;

92. This type of work requires particular expertise and professionalism;

93. Often, in this type of work, communication with the public is also necessary, (e.g. by communicating with class members, maintaining and updating a functional and informative website, etc.). This requires the firm to be more proactive to protect the interests of the class members whom they represent;

ix) The Result Obtained

94. In terms of monetary compensation, the results obtained in this case were very good for Settlement Class Members as outlined above;

x) Fees Not Contested

95. The Defendants are not contesting Class Counsel Fees as requested herein;

96. Further, no Settlement Class Member has indicated any intention to contest the Settlement Agreement nor the request for Class Counsel Fees despite being informed that such a hearing would take place;

97. The present Application is well-founded in fact and in law.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :

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

ACCORDER la présente Demande;

GRANT the present Application;

ORDONNER que, sauf indication contraire ou modification par le présent Jugement, les termes en majuscules utilisés dans le présent document ont la signification qui leur est attribuée dans l'Entente de règlement;

ORDER that, except as otherwise specified in, or as modified by this judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement;

DÉCLARER que l'Entente de règlement (incluant son Préambule, ses Pièces et sa Modification):

DECLARE that the Settlement Agreement (including its Preamble, its Exhibits, and its Modification):

- a) est valide, juste, raisonnable et dans le meilleur intérêt des Membres du Groupe;
- b) est par le présent approuvé conformément à l'article 590 du Code de procédure civile; et
- c) sera mise en œuvre conformément à tous ses termes;

- a) is valid, fair, reasonable and in the best interest of the Class Members;
- b) is hereby approved pursuant to article 590 of the *Code of Civil Procedure*; and
- c) shall be implemented in accordance with all of its terms;

DÉCLARER que l'Entente de règlement constitue une transaction au sens des articles 2631 et suivant du *Code Civil du Québec* et que ce Jugement ainsi que l'Entente de règlement lient toutes les Parties et tous les Membres du Groupe qui ne se sont pas exclus en temps utile;

DECLARE that the Settlement Agreement constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec* and that this Judgment and the Settlement Agreement are binding upon all parties and all Class Members who have not excluded themselves in a timely manner;

DÉCLARER que tous les Membres du Groupe, sauf s'ils se sont exclus avant le 1^{er} octobre 2021, sont réputés avoir choisi de participer au Règlement et seront liés par l'Entente de règlement et le présent Jugement;

DECLARE that all Class Members, unless they opted out prior to October 1, 2021, are deemed to have elected to participate in the Settlement and shall be bound by the Settlement Agreement and this Judgment;

ORDONNER que la considération du règlement énoncée dans l'Entente de règlement soit fournie en pleine satisfaction

ORDER that the settlement consideration set forth in the Settlement Agreement shall be provided in full satisfaction of the

des obligations des Défenderesses en vertu de l'Entente de règlement;

obligations of the Defendants under the Settlement Agreement;

APPROUVER la forme, le contenu et le mode de diffusion du deuxième Avis d'approbation dans ses versions française et anglaise, essentiellement en conformité avec les pièces 5 et 6 de l'Entente de règlement (c'est-à-dire les versions courte et longue);

APPROVE the form, content and mode of dissemination of the Second Class Notice, in its French and English versions, substantially in conformity with Exhibits 5 and 6 of the Settlement Agreement (i.e. the short and long versions);

APPROUVER la forme et le contenu du Formulaire de réclamation tel que prévu à la Pièce 7 à l'Entente de règlement;

APPROVE the form and content of the Claim Form, as Exhibit 7 to the Settlement Agreement;

NOMMER RicePoint Administration Inc. à titre d'Administrateur des réclamations afin d'accomplir les tâches qui lui sont dévolues en vertu de l'Entente de règlement;

APPOINT RicePoint Administration Inc. as the Claims Administrator for the purposes of accomplishing the tasks that devolve to it pursuant to the Settlement Agreement;

APPROUVER le paiement aux Procureurs du Groupe de leurs honoraires extrajudiciaires et des débours de 790 600,50 \$ plus les taxes applicables;

APPROVE the payment to Class Counsel of its extrajudicial fees and disbursements of \$790,600.50 plus applicable taxes;

ORDONNER que les prélèvements du Fonds d'aide aux actions collectives prévus à l'Entente de règlement soient remis conformément à la *Loi sur le fonds d'aide aux actions collectives* et le *Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives*;

ORDER that the levies for the *Fonds d'aide aux actions collectives* as provided for in the Settlement Agreement be remitted according to the *Act respecting the Fonds d'aide aux actions collectives* and the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*;

PRENDRE ACTE de l'engagement de l'Administrateur des réclamations à produire un rapport sur l'administration des fonds de règlement, conformément à l'article 59 du *Règlement de la Cour supérieure du Québec en matière civile*, et d'en donner avis à la Cour et au Fonds d'aide aux actions collectives;

TAKE ACT of the Claim Administrator's undertaking to produce a report on the administration of the settlement funds, pursuant to section 59 of the *Regulation of the Superior Court of Québec in civil matters*, and to give notice thereof to the Court and to the *Fonds d'aide aux actions collectives*;

LE TOUT, sans frais de justice.

THE WHOLE, without legal costs.

Montreal, October 15, 2021

Andrea Grass

CONSUMER LAW GROUP INC.

Per: Me Andrea Grass

Attorneys for the Representative Plaintiff

SOLEMN DECLARATION

I, Andrea Grass, attorney, practicing my profession at 1030 rue Berri, Suite 102, Montreal, Quebec, H2L 4C3, solemnly affirm:

1. That I am one of the attorneys for the Representative Plaintiff in this matter;
2. That I have taken cognizance of the Application attached and the facts alleged therein are accurate to the best of my knowledge;
3. That said Application is made in good faith.

AND I HAVE SIGNED

(S) Andrea Grass

Andrea Grass

Solemnly affirmed before me at Montreal
this 15th day of October 2021

(s) Lauren Brunet #208801

Commissioner of Oaths
for the judicial district of Montreal

NOTICE OF PRESENTATION

TO: Me Jean Lortie
Me Samuel Lepage
MCCARTHY TÉTRAULT LLP
1000 rue De La Gauchetière Ouest
Suite 2500
Montréal, Québec, H3B 0A2

Attorneys for the Defendants

TAKE NOTICE that the present application will be presentable for adjudication before the Honourable Mr. Justice Pierre-C. Gagnon of the Superior Court, at the Palais de Justice in Montreal, located at 1 Notre Dame East, in Quebec, Canada, H2Y 1B6 on **October 15, 2021 at 9h30 A.M.** at the **Annex of the Longueuil Courthouse** as well as by way of Microsoft Teams.

Montreal, October 15, 2021



CONSUMER LAW GROUP INC.
Per: Me Andrea Grass
Attorneys for the Representative Plaintiff

CONSUMER LAW GROUP INC.

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

N°: 500-06-000720-140

(Class Action)
SUPERIOR COURT
DISTRICT OF MONTREAL

4037308 CANADA INC.

Representative Plaintiff

-vs.-

NAVISTAR CANADA ULC *et al.*

Defendants

APPLICATION BY THE REPRESENTATIVE PLAINTIFF FOR:

(A) APPROVAL OF A CLASS ACTION SETTLEMENT;

(B) APPROVAL OF THE NOTICE OF SETTLEMENT

APPROVAL TO CLASS MEMBERS; AND

(C) APPROVAL OF THE CLAIM FORM

(Arts. 579, 590, and 591 C.C.P., arts. 63, 65, and 69 *Règlement de procédure civile*, RLRQ, c. C-25, a. 47, and arts. 30 & 32 of the *Loi sur le Fonds d'aide aux actions collectives*, RLRQ, c. F-3.2.0.1.1)

COPY

Me Jeff Orenstein (Ext. 2)

Me Andrea Grass (Ext. 3)

CONSUMER LAW GROUP INC.

Avocats • Attorneys

1030 rue Berri, Suite 102

Montreal, Quebec, H2L 4C3

Telephone: (514) 266-7863

Télécopieur: (514) 868-9690

Email: jorenstein@clg.org

agrass@clg.org

BC 4013



Consumer Law Group