

THE HONOURABLE )  
 )  
JUSTICE BELOBABA )

September 11, 2020

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

ROBERT STIBBE

Plaintiff/Moving Party

- and -

AUDI CANADA INC., AUDI AKTIENGESELLSCHAFT,  
AUDI OF AMERICA INC. and VW CREDIT CANADA INC.

Defendants/Respondents

Proceeding under the *Class Proceedings Act, 1992*

**ORDER  
(Motion to Amend)**

**THIS MOTION**, made by the Plaintiff for an Order granting the Plaintiff leave to amend the Fresh as Amended Statement of Claim was read this day at the Court House at 130 Queen Street West, Toronto, Ontario.

**ON READING** all material filed and upon being advised that the Defendants consent to the relief requested,

1. **THIS COURT ORDERS** that the Second Fresh as Amended Statement of Claim be issued in the form attached hereto as Schedule “A”.
2. **THIS COURT ORDERS** that if and to the extent necessary, leave is granted to discontinue this action on behalf of the former putative class members (i.e. owners or lessees of a i) Audi-brand A4, Allroad, A5, A6, A7, A8, Q5 and SQ5 vehicles for model years 2011 to 2016; ii) Audi-brand A8L vehicles for model years 2011, 2012 and 2014; and/or iii) Audi-brand S8 vehicles for model years 2011, 2012 and 2015) as defined at paragraph 10 of the Fresh as Amended Statement of Claim (“Former Putative Class Members”).
3. **THIS COURT ORDERS** that pursuant to sections 19 and 29(4) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, notice of the foregoing discontinuance be disseminated by Class Counsel posting this Order on Class Counsels’ websites. Class Counsel shall also provide a copy of this Order to any Former Putative Class Members who contacted or will contact Class Counsel seeking information about this Action before the proposed settlement is completed or, if the settlement is not approved, before the final resolution of this Action.
4. **THIS COURT ORDERS** that there be no costs of this motion.

**Signed:** *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

**Schedule A to the Order**

Court File No.: CV-16-564517-CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

UDO RENK

Plaintiff

- and -

AUDI CANADA INC., AUDI AKTIENGESELLSCHAFT,  
AUDI OF AMERICA INC., VW CREDIT CANADA  
INC., BENTLEY MOTORS CANADA LTD., PORSCHE  
CARS CANADA LTD., VOLKSWAGEN GROUP  
CANADA INC., and VOLKSWAGEN  
AKTIENGESELLSCHAFT

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED STATEMENT  
OF CLAIM**

**(Notice of Action issued on November 21, 2016)**

**CLAIM**

1. The Plaintiff, on his own behalf and on behalf of all Class Members, claims:
  - a. an order certifying this action as a class proceeding and appointing the Plaintiff as the representative Plaintiff;
  - b. statutory damages pursuant to the *Competition Act* R.S.C. 1985, c. C-34, the *Consumer Protection Act, 2002*, S.O. 1992, c. 6 (and equivalent statutes in every Canadian Province) ("**CPA**") in an amount to be determined by this Honourable Court;
  - c. declarations that it is not in the interests of justice to require notice be given pursuant to s. 18(15) of the *Consumer Protection Act* (and any equivalent provisions of the Equivalent Consumer Protection Statutes) and waiving any such notice provisions;
  - d. an order for the rescission of the purchase of the Vehicles as well as the rescission of any financing, lease or other agreements related to the Vehicles;
  - e. a declaration that each of the Defendants breached, Part VI of the *Competition Act* and that the Defendants engaged in unfair practices contrary to the CPA;
  - f. a declaration that each of the Defendants misrepresented the characteristics of the Vehicles intentionally or negligently;
  - g. a declaration that the Defendants breached the express and implied warranties in relation to the Vehicles;
  - h. a declaration that some or each of the Defendants were negligent in the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles;
  - i. a declaration that the Defendants engaged in a conspiracy;

- j. an order for restitution flowing from the Defendants' unjust enrichment;
- k. general damages and special damages in the amount of \$10,000,000;
- l. punitive damages and/or aggravated damages in the amount of \$500,000;
- m. a reference to decide any issues not decided at the trial of the common issues;
- n. costs of the investigation and prosecution of this proceeding pursuant to s. 36 of the *Competition Act*;
- o. prejudgment interest compounded and post-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990, c. C-43;
- p. costs of this action on a substantial indemnity basis and the cost of administration and notice pursuant to s. 26(9) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, plus applicable taxes; and,
- q. such further and other relief as to this Honourable Court seems just.

## **NATURE OF THE ACTION**

2. This class action concerns the design, manufacture and installation of a transmission software program (“Program”) which affected the true measure of CO2 emissions of certain gasoline powered Vehicles (as defined below), and which resulted in the fuel efficiency of the Vehicles being overstated in Canada. The Program, among other things, used transmission shift maps or otherwise caused the transmission to operate in a manner in the government mandated certification and/or fuel consumption testing process of the Vehicles that differed from transmission shift maps used or transmission operation in basic or dynamic shift programs (the “Transmission Warm-Up Mode”). All of the Vehicles are

and were engineered, developed, manufactured, tested, marketed and sold by the Defendants. The Program at issue in this action is separate and distinct from the defeat device incorporated into diesel powered Volkswagen and Audi vehicles which was made public in or about September and November 2015, and which formed the basis of separate actions in Canada against the Volkswagen and Audi group of companies and others. The Vehicles at issue are those listed below:

<b>Make</b>	<b>Model</b>	<b>Engine</b>	<b>Model Year</b>
Audi	A8L	6.3L	2013
Audi	A8L	6.3L	2015
Audi	A8L	6.3L	2016
Audi	RS7	4L	2014
Audi	RS7	4L	2015
Audi	RS7	4L	2016
Audi	S8	4L	2013
Audi	S8	4L	2014
Audi	S8	4L	2016
Bentley	Continental GT	4L	2013
Bentley	Continental GT	4L	2014
Bentley	Continental GT	4L	2015
Bentley	Continental GT	4L	2016
Bentley	Continental GT	4L	2017
Bentley	Continental GTC	4L	2013
Bentley	Continental GTC	4L	2014
Bentley	Continental GT Convertible	4L	2015

<b>Make</b>	<b>Model</b>	<b>Engine</b>	<b>Model Year</b>
Bentley	Continental GT Convertible	4L	2016
Bentley	Continental GT Convertible	4L	2017
Bentley	Flying Spur	6L	2014
Bentley	Flying Spur	6L	2015
Bentley	Flying Spur	4L	2015
Bentley	Flying Spur	6L	2016
Bentley	Flying Spur	4L	2016
Porsche	Cayenne	3.6L	2013
Porsche	Cayenne	3.6L	2014
Porsche	Cayenne	3.6L	2016
Porsche	Cayenne GTS	4.8L	2013
Porsche	Cayenne GTS	4.8L	2014
Porsche	Cayenne GTS	3.6L	2016
Porsche	Cayenne S	4.8L	2013
Porsche	Cayenne S	4.8L	2014
Porsche	Cayenne S	3.6L	2015
Porsche	Cayenne S	3.6L	2016
Porsche	Cayenne Turbo S	4.8L	2014
Volkswagen	Touareg	3.6L	2013
Volkswagen	Touareg	3.6L	2014
Volkswagen	Touareg	3.6L	2015
Volkswagen	Touareg	3.6L	2016

3. This action was first commenced in 2016 and alleged that a model of transmission found in

a number of Audi-brand vehicles had allowed the Audi defendants to circumvent environmental legislation during the vehicle's government required certification and had resulted in the overstatement of fuel economy. Since this action was first issued, additional investigations have determined that the Program was incorporated into the various Volkswagen, Audi, Porsche and Bentley Vehicles listed above.

4. Among other things, a press release issued by the Environmental Protection Agency in the United States dated August 30, 2019 provided:

*The U.S. Environmental Protection Agency (EPA) is revising estimates for a number of 2013-2017 Audi, Bentley, Porsche and Volkswagen vehicles to ensure consumers are given accurate fuel economy values. EPA is also requiring the Volkswagen Group to forfeit emissions credits under the greenhouse gas (GHG) emissions standards for light duty vehicles to account for under-reporting emissions.*

*In the course of the investigation concerning defeat devices in Volkswagen's diesel vehicles, the EPA and the California Air Resources Board discovered that the company employed software to manage vehicle transmissions in gasoline vehicles. This software causes the transmission to shift gears during the EPA-prescribed emissions test in a manner that sometimes optimizes fuel economy and greenhouse gas (GHG) emissions during the test, but not under normal driving conditions. The company employed this software in roughly one million gasoline, light-duty vehicles from model years 2013 through 2017 sold by Volkswagen in the United States under the brand names Volkswagen, Audi, Porsche, and Bentley.*

*The EPA required Volkswagen to estimate the emissions and fuel economy impact of the software through extensive testing and other methods. Based on these investigations, Volkswagen found that, deactivation of the software resulted in an impact to fuel economy on roughly 98,000 vehicles of approximately one mile per gallon.*

*Just as Volkswagen over-stated the fuel economy of these vehicles, the company under-stated greenhouse gas emissions by approximately 220,000 metric tons. To account for these discrepancies Volkswagen will forfeit approximately 220,000 GHG emission credits under EPA's light duty GHG emissions standard program. Volkswagen will also forfeit credits in the federal Corporate Average Fuel Economy program. The exact amount of credits will be subject to approval by EPA and the National Highway Traffic Safety Administration.*



5. Recently, in the summer of 2020, the re-stated fuel economy values for the Vehicles in Canada were published by Natural Resources Canada. These re-stated fuel economy values reflect the fuel economy of the Vehicles without the effect or use of the Program.

## **THE PARTIES**

6. The Plaintiff Udo Renk ("Renk" or "Plaintiff") is an individual residing in Grand Prairie Alberta. The Plaintiff is a long-time customer of the Defendants. The Plaintiff purchased his first Volkswagen Beetle in 1980 and has purchased numerous Volkswagen and Audi brand vehicles since that time. In or around October 2013, the Plaintiff purchased a 2013 model year Audi S8 from a Volkswagen dealership in Edmonton Alberta. The purchase price of the Plaintiff's S8 was in excess of \$119,000. The Plaintiff's S8 is equipped with the Program.
7. Prior to purchasing his Vehicle, the Plaintiff viewed or heard the Representation, as defined below in, among other things websites produced by the Defendants as well as marketing materials and brochures produced or distributed by the Defendants. The sales staff at an Audi dealership in Edmonton repeated the Representation to the Plaintiff. In purchasing his Vehicle, the Plaintiff reasonably relied upon the Representation.
8. As discussed below, the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles is shared among the various Defendants, which each are part of what can be described as the Volkswagen Group of companies. Technologies developed by one brand are sometimes incorporated into vehicles manufactured and marketed by other brands within the Volkswagen Group.
9. The Defendant Volkswagen Aktiengesellschaft ("Volkswagen AG") is a German car

manufacturer headquartered in Wolfsburg, Lower Saxony, Germany. It is the second largest automaker in the world. Volkswagen AG and its wholly owned subsidiaries are responsible for the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles. The Plaintiff asserts that the Defendant Volkswagen AG exercised control or effective control or direction over the other Defendants as it relates to the Program. The incorporation and use of the Program in the Vehicles and the Representations regarding the Vehicles as set out herein were authorized, approved, directed and controlled by Volkswagen AG. Volkswagen AG is jointly and severally liable for the liability of the other defendants.

10. The Defendant Volkswagen Group Canada Inc. (“Volkswagen Canada”) is a Canadian federally incorporated company, directly or indirectly owned and controlled by Volkswagen AG, with its head office in Ajax, Ontario. Volkswagen Canada is the sole distributor of the Volkswagen-branded Vehicles in Canada. Volkswagen Canada does not manufacture any automobiles in Canada, but is involved with, has responsibilities for and provides directions or input for the engineering, design, development, research, regulatory compliance, marketing and/or distribution of the Vehicles in or for Canada. Volkswagen Canada is a wholly-owned indirect subsidiary of Volkswagen AG.

11. The Defendant Audi Aktiengesellschaft (“Audi AG”) is a German car manufacturer headquartered in Ingolstadt, Lower Saxony, Germany. It is the parent company of the Audi Group. Audi AG and its wholly owned subsidiaries are responsible for the engineering, design, development, research, manufacture, regulatory compliance, marketing and distribution of the Vehicles.

12. The Defendant Audi Canada Inc. (“Audi Canada”) is a Canadian federally incorporated company with its head office in Ajax, Ontario. Audi Canada is the distributor of Audi-branded Vehicles in Canada. It does not manufacture any automobiles in Canada, but it is involved with, has responsibilities for and provides directions or input for the engineering, design, development, research, regulatory compliance, marketing and/or distribution of the Audi-branded Vehicles in Canada.
13. The Defendant Audi America Inc. (“Audi America”) is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Herndon, Virginia. It does not manufacture any automobiles in the United States, but it is involved with, has responsibilities for and provides directions and input for the engineering, design, development, research, regulatory compliance, marketing and/or distribution of the Audi-branded Vehicles in North America.
14. The Defendant VW Credit Canada. Inc (“VWCCI”). is a Canadian federally incorporated company with its head office in St. Laurent, Quebec. It offers retail financing and customer lease financing for the Vehicles in Canada.
15. The Defendant Bentley Motors Canada Ltd. (“Bentley Canada”) is a federally incorporated corporation with its head office in Montreal, Quebec. Bentley Canada is the distributor of Bentley-branded Vehicles in Canada.
16. The Defendant Porsche Cars Canada Ltd. (“Porsche Canada”) is a federally incorporated corporation with its head office in Toronto, Ontario. Porsche Canada is the distributor of Porsche-branded Vehicles in Canada.

17. The class is comprised of all persons in Canada who own, owned, lease or leased one of the Vehicles ("**Class**" or "**Class Members**").

### **DEFECTS IN THE VEHICLES**

18. At all material times, the Defendants were required to comply with, and knew or should have known that the Vehicles were required to comply with, Canadian law, regulations and policy in respect of emissions standards, including those imposed pursuant to the *CEPA* and the regulations thereto.

19. Automobile companies, including the Defendants, are prohibited from assembling, manufacturing and/or importing into Canada vehicles, engines or equipment unless Canadian emissions standards are met.

20. The Defendants knowingly, intentionally or negligently incorporated the Program into the Vehicles. The Program, through the use of so-called adaptive shift or transmission controls, reduced the Vehicles' fuel consumption and emissions until regulatory testing was complete.

21. Each of the Defendants knew or ought to have known of the installation of the Program.

22. When driven under ordinary conditions, the Program adjusts the Vehicles' transmission shift maps thereby increasing CO<sub>2</sub> emissions, fuel consumption and reducing the Vehicles' fuel economy below represented levels.

23. Increased exposure to CO<sub>2</sub> and other pollutants for Class Members and the public, has direct and indirect negative effects on human health. Moreover, CO<sub>2</sub> is a greenhouse gas found to

be dangerous to the environment and the public at large.

24. The effect of the use of the Program was to mislead regulators and consumers about the performance of the Vehicles. The Program had the effect of misleading regulators, consumers, lessees and purchasers with respect to the emissions and fuel efficiency of the Vehicles.
25. In each of the Vehicles, the Program alters the points at which the transmission shifts between gears and results in increased CO<sub>2</sub> emissions and decreased fuel economy. The Program is embedded in the Vehicles' Transmission Control Unit ("TCU"). The primary function of the TCU is to regulate shifting between gears by reacting to various inputs from sensors monitoring, for example, coolant temperature, exhaust temperature, ignition timing, crankshaft and camshaft positioning, fuel mixture and air flow volumes.
26. The Vehicles operate with the Program either "active" or "inactive." When the Program is active, the transmission changes gears at lower engine speeds than when it is inactive. Shifting between gears at lower engine speeds (when the Program is active) keeps the average engine speed low, thus burning less fuel and emitting less carbon dioxide. Conversely, when the Program is inactive (i.e., in regular driving), the Vehicles shift gears at higher revolutions per minute (RPMs), resulting in higher carbon dioxide emissions and reduced fuel economy.
27. The Program software was calibrated to activate when it encounters certain "entry conditions" and de-activate under certain "exit conditions." For example, in some Vehicles the Program activates immediately after a key-start (when the vehicle's ignition is turned on)

and remains on until the steering wheel is turned 15 degrees or more (which does not occur during emissions testing). After a wheel turn, as occurs in real-world driving, the transmission switches to a “normal” mode (i.e., with Warm-up Program off) in which it shifts at higher RPMs, uses more fuel, and emits more carbon dioxide.

28. The Program in each Vehicle is active for at least some portion of standard emissions testing procedures and mostly inactive during on-road driving. This is so because the “exit conditions” that render the Program inactive (like turning the steering wheel) are encountered in everyday driving conditions, but not during emissions testing.
29. Fuel economy is an important factor in Class Members’ decisions to purchase or lease a Vehicle. Fuel economy ratings are conveyed to Class Members by the Defendants through their reported and published fuel economy figures and as part of the Representations (as defined below).

### **NEGLIGENT MISREPRESENTATION**

30. The Defendants made, approved, utilized or authorized a number of consistent, common and uniform representations in, among other things, their written warranties, vehicle manuals, television, radio, internet and print media advertising, website(s), sales brochures, posters, dealership displays and other marketing materials in relation to the Vehicles. The Defendant represented, among other things, that:
- a. the Vehicles met certain specified fuel economy ratings and that those ratings had been accurately reported to regulators and the public;
  - b. the CO2 ratings reported to the regulator for the Vehicles were accurate; ;

c. the Vehicles were environmentally friendly, environmentally compliant and/or "green"; and,

d. the Vehicles provided a superior driving experience, including by virtue of their fuel economy and emissions.

31. The representations referred to at paragraph 30 above are collectively referred to as the "Representation." The Representation was false and misleading, and was made intentionally or negligently.

### **CONSUMER PROTECTION ACT**

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

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

34. The Plaintiff states that the Representation constituted unfair, unconscionable and/or otherwise prohibited practices under the *Consumer Protection Act* and Equivalent Consumer

Protection Statutes, given that, among other things, the Defendants knew, or ought to have known, that:

- a. the Representation was false, misleading and deceptive;
- b. the Vehicles did not have the performance characteristics, uses, benefits or qualities as set out in the Representation;
- c. the Vehicles were not of the particular standard, quality or grade as set out in the Representation;
- d. the Vehicles did not provide the specific price advantage as set out in the Representation;
- e. the Representation used exaggeration, innuendo and/or ambiguity as to a material fact and failed to state a material fact in respect of the Vehicles;
- f. the price for the Vehicles grossly exceeded the price at which similar goods or services were readily available to like consumers;
- g. the Class Members were unable to receive all expected benefits from the Vehicles;
- h. the consumer transactions were excessively one-sided in favour of the Defendants;
- i. the terms of the consumer transactions were so adverse to the Class Members as to be inequitable; and/or,
- j. because of such further conduct concealed by the Defendants and unknown to the Plaintiff.



35. The Class Members are entitled to rescission of the purchase, lease or other related agreements as well as damages pursuant to s. 18 of the *Consumer Protection Act* and equivalent provisions of the Equivalent Consumer Protection Statutes.
36. The Class Members are entitled, to the extent necessary, to a waiver of any notice requirements under the *Consumer Protection Act* or of the Equivalent Consumer Protection Statutes, particularly as the Defendants have concealed the actual state of affairs from the Class Members.
37. The Defendants made the Representation to the public and in so doing breached s. 52 of the *Competition Act* because the Representation:
- a. was made for the purpose of promoting the business interests of the Defendants;
  - b. was made to the public; and,
  - c. was false and misleading in a material respect.
38. The Defendants were in a proximate and special relationship with the Plaintiff and the Class Members, which gave rise to a duty of care owed by the Defendants to the Plaintiffs and the Class Members, which the Defendants breached.
39. It was intended by the Defendants and reasonably foreseeable that the Class Members would reasonably rely upon the Representation when purchasing or leasing the Vehicles and would suffer damages described below as a result of the Representation, which in fact the Class Members did.
40. The Class Members' reliance on the Representation is established, among other things, by their purchase or lease of the Vehicles. Had the Class known that the Representation was

false and misleading, they would not have purchased, leased or continued to drive the Vehicles.

41. The Plaintiff and Class Members suffered damages as a result of the Representation and in reliance thereon. The Defendants are liable to pay damages to the Class Members.

42. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which are payable as a result of the breach of s. 52.

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

43. The Defendants expressly or impliedly warranted to the Plaintiff and the Class Members that the Vehicles would be reasonably fit for the purposes of driving on roads in Canada, that the Vehicles were of merchantable quality, that the Vehicles were free from defects and/or that the Vehicles were of acceptable quality, when in fact the Vehicles were not with respect to CO2 emissions. Despite and contrary to the foregoing warranties and representations, the Vehicles were sold or leased when they were intentionally or negligently manufactured, designed, tested, built and equipped not to provide the stated fuel economy.

### **NEGLIGENCE**

44. The Defendants, through their employees, officers, directors and agents, owed the Class Members a duty of care. That duty of care included ensuring that the Vehicles were engineered, designed, developed, tested, manufactured and distributed without the Program. Moreover, the Defendants owed the Class a duty to warn that the Vehicles incorporated and used the Program.

45. The Defendants knew and it was reasonably foreseeable that the Class Members would trust

and rely on the Defendants' skill and integrity in purchasing the Vehicles. The Defendants also knew that and it was reasonably foreseeable that, if the Vehicles contained the Program, the value of the Vehicles would diminish or the cost to operate the Vehicles would increase.

46. The reasonable standard of care expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of engineering, designing, developing, testing and manufacturing the Vehicles and having them certified, imported, marketed and distributed. The Defendants, through its employees, officers, directors and agents failed to meet the reasonable standard of care expected in the circumstances and similarly failed to warn the Class Members.

47. The negligence of the Defendants resulted in damage to the Plaintiff and the other Class Members. Had the Defendants complied with the required standard of care, the Vehicles would have been sold without the Program, or alternatively, they would have been offered and/or acquired at prices that represented their true value and cost of operation.

48. As a result of the Defendants' Representations, the Plaintiff and Class Members suffered damages.

## **CONSPIRACY**

49. The Defendants and others, including their officers, directors, agents and co-conspirators that are known to the Defendants but unknown to the Plaintiff, conspired among themselves, in Germany, the United States, and Canada, to intentionally create or make use of the Program. They concealed from, or failed to disclose to, Canadian, American and other authorities the existence of the Program.

50. The Defendants had as their preponderant motivation and purpose a desire to increase their profits by misleading the Class Members and regulators and by causing the Class Members to purchase or lease the Vehicles. The Defendants intended to cause harm to the Plaintiff and the Class members and to thereby enrich themselves.

51. To carry out the conspiracy, the Defendants acted in concert with one another and each directed their own and each others' agents, servants and employees to knowingly or unknowingly carry out unlawful and wrongful acts including:

- a. the Defendants all formed one group of companies with consolidated financial reporting and coordinated design, manufacturing, engineering, marketing, distribution and regulatory compliance for their brands across the globe;
- b. the Defendants and their agents, servants and employees coordinated their efforts. Senior employees of the Defendants corresponded through telephone conversations, emails, reports and in personal meetings in Canada, the United States, Germany and elsewhere to design Program; and,
- c. the Defendants coordinated a strategy not to disclose the incorporation and use of the Program and not to warn the Class Members or the public of the use of the Program.

52. The Defendants knew that the Class Members would not pay the selling price for the Vehicles if the Class members were aware of the Program. The purpose and result of the conspiracy was to deceive the Plaintiff and Class Members into purchasing the Vehicles at an inflated price and to thereby increase the Defendants' profits at the expense of the Class Members. The Defendants knew or ought to have known that the Class Members would be

injured by the conspiracy.

53. As a result of the Defendants' conspiracy, the Class Members suffered damages.

### **UNJUST ENRICHMENT**

54. The Defendants caused the Plaintiff and the Class Members to pay money for a product for which they should have paid less than they did.

55. As a result, the Defendants were enriched by the payment or overpayment.

56. The Plaintiff and Class Members suffered a deprivation corresponding to the Defendants' enrichment.

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

### **GENERAL AND SPECIAL DAMAGES**

58. As a result of the inclusion of the Program in the Vehicles the Class has suffered damages. Each Class Member has suffered lower fuel economy in their Vehicles than what was represented by the Defendants. As a result, the Class Members paid higher sums for greater amounts of fuel, at a higher cost than they would have had they purchased an alternative vehicle.

59. The Class Members have or will have lost time, lost income and suffered inconvenience and special damages.

60. The Plaintiff pleads that the Class Members' damages were sustained in Ontario and in the rest of Canada.

### **PUNITIVE DAMAGES**

61. The Plaintiff pleads that the Defendants' conduct was reckless, high-handed and an abuse of its special relationship with the Class Members. The conduct of the Defendants as aforesaid was deliberate. Class Members were actively misled by the Defendants. The Defendants' conduct was motivated for financial gain at the expense of the Class Members. The Defendants' conduct entitles the Class to an award of punitive, exemplary and aggravated damages in the amount of \$500,000.00.

### **DISGORGEMENT**

62. In the alternative to damages, the Plaintiff pleads that he is entitled to claim a disgorgement of the Defendants' profits and/or revenues and thereby to claim an accounting or other such "gain-based" remedy due to inter alia, the failure of the Defendants to disclose the existence of the Program and the other wrongful conduct outlined above.

63. The Plaintiff claims that their entitlement to such an election is appropriate for, among other things, the following reasons:

- a. revenue was acquired in a manner in which the Defendants cannot in good conscience retain;
- b. the integrity of the marketplace would be undermined if an accounting was not required; and

- c. absent the Defendants' wrongful conduct, the Vehicles could not have been marketed or sold at the same prices.

### **RELEVANT STATUTES**

64. The Plaintiff pleads and relies upon the following statutes:

- a. *Class Proceedings Act, 1992 S.O. 1992, c. 6, as amended;*
- b. *Competition Act, R.S. 1985, c. C-34, as amended, and the regulations thereto, sections 36(1) and 52(1);*
- c. *Consumer Protection Act, 2002, S.O. 2002, c. 30, as amended, and the regulations thereto, sections 2, 5, 9(1), 9(2), 14, 15, 16, 17, 18, and 19;*
- d. *Fair Trading Act, R.S.A. 2000, c. F-2 as amended, and the regulations thereto, sections 5, 6, 7, 7.2, 7.3, and 13;*
- e. *Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 as amended, and the regulations thereto, sections 4, 5, 8, 9, 10, 171, and 172;*
- f. *The Business Practices Act, C.C.S.M. c. B120 as amended, and the regulations thereto, sections 2, 3, 4, 5, 6, 8, and 23;*
- g. *Trade Practices Act, R.S.N.L 1990, c T-7 as amended, and the regulations thereto, sections 5, 6, 7, and 14;*
- h. *Consumer Protection and Business Practices Act, S.N.L. 2009, c. C-31. 1 as amended, and the regulations thereto, sections 7, 8, 9, and 10;*
- i. *Consumer Protection Act, C.Q.L.R. c. P-40.1 as amended, and the regulations*

thereto, sections 215,218,219,220,221,222,228,239,252,253,271, and 272;

- j. *The Consumer Protection Act*, S.S. 1996, c. C-30.1 as amended, and the regulations thereto, sections 5, 6, 7, 8, 14, and 16;
- k. *The Consumer Protection and Business Practices Act*, S.S. 2014, c. C-30.2 as amended, and the regulations thereto, sections 2, 4, 6-16, 19-22, 24-33, 36, 37, 39, 91 and 93;
- l. *Business Practices Act*, RSPEI 1988, c B-7, as amended, and the regulations thereto, sections 1, 2, 3 and 4;
- m. *The Consumer Protection Act*, RSNS 1989, c. 92 as amended, and the regulations thereto, section 28; and,
- n. *Negligence Act*, R.S.O. 1990, c. N. 1, as amended and the equivalent Provincial and Territorial legislation.

### **PLACE OF TRIAL**

65. The Plaintiff proposes that this action be tried in the City of Toronto.

### **SERVICE**

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

- a. in respect of personal property in Ontario (Rule 17.02(a));
- b. in respect of the interpretation of a contract in respect of personal property (Rule 17.02(c));



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

December 20, 2016

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**UDO RENK**

Plaintiff

-and-

**AUDI CANADA INC. et al.**

Defendants

Court File No.: CV-16-564517-00CP

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act*, 1992

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**SECOND FRESH AS AMENDED STATEMENT OF CLAIM  
(Notice of Action issued on November 21, 2016)**

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Defendants

Court File No.: CV-16-564517-00CP

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

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**ORDER  
(Motion to Amend)**

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