

Ontario
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LANDSBRIDGE AUTO CORP. and 405341 ONTARIO LIMITED

Plaintiffs

- and -

**MIDAS CANADA INC. and
MIDAS INTERNATIONAL CORPORATION**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM
(Notice of Action issued on May 31, 2007)

1. The plaintiffs claim:
 - (a) damages for breach of contract, derogation from the grant, and breach of the duty of fair dealing contained in section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3, section 7 of the *Franchises Act*, S.A. 1995, c. F-17, and section 3(3) of the *Franchises Act*, S.P.E.I. 2005, c. 36 in the amount of \$75,000,000;
 - (b) further, and in the alternative, compensation and restitution for unjust enrichment in the amount of \$75,000,000;
 - (c) an abatement of royalties payable under the Midas Franchise Agreement described below;

- (d) a declaration that the defendants have breached their respective obligations to the Canadian Midas Dealers under the Midas Franchise Agreement and the NASCC Charter (described below) in respect of the supply of automotive parts and accessories to the Canadian Midas Dealers;
- (e) a declaration that Midas Canada Inc. has derogated from the grant of the right, franchise and licence contained in section 1.1(c) of the Midas Franchise Agreement;
- (f) a declaration that the defendants are prohibited from receiving rebates and allowances from suppliers of parts and accessories to the Canadian Midas Dealers;
- (g) an order requiring the defendants to disclose, account for and pay to the Canadian Midas Dealers all rebates and allowances received from suppliers in respect of all automotive parts and accessories sold to the Canadian Midas Dealers;
- (h) an interim and interlocutory order requiring the defendants, or either of them, to pay into court to the credit of this action all rebates and allowances received from suppliers in respect of all automotive parts and accessories sold to the Canadian Midas Dealers;
- (i) a mandatory order that the defendants permit and bear the full costs of an audit of all warranty claim revenues and expenses by an independent firm of chartered accountants selected and instructed by the plaintiffs;
- (j) punitive, exemplary and aggravated damages in an amount not to exceed \$100,000 per class member shop;

- (k) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (l) costs of this action on a substantial-indemnity scale, plus applicable goods and services tax; and
- (m) such further or other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

The Parties

2. The plaintiff, Landsbridge Auto Corp. (“Landsbridge”), is an Ontario corporation carrying on business as an automotive specialty shop under the “Midas” name in the City of Ottawa, Ontario.

3. The plaintiff, 405341 Ontario Limited (“Ontario Ltd.”), is an Ontario corporation carrying on business as an automotive specialty shop under the “Midas” name in the City of Vaughan, Ontario.

4. The defendant, Midas Canada Inc. (“Midas”), is an Ontario corporation and a wholly-owned subsidiary, directly or indirectly, of the defendant, Midas International Corporation (“Midas International”).

5. Midas International is a Delaware U.S.A. corporation listed on the New York Stock Exchange and based in Itasca, Illinois. Midas International is one of the largest providers of automotive service in the world with approximately 2,600 franchised, licensed and company-owned Midas shops in 19 countries, including approximately 1571 in the United States and 180 in Canada.

6. Landsbridge and Ontario Ltd. are franchisees under a Midas Franchise and Trade-Mark Agreement with Midas (the “Midas Franchise Agreement” or the “Agreement”).

7. Landsbridge and Ontario Ltd. are members of, and bring this action on behalf of the following class: all corporations, partnerships and individuals carrying on business in Canada on or after May 31, 2007 under a “Midas” Franchise Agreement (herein “Canadian Midas Dealers” or “franchisees”).

8. There are currently approximately 90 Canadian Midas Dealers operating approximately 180 Midas shops.

Overview

9. This claim arises out of unilateral and fundamental changes which the defendants made to the Midas franchise system in breach of their contractual, statutory and other duties to the Canadian Midas Dealers. These changes improperly benefited the defendants and caused serious and continuing losses to the franchisees as a class as represented in this action by the plaintiffs.

Midas System Based on Supply of Quality Parts at Discounted Prices

10. The Midas system was for the majority of its history a franchise system based on the distribution of automotive parts and accessories (“products”) through a North American distribution system owned and controlled by Midas, Midas International or their affiliated companies (the “Midas Distribution System”) to Midas franchisees for sale to the public.

11. The franchisees' right to purchase products from Midas is expressly stated in Articles One and Three of the Midas Franchise Agreement and is a fundamental term thereof.

12. The Midas Distribution System was, from the inception of the chain, an integral part of the franchise system. The Midas Distribution System offered franchisees a reliable and consistent chain of distribution, with warehouses across Canada offering an array of products for weekly or twice-weekly delivery or pick-up.

13. The Midas Distribution System sold products to the Midas dealers on a non-exclusive basis. In addition to the Midas dealers, the Midas Distribution System sold to other automotive shops, including competitors to the Midas dealers, and other automotive distributors.

14. As pleaded below, the Midas Distribution System enabled Midas to carry out its contractual obligation to sell all products to the Canadian Midas Dealers at below competitive prices.

Midas Agrees to Sell to Canadian Midas Dealers at Net-Net Discount

15. The obligation to sell to the franchisees at below competitive prices originated with a fundamental change to the Midas Franchise Agreement in 1980. Until that time, Midas franchisees purchased products from the Midas Distribution System at "net cost", meaning the wholesale prices at which the Midas Distribution System sold products to its preferred customers. Because of the combined purchasing power of the Midas franchise system, Midas franchisees were entitled to net wholesale pricing from the Midas Distribution System. However, until 1980, Midas franchisees did not receive additional discounts on account of being Midas franchisees.

16. Until 1980, Midas franchisees paid 5% royalties (including advertising fees) on all retail sales. In or around 1980, Midas sought to increase royalties from 5% to 10% (including advertising fees) on all retail sales. The Canadian Midas Dealers, led by the Canadian Midas Dealers Association (“CMDA”), negotiated a new franchise agreement which allowed for the increased royalties but offset the increase with other benefits for the franchisees.

17. The most significant benefit was the requirement for Midas, on behalf of the Midas Distribution System, to sell all products to the franchisees at “net-net prices”. Pursuant to the negotiations with the CMDA, Midas agreed on behalf of the Midas Distribution System to sell all products to the franchisees at a 14.5% discount from the net prices it offered to its most preferred wholesale customers (the “net-net discount”).

18. The net-net discount was a substantial benefit to the franchisees which allowed them to purchase the highest quality products at significantly better prices than all of their competitors in the marketplace.

19. The net-net discount more than offset the increased royalty and gave the franchisees a significant competitive advantage in the marketplace.

20. In a communication from Midas to the Canadian Midas Franchisees dated November 26, 1980, Midas expressly tied the introduction of the net-net discount to the 5% royalty increase and stated that it was “[i]n order to compensate you for the [additional] 5% royalty”. The memorandum further states that “the 14.5% discount represents an aggregate benefit to all Midas shops” after accounting for the additional royalty.

21. The majority of Midas franchisees agreed to surrender their previous franchise agreements and sign the Midas Franchise Agreement which provides for a 10% royalty. Although the Midas Franchise Agreement does not expressly incorporate the right to the net-net discount, for over 20 years following the introduction of the Midas Franchise Agreement, Midas consistently provided the net-net discount to the Canadian Midas Dealers, and detailed the net-net discount on the Canadian Net Price Lists and invoices provided to the Canadian Midas Dealers.

22. For the reasons stated in paragraphs 15 to 21 hereof, the plaintiffs plead that the Midas Franchise Agreement contains a term and condition requiring Midas through the Midas Distribution System to sell all products to the Canadian Midas Dealers at the net-net discount in exchange for the payment of royalties of 10% on all retail sales.

Midas Stops Disclosing Net-Net Discount on Statements to Franchisees

23. For 20 years following the introduction of the Midas Franchise Agreement, the net-net discount was consistently shown on all Canadian Net Price Lists and invoices provided to all Canadian Midas Dealers. In 2001, Midas informed the Canadian Midas Dealers that they would still receive the net-net discount but that instead of being separately disclosed it would be deducted from the price shown on the Canadian Net Price Lists and invoices that they received.

24. As of June 1, 2001, Midas ceased disclosing the net-net discount on their Canadian Net Price Lists and invoices sent to the Canadian Midas Dealers.

25. From June 1, 2001 the Canadian Midas Dealers lost the ability to verify that Midas was reducing the prices of their products by the amount of the net-net discount.

26. At some time following June 1, 2001 known only to Midas, without the knowledge of the Canadian Midas Dealers, Midas began eliminating the net-net discount and increasing the prices which the Canadian Midas Dealers paid for their products to levels which paralleled those paid by other competing purchasers from the Midas Distribution System.

27. The process of aligning the Canadian Midas Dealers' prices with those paid by competing purchasers benefited Midas to the detriment of the Canadian Midas Dealers and facilitated Midas' plan to exit from the distribution business. Midas knew that the Canadian Midas Dealers would be deprived of the benefit of the preferential pricing once it exited the distribution business and therefore decided to make the net-net discount less transparent before carrying out its planned withdrawal from distribution.

Midas Breaches Supply Obligations and Eliminates Net-Net Pricing

28. Beginning in or around July 2003, Midas began unilaterally withdrawing from the distribution of products to the Canadian Midas Dealers. By December 2003, Midas had completely withdrawn from distribution.

29. By ceasing to act as a distributor of products through the Midas Distribution System, Midas breached the following obligations in the Midas Franchise Agreement:

- (a) Section 1.1(c) which grants to each Canadian Midas Dealer the right, franchise and licence to purchase *from Midas* the genuine Midas products listed in Schedule A to the Agreement;

(b) Section 3.2, under the heading “Continuing Obligations of Midas”, in which *Midas agrees to sell* to the franchisees, during the term of the Agreement and subject to the terms therein set forth, such quantities of genuine Midas products referred to in Schedule A of the Agreement as the franchisee may order from time to time;

(c) The obligation to sell all products to the Canadian Midas Dealers at the net-net discount; and

(d) Sections 5.2 and 5.3 which require Midas to provide a Warranty and Guarantee to the Canadian Midas Dealers on all products *purchased from Midas*.

30. Midas was not permitted by the Agreement or otherwise to withdraw from the distribution of products entirely or to repudiate its obligation to sell all products to the Canadian Midas Dealers at the net-net discount.

31. In the alternative, if Midas was permitted to discontinue entirely the sale of products through the Midas Distribution System, Midas was not permitted to do so without providing a substitute distribution system offering equivalent advantages to the Midas Distribution System in terms of:

(a) Prices of all products on a net-net discounted basis;

(b) Availability of products; and

(c) All other terms and conditions of sale.

The Uni-Select Agreement

32. In July 2003, Midas entered into a Supply Agreement (the “Supply Agreement”) with Uni-Select Inc. (“Uni-Select”), a wholesale distributor of automotive replacement parts in Canada.

Under the Supply Agreement, Midas appointed Uni-Select to serve as the exclusive supplier of Midas-branded products, as well as a non-exclusive supplier of non-Midas branded automotive replacement products to the Canadian Midas Dealers.

33. The Supply Agreement is a wholly inadequate substitute for the Midas Distribution System and places the Canadian Midas Dealers at a significant competitive disadvantage for several reasons.

34. With respect to products purchased from Uni-Select's warehouse, the Supply Agreement does not provide the Canadian Midas Dealers with net-net pricing, i.e. pricing which is 14.5% less than that of Uni-Select's best wholesale customers which themselves receive a net discount.

35. Other disadvantages compared to the Midas Distribution System are:

(a) loss of 1% cooperative advertising (Midas contributed 1% of the franchisees' purchases to cooperative advertising, whereas Uni-Select contributes nothing);

(b) Midas gave a 2% early payment discount to the franchisees, whereas Uni-Select gives only 1%;

(c) Uni-Select's Manufacturers' Stocking Return Program (MSRP) is less favourable than that offered by Midas resulting in the franchisees having to discard product that they can no longer sell instead of returning it to the warehouse for credit; and

(d) the franchisees are now required to purchase catalogues of products sold by Uni-Select and its jobbers at a cost of approximately \$1,600 annually per shop; Catalogues are an integral part of selling and were provided to all shops free of charge by the Midas Distribution System.

36. With respect to products purchased from Uni-Select's independent distributors ("jobbers"), the Supply Agreement places the Canadian Midas Dealers at a significant competitive disadvantage in that it:

- (a) does not preserve the Canadian Midas Dealers' contractual entitlement to net-net pricing on the purchase of products from jobbers;
- (b) does not ensure that the Canadian Midas Dealers receive most favoured pricing from jobbers or even stipulate maximum prices on the purchase of products from jobbers; and
- (c) imposes minimum purchase requirements in order to obtain Midas-branded products.

37. As a result, the Canadian Midas Dealers have lost their contractual right to purchase products at below competitive prices and have been required to pay prices which are higher than other wholesale customers of Uni-Select. The Canadian Midas Dealers have thereby lost the competitive advantage to which they were entitled and in exchange for which they pay 10% royalties on all sales.

38. At the same time, Midas has unlawfully sought to maintain the Canadian Midas Dealers' royalties at the increased rate of 10% of retail sales, notwithstanding that this rate was expressly conditioned upon the franchisees' right to purchase all products from the Midas Distribution System at the net-net discount.

39. Thus, if Midas was lawfully entitled to withdraw entirely from distribution (which, as stated in paragraph 30 above, is strictly denied), by failing to provide an equivalent distribution system for the Canadian Midas Dealers which ensures the continuation of the net-net discount and all other advantages enjoyed by the Canadian Midas Dealers through the Midas Distribution System, Midas

has breached the Midas Franchise Agreement and has caused significant losses to each Canadian Midas Dealer, as more fully particularized in paragraphs 75-77 below.

Midas Fails to Leverage Purchase Power of Midas Chain for Dealers' Benefit

40. Just as Midas had no express or implied right to breach its obligation to sell to the Canadian Midas Dealers, Midas had no express or implied authority to negotiate the Supply Agreement on behalf of the Canadian Midas Dealers.

41. In the alternative, if Midas had such authority (which is expressly denied), Midas did so as the agent for the Canadian Midas Dealers and therefore owed all of the fiduciary duties of an agent to the Canadian Midas Dealers. Accordingly, Midas had the duty to:

- (a) use the aggregate purchasing power of the Midas chain to ensure that the Canadian Midas Dealers receive pricing and terms equal or superior to the pricing and terms received through the Midas Distribution System;
- (b) impose ceilings on the prices to be charged by Uni-Select and its jobbers;
- (c) place the interests of the Canadian Midas Dealers ahead of its own in negotiating the Supply Agreement; and
- (d) fully disclose to the Canadian Midas Dealers in advance of executing the Supply Agreement any and all consideration received or to be received from Uni-Select in connection with the Supply Agreement, including all rebates, allowances and collateral agreements.

42. Midas breached each of these duties in negotiating the Supply Agreement. Particulars of the breach follow.

(A) Rebates paid to Midas

43. Instead of utilizing the aggregate purchasing power of the Canadian Midas Dealers to obtain the best possible pricing for the Canadian Midas Dealers, Midas negotiated the payment of substantial rebates and allowances for itself in respect of all purchases by the Canadian Midas Dealers from Uni-Select and its jobbers.

44. Midas has no lawful entitlement, whether in the Midas Franchise Agreement or otherwise, to receive rebates and allowances or any other consideration in respect of purchases by the Canadian Midas Dealers from suppliers. Moreover, Midas knew or ought to have known that the negotiation and receipt of such rebates and allowances would and did have a direct inflationary effect on the prices to be charged by Uni-Select and its jobbers to the Canadian Midas Dealers for products.

45. Midas did not disclose the rebates and allowances to the Canadian Midas Dealers before executing the Supply Agreement.

46. When Midas did disclose the receipt of rebates and allowances to the Canadian Midas Dealers, it stated that the rebates and allowances would be used to cover Midas' warranty obligations under the Midas Franchise Agreement.

47. However, nothing in the Midas Franchise Agreement or otherwise entitles Midas to fund its warranty obligations through rebates and allowances from third party vendors. Warranty costs are

paid for through the 10% royalties paid by the Canadian Midas Dealers on all retail sales, or, alternatively, are included in the cost of products purchased from Uni-Select or its jobbers.

48. In the alternative, if Midas is entitled to fund its warranty obligations through vendor rebates and allowances (which is expressly denied), then, having regard to Midas' fiduciary duties as agent and statutory and common law duties of good faith and fair dealing (described more fully below), such right is strictly circumscribed by the following obligations:

- (a) Midas is obligated to negotiate a corresponding reduction in the prices to be paid by the Canadian Midas Dealers to the supplier to account for the supplier being relieved of its statutory warranty obligations under provincial sale of goods legislation;
- (b) Midas is required to strictly account for such rebates and warranty expenses and is limited to recovering no more than its actual warranty expenses in respect of products purchased by the Canadian Midas Dealers from the third-party vendors;
- (c) Midas is not entitled to use supplier rebates and allowances to cover warranty obligations in respect of parts which were purchased by the Canadian Midas Dealers from the Midas Distribution System before July 2003, as the warranties for these products were paid for at the time of purchase;
- (d) Midas is not entitled to co-mingle the Canadian supplier rebates with other funds, including U.S. dealer warranty funds, or to use the Canadian supplier rebates to pay for warranty obligations in respect of non-Canadian dealers; and

(e) Midas is required to promptly account for and reimburse to the Canadian Midas Franchisees any excess revenues over and above its actual expenses in respect of the warranty on purchases by the Canadian Midas Dealers from third-party vendors, and is not entitled to profit in any way from the supplier rebates and allowances.

49. Midas failed to carry out the duties set out in the preceding paragraph. In particular:

(a) Midas failed to negotiate any reduction in the prices of products on account of the seller being relieved of its statutory warranty obligations under provincial sale of goods legislation;

(b) Midas has failed to strictly account for warranty expenses related to the Canadian Midas Dealers and has utilized the supplier rebates and allowances to pay for its ongoing operational expenses;

(c) Midas has utilized supplier rebates and allowances to cover warranty obligations in respect of parts purchased by the Canadian Midas Dealers before July 2003 from the Midas Distribution System;

(d) Midas has co-mingled Canadian supplier rebates and allowances with other funds and has used the Canadian supplier rebates and allowances to fund U.S. warranty expenses in relation to its US dealers; and

(e) Midas has failed to account for and remit to the Canadian Midas Franchisees any surplus revenues over actual warranty expenses.

(B) Failure to Negotiate Below-Competitive Pricing

50. Midas failed to negotiate the equivalent of the Canadian Midas Dealers' contractual right to purchase all products at the net-net discount.

51. Moreover, Midas did not seek to place any limits on the prices to be charged by Uni-Select's jobbers to the Canadian Midas Dealers. As a result, the jobbers have charged or sought to charge prices to the Canadian Midas Dealers which are excessive and uncompetitive.

52. The failure to negotiate limits on pricing from jobbers has resulted in many Canadian Midas Dealers purchasing from other sources, thereby further eroding any aggregate purchasing power which the Midas chain once had.

53. Accordingly, Midas failed to carry out any of the duties set out in paragraph 41 above. Therefore, Midas has breached its contractual duty, its fiduciary duties as agent, and its statutory and common law duties of good faith and fair dealing (describe more fully below) to the Canadian Midas Dealers.

Midas International Executes Then Breaches Procurement Charter

54. In recognition of its failure to fulfill its supply obligations following its withdrawal from distribution, and its failure to negotiate an equivalent third party distribution system, on or about October 11, 2004 Midas International on its own behalf and on behalf of Midas executed an agreement with the International Midas Dealers Association ("IMDA") entitled the North American

Supply Chain Council Charter (“NASCC Charter”). The NASCC Charter was entered into for the benefit of all Midas franchisees in Canada and the United States.

55. The NASCC Charter required Midas International, on behalf of itself and Midas, to, among other things:

- (a) provide an assured source of supply of high-quality automotive parts and accessories necessary for the operation of a Midas shop;
- (b) leverage the aggregate purchasing power of the North American Midas system to negotiate favourable vendor terms;
- (c) leverage the resources of supplier partners for the benefit of the North American Midas system;
- (d) provide for a discount, rebate and/or allowance (“rebate”) of not less than 5% to all Midas shops on all purchases made by all such shops, and to ensure that the rebate “shall be paid directly to the participating shops”;
- (e) negotiate a rebate of not less than 5% to cover Midas’ warranty expenses; provided, however, that any amounts received in excess of actual warranty expenses and reasonable reserve contributions would be returned to the supporting shops in the Midas system; and
- (f) conduct an annual audit at Midas’s expense of all warranty revenues and expenses.

56. Midas International specifically undertook in the NASCC Charter to ensure that all programs, benefits and rights developed or obtained as a result of its use of its aggregate purchasing power

would be for the benefit of all North American Midas franchisees including the Canadian Midas Dealers.

57. The NASCC Charter does not amend the Midas Franchise Agreement and thus does not relieve Midas of its contractual obligation to supply products to the Canadian Midas Dealers at the net-net discount. Nor does it amend the Midas Franchise Agreement to allow Midas or Midas International to receive vendor rebates and allowances since, as pleaded above; such rebates and allowances are not permitted under the Midas Franchise Agreement.

58. The NASCC Charter does, however, impose the additional obligation on Midas International (on behalf of itself and Midas) to use the aggregate purchasing power of the entire North American Midas system (comprising approximately 1750 shops) to negotiate favourable vendor terms, and confirms that Midas International's sole duty in negotiating with third party vendors is to ensure that all programs, benefits and rights developed or obtained as a result of the chain's aggregate purchasing power would be exclusively for the benefit of the North American Midas franchisees.

59. It also imposes a specific obligation on Midas International (on behalf of itself and Midas) to negotiate supply agreements which provide for a rebate of not less than 5% to all Midas shops on all purchases made by all such shops.

60. Midas International has breached each and every one of the above-enumerated obligations under the NASCC Charter.

61. In particular, Midas and Midas International have failed to negotiate any supply agreements which provide for a rebate of not less than 5% to all Midas shops on all purchases made by all such

shops. To this day, while Midas continues to receive substantial rebates and other consideration under the Supply Agreement and otherwise, the Canadian Midas Dealers have not received a single dollar in rebates on their purchases.

Breach of Canadian Franchise Statutes

62. The Midas Franchise Agreement is a franchise agreement within the meaning of section 1 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (“*Wishart Act*”).

63. In view of the fact that the Canadian Midas Dealers were dependent on the Midas Distribution System for the supply of products at discounted prices and would therefore be severely prejudiced by a unilateral withdrawal from distribution, Midas has breached its obligations under section 3 of the *Wishart Act* by, *inter alia*:

- (a) unilaterally withdrawing from the distribution of products;
- (b) failing to utilize the negotiating leverage and purchasing power of the Midas system to secure below-competitive prices for the Canadian Midas Dealers on all products required for the operation of a Midas shop;
- (c) preferring its own interests in the negotiation of supply agreements over those of the franchisees;
- (d) negotiating the payment of substantial rebates and allowances to itself from vendors without authority under the Midas Franchise Agreement or otherwise; and
- (e) continuing to require the Canadian Midas Dealers to pay 10% royalties which exceed those charged by other franchise chains in the same industry, knowing that such royalties

were conditioned on the Canadian Midas Dealers receiving the net-net discount on all products purchased from the Midas Distribution System.

64. The plaintiffs expressly plead that the conduct particularized in the preceding paragraph breaches the requirement in section 3 of the *Wishart Act* to act in good faith and in accordance with reasonable commercial standards in the performance of the Midas Franchise Agreement.

65. The plaintiffs also plead and rely on section 7 of the *Franchises Act*, S.A. 1995 (Alberta), c. F-17 and section 3(3) of the *Franchises Act*, S.P.E.I. 2005, c. 36 (Prince Edward Island) to the same effect.

Unjust Enrichment

66. Midas and Midas International have fundamentally and unilaterally altered the franchise relationship with the Canadian Midas Dealers. Through these unilateral changes, Midas and Midas International have been able to rid themselves of the financial burden of distributing products to the Canadian Midas Dealers at the net-net discount and other preferential terms. At the same time, they have realized significant additional revenue through the unlawful and unjustified receipt of rebates and allowances from suppliers and the retention of the 10% royalty.

67. As a direct result of these changes, Midas and Midas International have experienced a profit windfall. Midas International's share price has increased fourfold since their withdrawal from distribution. Over the same period, total franchise system sales and franchisee profit have markedly declined.

68. All Canadian Midas Dealers have suffered a corresponding deprivation as a result of being forced to pay higher prices for their products, and the loss of other benefits derived through the Midas Distribution System particularized in paragraphs 34 to 36 above.

69. Many Canadian Midas Dealers are suffering from chronic lack of profitability. All Canadian Midas Dealers are at a competitive disadvantage from having lost the ability to source all products at below-competitive prices while still being required to pay 10% royalties on all sales, which amount is significantly above royalties charged by other franchise chains in the same industry.

70. There is no juristic reason or justification for Midas and Midas International's enrichment and the Canadian Midas Dealers' corresponding deprivation. Indeed, Midas deliberately chose not to amend the Midas Franchise Agreement when it withdrew from distribution, and when it negotiated the payment to itself of supplier rebates and allowances, neither of which actions were permitted by or contemplated under the Midas Franchise Agreement.

71. Accordingly, the Canadian Midas Dealers are entitled to compensation and restitution for unjust enrichment.

Derogation from the Grant

72. The right of the Canadian Midas Dealers to purchase products from Midas (i.e. through the Midas Distribution System) is, and is stated in section 1.1(c) of the Midas Franchise Agreement to be, an express grant of a right, franchise and licence.

73. By unilaterally withdrawing from the distribution of products and failing to ensure the continuation of equivalent benefits to which the franchisees were contractually entitled under the Midas Distribution System, Midas has substantially deprived the Canadian Midas Dealers of the enjoyment of a benefit in consideration of which they continue to pay 10% royalties to Midas.

74. In so doing Midas has created a substantial impediment to the profitability of all Canadian Midas Dealers and has derogated from the grant contained in the Midas Franchise Agreement.

Losses Suffered by Franchisees

75. The Canadian Midas Dealers have paid substantially inflated prices for their products. In addition to losing the right to purchase all products at the net-net discount and other benefits under the Midas Distribution System, they have lost the ability to leverage Midas' system-wide purchasing power to obtain the best pricing in the industry. At the same time, Midas has continued to charge the franchisees royalties beyond those paid in similar franchise chains in the same industry.

76. These activities have resulted in highly diminished profitability of the Canadian Midas Dealers.

77. The payment of 10% royalties was conditioned upon the right of all Canadian Midas Dealers to purchase all products from the Midas Distribution System at the net-net discount. In view of the loss of this contractual entitlement and other benefits from the Midas Distribution System as particularized in paragraphs 34-36 above, the Canadian Midas Dealers are entitled to past and future damages, and a future abatement of royalties in an amount equal to 5% of their retail sales.

Mandatory Order

78. The plaintiffs are entitled to an order requiring the defendants to disclose, account for and pay to the Canadian Midas Dealers all rebates and allowances received from any and all suppliers in respect of all automotive parts and accessories sold to the Canadian Midas Dealers.

79. The plaintiffs also seek an interim and interlocutory order requiring Midas Canada Inc. to pay into court to the credit of this action all such rebates and allowances received from suppliers.

Audit

80. In the event that this Honourable Court finds that Midas is entitled to receive rebates and allowances from suppliers in order to cover the costs of warranty obligations (which right is expressly denied), the plaintiffs request a mandatory order that Midas permit and bear the full costs of an audit of all such revenues and warranty-related expenses since January 1, 2003 by an independent firm of chartered accountants selected and instructed by the plaintiffs.

81. The plaintiffs are entitled to such audit at common law, in equity and pursuant to Article VI of the NASCC Charter.

Punitive, Exemplary and Aggravated Damages

82. Midas and Midas International have abused their position as franchisor and supplier to the Canadian Midas Dealers and their fiduciary duties as agent of the Canadian Midas Dealers in the negotiation of the Supply Agreement in order to enrich themselves at the expense of the Canadian Midas Dealers.

83. Midas and Midas International were, at all times, aware that their actions would have a significant adverse impact on all Canadian Midas Dealers by causing their cost of goods to rise and in turn causing them to be less profitable, lose money and/or go out of business.

84. Accordingly, the plaintiffs request substantial punitive, exemplary and aggravated damages in favour of each Canadian Midas Dealer.

Service Ex Juris

85. The plaintiffs are entitled to serve this statement of claim outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because:

- (a) Rule 17.02 (f)(i) – the claim relates to a contract made in Ontario;
- (b) Rule 17.02 (f)(iv) – the claim relates to a breach of a contract committed in Ontario;
- (c) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort and breach of contract; and
- (d) Rule 17.02 (o) – the defendant residing outside of Ontario is a necessary and proper party to this proceeding.

86. The plaintiffs propose that this action be tried at Toronto, Ontario.

DATE: June 29, 2007

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