

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

TRILLIUM MOTOR WORLD LTD.

Plaintiff

and

GENERAL MOTORS OF CANADA LIMITED and  
CASSELS BROCK & BLACKWELL LLP

Defendants

AND BETWEEN:

GENERAL MOTORS OF CANADA LIMITED

Plaintiff by Counterclaim

and

TRILLIUM MOTOR WORLD LTD. and THOMAS L. HURDMAN

Defendants by Counterclaim

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF DEFENCE AND COUNTERCLAIM OF GENERAL MOTORS OF  
CANADA LIMITED**

TO THE DEFENDANT(S) TO THE COUNTERCLAIM

A LEGAL PROCEEDING has been commenced against you by way of a Counterclaim in an action in this Court. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS COUNTERCLAIM, you or an Ontario lawyer acting for you must prepare a Defence to Counterclaim in Form 27C prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff by counterclaim's lawyer or, where the Plaintiff by Counterclaim does not have a lawyer, serve it on the Plaintiff by Counterclaim, and file it, with proof of service, in this Court, WITHIN TWENTY DAYS after this Statement of Defence and Counterclaim is served on you.

If you are not already a party to the main action and you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

If you are not already a party to the main action, instead of serving and filing a Defence to Counterclaim, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your defence to Counterclaim.

IF YOU FAIL TO DEFEND THIS COUNTERCLAIM, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date May 2, 2011

Issued by  \_\_\_\_\_  
Local Registrar

Address of  
court office: 393 University Avenue, 10th Floor  
Toronto, Ontario  
M5G 1E6

TO: **THOMAS L. HURDMAN**  
c/o Trillium Motor World Ltd.  
35 Auto Mall Drive  
Scarborough, Ontario M1B 5N5

**AND TO: WEIRFOULDS LLP**  
Barristers and Solicitors  
The Exchange Tower  
130 King Street West, Suite 1600  
Toronto, ON M5X 1J5

Bryan Finlay, QC (LSUC# 11509B)  
Tel: (416) 947-5011

Marie-Andrée Vermette (LSUC# 45008F)  
Tel: (416) 947-5049  
Fax: (416) 365-1876

**SOTOS LLP**  
Barristers and Solicitors  
180 Dundas Street West, Suite 1250  
Toronto, ON M5G 1Z8

Allan D.J. Dick (LSUC# 24026W)  
Tel: (416) 977-5333 Ext. 309

David Sterns (LSUC# 36274J)  
Tel: (416) 977-5333 Ext. 313  
Fax: (416) 977-0717

Lawyers for the plaintiff/defendant by counterclaim,  
Trillium Motor World Ltd.

**AND TO: LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**  
Barristers and Solicitors  
130 Adelaide Street West  
Suite 2600  
Toronto, ON  
M5H 3P5

Peter H. Griffin (LSUC# 19527Q)  
Tel: (416) 865-2921

Rebecca Jones (LSUC# 47826M)  
Tel: (416) 865-3055  
Fax: (416) 865-9010

Lawyers for the defendant,  
Cassels Brock & Blackwell LLP

**STATEMENT OF DEFENCE OF GENERAL MOTORS OF CANADA LIMITED**

1. The defendant, General Motors of Canada Limited ("GMCL"), admits the allegations contained in paragraphs 4, 5, 6, 19, 29, 60 and 82 of the Amended Statement of Claim.

2. GMCL denies the allegations contained in paragraphs 7 to 28, 30 to 59, 63, 64, 73 to 78, 83 to 87, 95, 96, 99, 100, 121 to 123 and 126 of the Amended Statement of Claim.

3. GMCL has no knowledge in respect of the allegations contained in paragraphs 61, 62, 65 to 72, 79 to 81, 88 to 94, 97, 98, 101 to 120, 124 and 125 of the Amended Statement of Claim.

**Overview**

4. In 2009, GMCL and its then-parent, General Motors Corporation ("GM"), were on the verge of insolvency. In the midst of the economic crisis that began in 2008, consumers reduced purchases of new vehicles, driving sales levels down dramatically. GM and GMCL's revenues plummeted, draining liquidity. Faced with the worst credit conditions in many years, the companies had no source of inter-company or external financing. Unless GM and GMCL quickly restructured and obtained critical financing, they would have been forced to liquidate their operations with catastrophic effect on their stakeholders, including employees, retirees, dealers and suppliers, and the economies of Canada and the United States. The only possible sources of financing that remained were the governments of the United States, Canada and Ontario.

5. To obtain government financing, GM and GMCL developed restructuring plans which were subjected to extensive due diligence by governments in the United States and

Canada. On March 30, 2009, the governments rejected these restructuring plans because they did not go far enough or make changes fast enough to assure the governments of GM and GMCL's long-term viability. The governments gave GM and GMCL sixty additional days to develop and present a revised plan involving all of GM and GMCL's stakeholders.

6. During these sixty days, GM and GMCL made intensive efforts to develop revised restructuring plans and reach agreements with stakeholders. On April 27, 2009, GM submitted a revised viability plan in the United States and GMCL announced revised components of its restructuring plan in Canada. The plans called for GM and GMCL to reduce the number of brands manufactured and sold, including discontinuing the Pontiac brand, to implement workforce and plant capacity reductions, and to accelerate the reduction of their dealership networks.

7. To reduce its dealership network, GMCL reviewed the network and individual dealers in great detail using objective criteria and identified dealers that would not be retained as part of GMCL's dealer network going forward. The review process was fair, comprehensive and undertaken as quickly as possible in the circumstances. This process involved the exercise of the best business judgment of highly-experienced members of GMCL senior management. GMCL developed an agreement (the "Wind Down Agreement") that represented an offer by GMCL to assist these non-retained dealers with an orderly winding-down of their dealerships in return for financial compensation from GMCL.

8. GMCL kept all dealers informed as it developed its plans and acted in good faith in its dealings with its dealers at all times. On May 20, 2009, GMCL notified the dealers that were not being retained and offered them a Wind Down Agreement. Faced with the May 31,

2009 deadline imposed by the governments of Canada and Ontario, GMCL required the non-retained dealers that intended to accept the Wind Down Agreement to notify GMCL by May 26, 2009. GMCL advised all of the non-retained dealers to review the Wind Down Agreement with legal, tax and other advisors of their choosing and insisted that no Wind Down Agreement could be accepted unless the dealer provided a comprehensive certificate confirming the receipt of independent legal advice.

9. An overwhelming majority of non-retained dealers – about 85 percent - accepted a Wind Down Agreement. GMCL also reached agreements with its other key stakeholders: the Canadian Auto Workers, which represented GMCL's unionized employees, and certain bondholders. Following these agreements, the governments of Canada and Ontario agreed to provide GM and GMCL with funding to complete their restructuring. In the case of GMCL, this was an out-of-court restructuring to support GMCL becoming a company with long-term viability. GMCL completed its restructuring without filing under the *Companies' Creditors Arrangement Act* ("CCAA"), but if GMCL had not reached agreements by May 31, 2009 with the key stakeholders, including its dealers, it would have restructured under court supervision in a proceeding parallel to GM's bankruptcy in the United States.

10. The representative plaintiff Trillium Motor World Ltd., formerly known as Trillium Pontiac Buick GMC Ltd. ("Trillium"), is a former GMCL dealer. In May 2009, GMCL offered the plaintiff and other members of the class a Wind Down Agreement as part of GMCL's dealer network consolidation. The class members obtained independent legal advice, accepted GMCL's offer, wound down their dealerships, and settled all claims against GMCL in exchange for a total of over \$123,000,000 in payments from GMCL under Wind Down Agreements. Their claims against GMCL should be dismissed.

### **General Motors of Canada Limited**

11. GMCL is a corporation incorporated under the laws of Canada.
12. Until July 10, 2009, GMCL was a wholly-owned subsidiary of GM, now known as Motors Liquidation Company. GMCL is now an indirect wholly-owned subsidiary of General Motors Company ("New GM").
13. GMCL manufactures vehicles, vehicle powertrains and components and markets a full range of branded vehicles and related services ("GM Products and Services") through a network of authorized dealers and retailers across Canada.

### **The Class**

14. As of May 2009, GMCL marketed GM Products and Services through approximately 700 authorized dealers and retailers (each, a "Dealer") across Canada (collectively, the "GMCL Dealer Network").
15. Each Dealer operated under a Dealer Sales and Services Agreement ("DSSA") between it and GMCL.
16. From May 3, 1989 until July 2, 2009, Trillium was a Dealer operating in Scarborough, Ontario, most recently pursuant to a DSSA with GMCL made November 1, 2005 (the "Trillium DSSA").
17. Trillium and the other members of the class are former Dealers that each entered into a Wind Down Agreement with GMCL in connection with GMCL's restructuring in 2009, which is further described below.

### **The GMCL Dealer Network**

18. As of May 2009, GMCL's Dealers sold and serviced vehicles marketed under the brands Chevrolet, Buick, Pontiac, GMC, Cadillac, Saturn, Saab and HUMMER.

19. Dealers that sold and serviced the Saturn brand ("Saturn Retailers") composed a dealer channel entirely separate from those Dealers selling and servicing the Chevrolet, Buick, Cadillac, Pontiac and/or GMC brands (the "Domestic Dealers"). HUMMER brand vehicles were mostly sold by a limited number of Domestic Dealers.

20. Some Saturn Retailers also sold and serviced the Saab brand ("Saturn/Saab Retailers"), but with two exceptions, Saturn Retailers did not sell or service other GMCL brands.

21. The Dealer Communications Team ("DCT") was, and remains, an organization that meets on a quarterly basis to discuss issues of interest to Domestic Dealers from across Canada. In 2009, the DCT included representatives of GMCL management, Domestic Dealers and management of General Motors Acceptance Corporation of Canada, Limited ("GMAC").

22. GMCL also collaborated with Saturn Retailers in Canada through a representative body known as the Franchise Operations Team (the "FOT"). The FOT included representatives of GMCL management, Saturn Retailers and GMAC management. The FOT has now been disbanded.

23. Both the DCT and FOT regularly issued newsletters to Domestic Dealers and Saturn Retailers, respectively, regarding discussions and decisions at meetings of the DCT and FOT.



24. In addition to communicating with Dealers through the DCT and the FOT, GMCL used a private satellite-based television network known as Highly Interactive Distance Learning ("HIDL") to broadcast videos to its Dealers, including messages from senior GM and GMCL executives.

#### **GM and GMCL's Dire Situation in 2008 and Early 2009**

25. Over the past two decades, GM and GMCL have experienced financial and competitive pressures from auto manufacturers outside of North America, many of which have lower wage, healthcare and benefit costs than North American auto manufacturers.

26. In responding to these pressures, among other steps, GMCL recognized that it needed to rationalize the GMCL Dealer Network and reduce the total number of Dealers across Canada. GM and GMCL introduced a program known as Project 2000 ("P2000"), the goal of which was to reduce the size of GM's and GMCL's respective dealer networks and to ensure their brands were properly aligned. All Dealers were generally aware of this need to rationalize the GMCL Dealer Network over time, particularly in major metropolitan areas.

27. In 2005, GM initiated a further series of substantial restructuring initiatives designed to streamline the company and reduce costs.

28. In 2008, fluctuating oil prices, rising unemployment, illiquid credit markets and the threat of the widespread failure of the United States financial system undermined or derailed GM and GMCL's restructuring efforts. Consumers reacted immediately and negatively to these adverse events and significantly curtailed their purchases of new vehicles. This downturn dramatically eroded the market for vehicles produced and/or sold by GMCL and caused serious financial difficulty for GM and GMCL. As a result, GM's revenues plummeted, draining

liquidity that had previously been considered adequate to fund operations. Both GMCL and GM were also confronted with the worst credit conditions in years and were faced with no source of inter-company or external financing.

29. Unless GMCL and GM were able to quickly restructure, they would have been forced to liquidate their operations. A liquidation of GM and GMCL in late 2008, in the midst of the global financial crisis and the North American economic downturn, would have had a catastrophic effect on GMCL's stakeholders across Canada.

30. Among other things, a liquidation would have resulted in the loss of jobs for approximately 12,500 hourly and salaried GMCL workers in Canada; the loss of health care, life insurance and pension benefits for approximately 48,000 GMCL workers, retirees and surviving spouses; the shutdown of GMCL's manufacturing plants and facilities and parts distribution centres; the shutdown of GMCL's approximately 700 Dealers and the loss of jobs for the approximately 30,000 employees of those Dealers; the loss of approximately \$10.3 billion in sales to GMCL's suppliers in Canada; and a loss of value of the over 6,000,000 GM vehicles owned or leased by Canadians. In light of its magnitude and its residual effects on suppliers and local economies that depend on GMCL, a GMCL liquidation would have had a significant impact on the Canadian auto industry and economy.

31. As described in further detail below, GMCL was successful in avoiding a court-supervised restructuring of its operations, but it cannot be overstated how close GMCL came to ~~filing for protection under the CCAA. Between December 2008 and June 2009, the survival and~~ future of GMCL and GM were entirely dependent on obtaining liquidity support from the Canadian, Ontario and United States governments. For GM and GMCL to qualify for this

liquidity support, the governments needed to be confident that the GM's and GMCL's restructuring plans, including the reduction of their respective dealer networks, would result in the long-term viability of the companies. Had the governments not been satisfied by GMCL's restructuring plan, GMCL would have had no choice but to file for court protection under the *CCAA*.

32. If GMCL had restructured under *CCAA* protection, the DSSAs of the class members would have been terminated; the class members would have been treated like any other unsecured creditors of GMCL, and the class members would have received little, if any, compensation for any claims they may have had against GMCL.

#### **GM and GMCL's Viability Plans**

33. In late November 2008, GM requested urgent financing for its operations from the United States federal government. In response, the U.S. government requested that GM prepare a comprehensive restructuring plan.

34. GM submitted its plan (the "GM Initial Viability Plan") on December 2, 2008. In the GM Initial Viability Plan, GM announced that it intended to focus on four core brands: Chevrolet, Cadillac, Buick and GMC, with Pontiac becoming a niche brand. GM also disclosed that it would accelerate discussions with Saturn retailers and explore alternatives for the Saturn, Saab and HUMMER brands.

35. Although the GM Initial Viability Plan did not include specific plans for Canada, the plan included elements that would necessarily affect Dealers in Canada, such as GM's intention to focus on four core brands and to make other changes potentially affecting the Pontiac, HUMMER, Saturn and Saab brands.

36. Also in December 2008, GMCL sought loan assistance from the Canadian and Ontario governments to keep the company operating. To understand the nature of the business, the impact on the relevant communities across Canada, and the future viability of the company, the Canadian and Ontario governments posed a series of questions about the transformation of GMCL's operations and its plans going forward. GMCL responded to these questions on December 5, 2008. GMCL's responses were consistent with GM's intentions stated in the GM Initial Viability Plan, including GM's intention to focus on its four core brands.

37. On or about December 31, 2008, the U.S. Department of the Treasury (the "U.S. Treasury") and GM reached an agreement regarding up to \$13.4 billion in short term loans to sustain GM's operations through the first quarter of 2009. These loans gave GM vital liquidity support while GM finalized its viability plan. In consideration for this temporary loan facility, the U.S. Treasury required GM to submit, by February 17, 2009, a detailed restructuring plan for the period 2009 to 2014 that demonstrated GM's long-term viability.

38. On February 17, 2009, GM submitted its revised viability plan (the "GM February Viability Plan") to the U.S. Treasury and the Presidential Task Force on the Auto Industry (the "Presidential Task Force"). The GM February Viability Plan set out a path to revitalize GM's global business by concentrating on its four strongest brands and retaining Pontiac as a niche brand, restructuring its retail distribution channel and implementing a new product plan based on "fewer, better" entries.

39. On February 20, 2009, GMCL submitted a viability plan (the "GMCL February Viability Plan") to the Ontario and Canadian governments in connection with its own request for financial assistance from these governments. The goal of the GMCL February Viability Plan was

to achieve long-term viability for GMCL and enable GMCL to repay Canadian taxpayers. Like the GM February Viability Plan, the GMCL February Viability Plan focused on four core brands, with Pontiac retained as a niche brand. GMCL also announced it would reduce the GMCL Dealer Network from approximately 700 Dealers to 450-500 Dealers by the end of 2014.

40. In February and March of 2009, senior representatives of GMCL conducted meetings with Dealers in various cities across Canada. During these meetings, GMCL informed Dealer Owners and Dealer Operators about the GMCL February Viability Plan and GMCL's future. GMCL emphasized the need for different dealer network consolidation solutions, especially in key metropolitan and urban markets, given the current competitive and economic environments.

#### **The Rejection of the Viability Plans**

41. On March 30, 2009, the Presidential Task Force released its evaluation of the GM February Viability Plan. The Presidential Task Force concluded that the GM February Viability Plan did not establish a realistic path to sustained profitability and directed GM to develop a more aggressive restructuring strategy. The Presidential Task Force granted GM a period of sixty days from March 30, 2009 to develop and implement a more aggressive restructuring plan to be focused on sustained profitability, a healthy balance sheet and more aggressive operational restructuring. The Presidential Task Force concluded that the best way to achieve the restructuring might be through an expedited, court-supervised process (i.e. bankruptcy).

~~42. Also on March 30, 2009 the Canadian and Ontario governments rejected the~~  
GMCL February Viability Plan as insufficient to promote sustained viability. The Canadian and

Ontario governments required GMCL to develop and implement a more aggressive and comprehensive viability plan within the next sixty days.

43. On or about March 30, 2009, GMCL made an HIDL broadcast to Dealers to provide more information to them about the rejection of the plans and what GM and GMCL intended to do next. During the broadcast, GMCL informed Dealers that GMCL's plan remained as outlined in the GMCL February Viability Plan and that GMCL planned to continue consolidating and rationalizing the GMCL Dealer Network.

#### **The April Viability Plans**

44. Following the rejection of the viability plans, GMCL and GM had to go back to the drawing board and, in a condensed sixty day window, re-examine their approach to restructuring and develop new and workable viability plans acceptable to the governments.

45. On April 27, 2009, GM disclosed a revised viability plan (the "GM April Viability Plan") in the United States, and GMCL announced revised components of its viability plan in Canada (the "GMCL April Viability Plan").

46. Among other things, these revised plans called for GM and GMCL to phase-out the Pontiac brand, reduce their workforce and plant capacity and accelerate the reduction of their dealer networks in the United States and Canada.

47. In particular, GMCL specifically announced that: "In accelerating its Restructuring Plans and consistent with the announced changes to Saturn, Saab, HUMMER and Pontiac brands, GM Canada will reduce its dealer network from 705 dealers in 2009 to between 395-425 dealers at the end of 2010, a percentage reduction of 42 percent consistent with that in

the U.S.” This announcement reflected GMCL’s acceleration of the timeframe for the reduction of the GMCL Dealer Network from the target date of 2014 announced on February 20, 2009.

48. In addition to its public announcement, GMCL informed Dealers of the accelerated reduction of the GMCL Dealer Network during a HIDL broadcast on or about April 27, 2009. GMCL also emphasized in this broadcast that although it would be preferable for GM and GMCL to restructure outside of a court process, GM and GMCL would seek the protection of a court-supervised process to restructure, if necessary.

49. Accordingly, all Dealers knew, or ought to have known, on or shortly after April 27, 2009 that GM intended to discontinue the Pontiac brand and that GMCL intended to reduce the size of the GMCL Dealer Network by approximately 40 percent by the end of 2010.

#### **The Implementation of the GMCL April Viability Plan**

50. Immediately after the announcements on April 27, 2009, GMCL went to work on its restructuring efforts under the GMCL April Viability Plan. To ensure GMCL’s long-term viability and avoid a court-supervised restructuring under the *CCAA*, GMCL had to successfully address issues with three key groups of stakeholders during the short period between April 27, 2009 and the government-imposed deadline of May 31, 2009:

- (a) reaching agreements with the CAW to achieve competitive labour rates;
- (b) resolving claims by certain unsecured noteholders (the “Nova Scotia Litigation”);

and

- (c) restructuring the GMCL Dealer Network to ensure GMCL's long term viability, including the planned reduction in the number of GMCL dealerships across Canada.

51. To restructure the GMCL Dealer Network, GMCL had to, during this short period of time:

- (a) develop a fair process for individually evaluating each of the Domestic Dealers, to decide which ones would not be offered a new DSSA at the expiry of their current DSSAs (the "Domestic Non-Retained Dealers");
- (b) evaluate all Domestic Dealers using the process to identify the Domestic Non-Retained Dealers;
- (c) develop a Wind Down Agreement to be offered to the Domestic Non-Retained Dealers and the Saturn Retailers (collectively the "Non-Retained Dealers"), including developing a fair proposal of financial assistance for the proposed Non-Retained Dealers (the "Wind Down Payments"), bearing in mind the concessions being asked of other stakeholders;
- (d) develop a plan for communicating GMCL's decision and the financial assistance proposal to the Non-Retained Dealers; and
- (e) confirm the number of the Non-Retained Dealers who agreed to the proposal and determine, in consultation with the governments of Ontario and Canada, that this was a sufficient level of acceptance.



52. To decide which Domestic Dealers would become Non-Retained Dealers, a team of highly experienced and knowledgeable GMCL managers, which was led by GMCL's Vice-President, Sales, Service and Marketing, analyzed several major categories of data on a case-by-case basis, including retail sales performance, profitability, customer satisfaction, location, dependence on Pontiac and projected sales opportunity.

53. GMCL's team examined every single Domestic Dealer in every single market across Canada before finalizing any decisions about the Domestic Non-Retained Dealers. This analysis continued virtually until the last moment before GMCL's announcement of the details of its network consolidation plan on May 19, 2009, which is described below.

54. GMCL selected the Domestic Non-Retained Dealers based on its business judgment of objective criteria applied on a case-by-case basis and reflecting the significantly different operations and market area of each Dealer.

55. At the conclusion of this review and analysis, GMCL identified approximately 240 Non-Retained Dealers, including all 51 of the Saturn Retailers that were active as of May 19, 2009.

56. While this process was underway, and despite the difficult and compressed context of the restructuring, GMCL maintained contact with the DCT and the Canadian Automobile Dealers Association ("CADA") regarding the planned reduction of the GMCL Dealer Network.

## **Saturn**

57. Immediately following GM's submission of the GM Initial Viability Plan on December 2, 2008, GM representatives and Saturn retailer members of the Franchise Operation Team in the United States (the "U.S. FOT") began studying alternatives for the Saturn brand and retailer network. GMCL was aware of and assisted in these efforts, which were led by GM and Saturn retailers in the United States.

58. Throughout December and January 2009, GMCL provided Canadian Saturn Retailers with periodic updates on the efforts led by GM and Saturn retailers in the United States to explore alternatives for the Saturn brand.

59. GMCL also disclosed confidential and commercially sensitive information regarding these efforts to Saturn Retailer representatives on the Canadian FOT.

60. In early February 2009, Saturn retailers in the United States informed GM that they strongly supported exploring the alternative of a spin-off of Saturn (the "SDC Option"). The retailers formed a sub-committee of the U.S. FOT (the "Sub-Committee") to develop a plan for implementing the SDC Option. GM provided funding and other assistance to the Sub-Committee to enable it to carry out its mandate.

61. On February 18, 2009, immediately following GM's submission of the GM February Viability Plan, GMCL notified all Saturn Retailers that GM had decided to phase out the Saturn brand unless a spin-off or sale of the Saturn brand occurred.

62. Between February and May 2009, GM, GMCL and the Sub-Committee continued to work on the SDC Option. GMCL successfully lobbied for the inclusion of a representative of Saturn Retailers on the Sub-Committee.

63. During this time period, GMCL also provided periodic updates to Saturn Retailers, the members of the Canadian FOT and the CADA on the activities and progress of GM, GMCL and the Sub-Committee in connection with the development of a plan for implementing the SDC Option.

64. All Saturn Retailers knew, or ought to have known, by in or around February 18, 2009 that the Saturn brand would be sold or discontinued by the end of 2010.

#### **Saab**

65. GM and GMCL each disclosed in the GM February Viability Plan and the GMCL February Viability Plan that:

- (a) GM had conducted a strategic review of its global Saab business and had offered it for sale; and
- (b) GM had developed a proposal that would result in Saab's operations becoming independent effective January 1, 2010.

66. On February 20, 2009, Saab Automotive AB filed for reorganization under a self-managed Swedish court process to create an independent business entity.

67. Between February and May 2009, GMCL provided periodic updates to Saturn/Saab Retailers and the CADA regarding the possible sale of the Saab brand.

68. All Saturn/Saab Retailers knew, or ought to have known, in or around February 2009 that the Saab brand would be sold.

**HUMMER**

69. GM and GMCL each disclosed in the GM February Viability Plan and the GMCL February Viability Plan that:

- (a) HUMMER was subject to strategic review, including its potential sale;
- (b) if the sale of HUMMER could not be completed, it would operate until its current products were no longer economically viable; and
- (c) a decision regarding the sale or phase-out of HUMMER would be made in the first quarter of 2009, with the final resolution expected by no later than 2010.

70. All Dealers selling or servicing the HUMMER brand knew, or ought to have known, in or around February 2009 that the HUMMER brand would be sold or discontinued.

**The CADA Dealer Steering Committee**

71. The CADA is a federation of provincial and regional dealer associations which operates as the national association for dealerships selling new cars and trucks. The CADA Board of Directors is made up of representatives of the provincial and regional associations, and its Executive Committee includes dealers chosen by each of the major regions and the President of CADA.

72. CADA describes its mission as "to deal with issues of a national nature which affect the well-being of franchised automobile and truck dealers in Canada". Its mission includes

being active in the protection of the interests of member dealers and providing legal assistance to member dealers.

73. In this regard, CADA advocates for dealers in relations between dealers and manufacturers, supports dealer councils and dealer members of dealer communication teams, and provides dealers with the ability to associate with each other.

74. CADA also supports, by way of financial and/or advisory assistance, dealers involved in litigation; handles legal inquiries on an individual dealer basis; and provides legal and other assistance in the development and review of the various automotive manufacturers' dealer sales and service agreements.

75. To carry out its role, CADA employs a dedicated staff of knowledgeable and experienced individuals with expertise in the business and legal issues affecting automotive dealers.

76. In late April 2009, the CADA organized a committee of Dealers (the "Dealer Steering Committee") to represent the interests of Dealers in the event of a CCAA filing by GMCL.

77. The Dealer Steering Committee and CADA solicited Dealers to join a national group and to contribute to a fund held by CADA to pay for legal and other professional services on behalf of Dealers in the event of a CCAA filing by GMCL.

78. The CADA provided the Dealer Steering Committee with a dedicated telephone hotline and web site for Dealers and provided additional communications and administrative support to the Dealer Steering Committee.

79. During this period, the CADA and/or the Dealer Steering Committee communicated information to Dealers regarding issues that would arise out of a *CCAA* filing by GMCL, including potential termination of DSSAs or changes to the Dealers' relationship with GMCL.

**GMCL's Announcement of the Details of the Dealer Network Restructuring**

80. On May 19, 2009, GMCL informed Dealers of an important HIDL broadcast scheduled for that day.

81. In this broadcast, GMCL informed Dealers that GMCL would be notifying the Non-Retained Dealers on May 20, 2009, that GMCL would not be offering them a new DSSA at the expiry of their current DSSA's term. GMCL explained how GMCL had selected the Non-Retained Dealers and summarized the key terms of the Wind Down Agreement, including the formula for calculating Wind Down Payments. GMCL advised Non-Retained Dealers to review the Wind Down Agreement with legal, tax or other advisors before making any decision.

82. Shortly before the broadcast, GMCL also briefed the CADA and the DCT executive on the dealer consolidation plan and the Wind Down Agreement so that these organizations could answer any questions they might receive from Dealers.

83. On May 20, 2009, GMCL provided notice (the "Notice of Non-Renewal") to each of the Non-Retained Dealers that they would not receive a new DSSA when their current agreement expired. GMCL also offered a Wind Down Agreement to each Non-Retained Dealer.

84. In the Notice of Non-Renewal, GMCL explained the reasons for its dealer consolidation plan, summarized the analysis that it had undertaken and advised the Non-Retained

Dealers that if they were interested in entering into a Wind Down Agreement, they should review the Wind Down Agreement with legal, tax and any other advisors of their choosing.

85. GMCL also expressly stated in the Notice of Non-Renewal that although the Wind Down Agreement was conditional upon all of the Non-Retained Dealers accepting the offer of the Wind Down Agreement (the "Acceptance Threshold Condition"), GMCL reserved the right, in its discretion, to waive this condition.

### **The Wind Down Agreement**

86. The forms of Wind Down Agreement offered to Non-Retained Dealers provided, among other things, that:

- (a) the Non-Retained Dealer agreed to continue to operate its dealership until the voluntary termination of its DSSA effective December 31, 2009 (or such other date as GMCL might approve but, in any event, no later than October 31, 2010);
- (b) GMCL would make certain formula-based payments (i.e., the Wind Down Payments) to the Non-Retained Dealers; and
- (c) the Non-Retained Dealer would provide a comprehensive release in favour of GMCL and its affiliates.

87. The total amount of the Wind Down Payment offered to each Non-Retained Dealer differed depending on each Non-Retained Dealer's 2008 retail sales volume and the market area classification.

88. The Wind Down Agreements also provided for an allowance for sign removal costs.

89. As GM was considering a potential divestiture of the Saturn and Saab brands at the time, GMCL offered Saturn Retailers (including Saturn/Saab Retailers) the option of either (a) accepting the Wind Down Payment and waiving any and all rights to participate in any such divestiture or (b) indicating their interest in a divestiture but not completely waiving their rights to the Wind Down Payments in the event that a divestiture did not occur.

90. Pursuant to the offer to enter into the Wind Down Agreements, Non-Retained Dealers and their respective Dealer Operators were required to execute and deliver their respective Wind Down Agreements to GMCL on or before May 26, 2009 at 6:00 p.m. EST (the "End of the Offer Period").

91. GMCL set this deadline of May 26, 2009 because of the need to assess the response to the Wind Down Agreements, obtain approval of the GMCL Dealer Network aspect of its restructuring, and integrate this into the work being done to reach agreement on other essential aspects of its restructuring plan, all before the deadline of May 31, 2009 imposed by the governments.

92. To ensure that Non-Retained Dealers were fully informed and properly advised of the implications of accepting a Wind Down Agreement, GMCL required Non-Retained Dealers and their Dealer Operators to obtain independent legal advice and to deliver a certificate of independent legal advice with the executed Wind Down Agreement.

93. GMCL did not publicly disclose the identities of Non-Retained Dealers or inform each Non-Retained Dealer of the identities of other Non-Retained Dealers. GMCL did not disclose this information to protect and respect the privacy of the Non-Retained Dealers and to avoid any potential prejudice to the Non-Retained Dealers' relationships with employees,



suppliers, customers and lenders that could be caused by disclosure. GMCL treated the list of Non-Retained Dealers as confidential.

**GMCL's Communications with Non-Retained Dealers**

94. Between May 20 and 26, 2009, GMCL followed up with the Dealer Owners and/or Dealer Operators of each Non-Retained Dealer to confirm that each Non-Retained Dealer had received the Notice of Non-Renewal and Wind Down Agreement, answer certain questions, and determine whether each Non-Retained Dealer intended to accept a Wind Down Agreement.

95. To ensure all Non-Retained Dealers had the benefit of the same information from GMCL, GMCL circulated to all Non-Retained Dealers written answers to common questions received from Non-Retained Dealers.

96. In some cases, Non-Retained Dealers requested to speak with more senior members of GMCL's management before making a decision to accept or reject the offer of the Wind Down Agreement. GMCL attempted to accommodate all of these requests, and senior GMCL managers conducted further follow-up calls or face-to-face meetings with Non-Retained Dealers.

**CADA's Role Between May 19 to 26, 2009**

97. Shortly before the May 19, 2009 announcement of the restructuring of the GMCL Dealer Network, GMCL informed the CADA that it was providing the Notices of Non-Renewal to the Non-Retained Dealers.

98. GMCL disclosed details of the terms of the Wind Down Agreement to the CADA. GMCL did not disclose a list of Non-Retained Dealers to the CADA.

99. Between May 19 and 26, 2009, the CADA made efforts to identify, contact and advise Non-Retained Dealers. The CADA specifically invited all Non-Retained Dealers to identify themselves to the CADA, organized conference calls for Non-Retained Dealers and provided written information and advice to Non-Retained Dealers about the Wind Down Agreement. To the extent that any Non-Retained Dealers wished to associate or have discussions with any other Non-Retained Dealers, the CADA provided a route and mechanism for this to occur.

#### **The Accepting Dealers**

100. By the End of the Offer Period on May 26, 2009, 202 (or approximately 84 percent) of the Non-Retained Dealers (the "Accepting Dealers") had executed and delivered Wind Down Agreements to GMCL.

101. All of the Saturn Retailers executed and returned Wind Down Agreements.

102. Prior to accepting a Wind Down Agreement, each of the Accepting Dealers:

- (a) knew, or ought to have known, that GM and GMCL had very significant financial challenges and were at risk of insolvency;
- (b) knew, or ought to have known, of the significant risk that GM and/or GMCL could seek court protection to complete their restructuring;
- (c) knew, or ought to have known, that GM planned to discontinue the Pontiac brand;
- (d) knew, or ought to have known, that GM planned to sell or discontinue the Saturn brand;

- (e) knew, or ought to have known, that GM planned to sell the Saab brand;
- (f) knew, or ought to have known, that GM planned to sell or discontinue the HUMMER brand;
- (g) knew, or ought to have known, that the GMCL Dealer Network needed to be consolidated to assure the long-term viability of GMCL;
- (h) knew, or ought to have known, that GMCL had announced on April 27, 2009 that it would reduce the GMCL Dealer Network by approximately 40 percent by the end of 2010;
- (i) reviewed, or had a reasonable opportunity to review, GM and GMCL's publicly disclosed viability plans and other written communications from GMCL regarding its and GM's viability plans;
- (j) participated, or had a reasonable opportunity to participate, in the meetings held during GMCL's cross-country tour in February and March 2009;
- (k) watched, or had a reasonable opportunity to watch, HIDL broadcasts to Dealers between December 2008 and May 2009 by GM and GMCL regarding the restructuring efforts and viability plans;
- (l) knew, or ought to have known, prior to May 19, 2009 of the risk that GMCL would identify it as a Dealer that would not continue as part of GMCL's previously announced plan to reduce the number of Dealers by the end of 2010;

- (m) planned, or ought to have planned, for the risk that its DSSA would not be renewed, either inside or outside of a CCAA proceeding;
- (n) consulted, or had a reasonable opportunity to consult, with tax, financial, legal and other advisors regarding the Notice of Non-Renewal, the Wind Down Agreement and the implications of accepting the Wind Down Agreement;
- (o) consulted, or had a reasonable opportunity to consult, with investors, employees, family members, potential successors and others regarding the Notice of Non-Renewal, the Wind Down Agreement and the implications of accepting the Wind Down Agreement;
- (p) discussed, or had a reasonable opportunity to discuss, the Notice of Non-Renewal and the Wind Down Agreement with GMCL representatives, including members of GMCL's senior management;
- (q) joined, or had the opportunity to join, the national group of Dealers organized by the CADA and led by the Dealer Steering Committee;
- (r) participated, or had the opportunity to participate, in conference calls organized by the CADA regarding the Notices of Non-Renewal and Wind Down Agreements;
- (s) reviewed, or had the opportunity to review, the written information and advice provided by the CADA to Non-Retained Dealers regarding the Notices of Non-Renewal and Wind Down Agreements;

- (t) obtained, or had a reasonable opportunity to obtain, other information and advice from the CADA regarding the Notices of Non-Renewal and the Wind Down Agreement;
- (u) associated, or had a reasonable opportunity to associate, with other Dealers, either through the CADA or otherwise;
- (v) knew, or ought to have known, of the risk that if an insufficient number of Non-Retained Dealers accepted the Wind Down Agreement, GMCL would have completed its restructuring under the *CCAA* and may have terminated all of the Non-Retained Dealers' DSSAs;
- (w) knew, or ought to have known, of the option to reject the Wind Down Agreement and pursue claims against GMCL;
- (x) carefully reviewed the Wind Down Agreement; and
- (y) received independent legal advice from qualified lawyers, including lawyers at some of Canada's leading national and regional law firms.

103. By executing the Wind Down Agreement, all of the Accepting Dealers specifically acknowledged that their decisions and actions were entirely voluntary and free from any mental, physical and economic duress. Each of the Accepting Dealers knew that GMCL would be relying on the execution of the Wind Down Agreement and the certificate of independent legal advice that accompanied it.

104. All of the Accepting Dealers had a sufficient period of time to review, consider and obtain advice regarding the Wind Down Agreement. More than half of the Accepting Dealers executed their Wind Down Agreements at least a day before the May 26, 2009 deadline.

105. Under the Wind Down Agreements with the Accepting Dealers, GMCL agreed to make Wind Down Payments to the Accepting Dealers, which ranged from \$9,600 to \$2,274,000, with an average of approximately \$600,000.

106. The total amount of the Wind Down Payments (*i.e.*, excluding payments for sign removal) payable to the Accepting Dealers was approximately \$123,000,000. GMCL has also paid, or agreed to pay, nearly \$2,500,000 for the Accepting Dealers' costs of removing signage.

107. Six Non-Retained Dealers (the "Late Acceptors") that initially did not accept a Wind Down Agreement subsequently decided to accept a Wind Down Agreement or substantially similar agreement entitled "Settlement Agreement".

108. Some of the Late Acceptors accepted the Wind Down Agreement after meeting with members of GMCL management to review and discuss GMCL's decision to designate them as Non-Retained Dealers.

109. The Late Acceptors accepted the Wind Down Agreement in materially different circumstances than the other Accepting Dealers.

110. Almost all of the Accepting Dealers terminated their respective DSSAs on or before December 31, 2009.

111. All of the Accepting Dealers and Late Acceptors have terminated their respective DSSAs as of the date of this pleading.

**GMCL's Successful Implementation of its Viability Plan**

112. Given the high acceptance rate of the Wind Down Agreements and the importance of the issues at stake, on May 30, 2009 GMCL notified the Accepting Dealers that it waived the Acceptance Threshold Condition.

113. To avoid a *CCAA* filing, GMCL also needed to reach agreements with bondholders and the CAW and demonstrate that the GMCL April Viability Plan would lead to GMCL's long-term viability. GMCL was ready to file for protection under the *CCAA* and was fully prepared to take this step if it was necessary in order to complete GMCL's restructuring.

114. Ultimately, GMCL was able to reach the required agreements and the Canadian and Ontario governments approved the GMCL April Viability Plan and provided financing to fund GMCL's operations, allowing GMCL to continue its restructuring without the need for a filing under the *CCAA*. The decision not to file under the *CCAA* was made in the early morning of June 1, 2009, mere hours before GMCL was prepared to appear in court to request a protective order.

115. In contrast, GM was not able to achieve the restructuring standards established by the Presidential Task Force without filing for court protection. Accordingly, on June 1, 2009, GM filed for protection under Chapter 11 of the U.S. Bankruptcy Code.

116. GMCL states that it acted in good faith in all of its dealings with the Non-Retained Dealers and specifically denies that it, at any time, acted in a manner that breached any

obligation of good faith and fair dealing or prevented the Non-Retained Dealers from in any way exercising their right of association.

**Trillium**

117. Thomas L. Hurdman ("Hurdman") was, and remains, the President of Trillium and was the designated Dealer Operator and Dealer Owner under the Trillium DSSA.

118. Trillium had the non-exclusive right to order vehicles marketed by GMCL within the following brands: Pontiac, Buick and GMC (excluding medium duty trucks, W series).

119. As of May 2009, Trillium:

- (a) had reported losses before bonus and taxes for the previous three years;
- (b) was highly undercapitalized;
- (c) had not participated in the GM Image Program;
- (d) was underperforming in terms of retail sales and service metrics;
- (e) ranked poorly as compared to other Dealers in its regional market; and
- (f) was highly dependent on sales of the discontinued Pontiac brand.

120. On May 19, 2009, GMCL contacted Trillium and advised that it watch the broadcast later that day regarding the announcement of the GMCL Dealer Network restructuring.

121. On May 20, 2009, GMCL sent a Notice of Non-Renewal and a form of Wind Down Agreement to Trillium. GMCL also verbally informed Trillium that Trillium was a Non-Retained Dealer.



122. Prior to executing the Wind Down Agreement offered by GMCL, Trillium:

- (a) had been considering a sale or relocation of its dealership business;
- (b) knew, from at least 2007, of the challenges facing GMCL and Dealers and the need to rationalize the GMCL Dealer Network, particularly within the Toronto area;
- (c) knew, as of December 2008, of GM's financial problems and GM's submission of a viability plan to the United States federal government;
- (d) knew, as of December 2008, that it was GM's intention to focus on four core brands;
- (e) attended a meeting in Toronto in February or March 2009 with GMCL regarding the GMCL February Viability Plan;
- (f) knew, as of April 27, 2009, that GM would be discontinuing the Pontiac brand and that there would be a significant reduction in the number of Dealers in Canada by the end of 2010;
- (g) watched, or had a reasonable opportunity to watch, all of the HIDL broadcasts between December 2008 and May 2009 by GM and GMCL regarding their restructuring efforts;
- (h) reviewed, or had a reasonable opportunity to review, some or all of GM and GMCL's publicly disclosed viability plans;

- (i) knew, or ought to have known, of the significant risk that GM and/or GMCL could seek court protection to complete their restructuring;
- (j) knew, or ought to have known, prior to May 19, 2009 of the risk that GMCL would identify Trillium as a Dealer that would not continue as part of GMCL's previously announced plan to reduce the number of Dealers by 2010;
- (k) planned, or ought to have planned, for the contingency that the Trillium DSSA would not be renewed, either inside or outside of an insolvency proceeding;
- (l) consulted, or had a reasonable opportunity to consult, with tax, financial, legal and other advisors regarding the Notice of Non-Renewal, the Wind Down Agreement and the implications of accepting the Wind Down Agreement;
- (m) consulted, or had a reasonable opportunity to consult, with investors, employees, family members, successors and others regarding the Notice of Non-Renewal, the Wind Down Agreement and the implications of accepting the Wind Down Agreement;
- (n) discussed the Notice of Non-Renewal and the Wind Down Agreement with GMCL representatives;
- (o) received, or had a reasonable opportunity to receive, information and advice from the CADA regarding the Notice of Non-Renewal and the Wind Down Agreement;
- (p) contacted the CADA for information and advice on the Wind Down Agreement;

- (q) participated in a conference call organized by the CADA for Non-Retained Dealers on May 24, 2009;
- (r) consulted with other Dealers about the Wind Down Agreement;
- (s) associated, or had a reasonable opportunity to associate, with other Dealers, either through the CADA or otherwise;
- (t) knew, or ought to have known, of the risk that if an insufficient number of Non-Retained Dealers accepted the Wind Down Agreement, GMCL would have completed its restructuring under the *CCAA* and compromised all of the unsecured claims of the Non-Retained Dealers;
- (u) knew, or ought to have known, of the option to reject the Wind Down Agreement and pursue claims against GMCL, potentially within a *CCAA* proceeding;
- (v) carefully reviewed the Wind Down Agreement; and
- (w) received independent legal advice from J. Robert Hall, a lawyer licensed to practise law in the province of Ontario.

123. As of 2009, Mr. Hurdman had known Mr. Hall for 21 years, and Mr. Hall had provided legal advice to Trillium and Mr. Hurdman during that period. Mr. Hurdman trusted Mr. Hall's legal ability, knowledge and experience.

~~124. On May 26, 2009, Trillium and Hurdman executed and delivered the Wind Down~~  
Agreement offered to Trillium by GMCL (the "Trillium WDA"). Trillium requested an early termination date of September 30, 2009.

125. Trillium subsequently requested an earlier termination date, which was granted by GMCL.

126. Trillium voluntarily terminated the Trillium DSSA effective July 2, 2009.

127. In accordance with the Trillium WDA, GMCL paid to Trillium a sign payment amount of \$6,051.20 and a Wind Down Payment amount of \$642,000.00 on or before October 5, 2009.

**GMCL's Right and Obligation to Undertake Dealer Network Planning**

128. Under Article 4.1 of the standard provisions that are included in all DSSAs (the "Standard DSSA Provisions"), GMCL has the sole discretion and a positive obligation to monitor marketing conditions and take appropriate action to ensure that the number and locations of its Dealers are appropriate to permit each Dealer to have the opportunity to earn a reasonable return on investment, among other objectives.

129. Article 4.1 supersedes other terms of the DSSA.

130. In light of prevailing market conditions and GMCL's financial circumstances, GMCL was permitted and required to take steps under Article 4.1 to consolidate the GMCL Dealer Network, as it did by sending the Notices of Non-Renewal and offering the Wind Down Agreements.

131. GMCL pleads and relies on the Accepting Dealers' respective DSSAs, including ~~Articles 4.1, 15.2 and 15.3 of the Standard DSSA Provisions, and section 6 of the National~~ Automobile Dealer Arbitration Program Rules for Dispute Resolution.

**GMCL Disclosed Sufficient Information to the Dealers**

132. Throughout the period from November 2008 to May 2009, GM and GMCL disclosed considerable information about their financial condition and restructuring plans to Dealers through, among other means, public announcements, securities filings, the viability plans, HIDL broadcasts, meetings and correspondence.

133. In addition, GM and GMCL's financial condition and restructuring plans were very widely reported in the press and significant information was shared with Dealers by the CADA.

134. All of this information was available to, and in many cases brought directly to the attention of, the Accepting Dealers before they accepted the Wind Down Agreement.

135. The amount of disclosure of information by GMCL was appropriate in light of GM's and GMCL's own legitimate interests, including, without limitation, their interests in:

- (a) developing and implementing revised viability plans by the May 31, 2009 deadline set by the United States and Canadian governments;
- (b) complying with applicable securities law in the United States and Canada;
- (c) maintaining the confidentiality of commercially sensitive information;
- (d) ensuring fairness of treatment of all Dealers within the GMCL Dealer Network;  
and
- (e) not prejudicing negotiations with the Canadian, Ontario and United States governments, the CAW and the Nova Scotia bondholders.

136. With respect to the allegation at paragraph 42 of the Amended Statement of Claim that GMCL “denied the affected dealers access” to the identities of the Non-Retained Dealers, GMCL maintained the confidentiality of the identities of Non-Retained Dealers to protect the privacy and other interests of the Non-Retained Dealers and not for the purpose of preventing the Non-Retained Dealers from associating or collectively negotiating.

137. GMCL denies that its acts prevented Non-Retained Dealers from associating or fairly considering the Wind Down Agreement. To the extent that any Non-Retained Dealers failed to associate with other Non-Retained Dealers, which is denied, this was their own choice for which they are responsible, or the result of a failure by the CADA to more effectively discharge its obligations to the Non-Retained Dealers.

**GMCL Gave the Accepting Dealers Sufficient Time**

138. With respect to the allegations at paragraph 38 of the Amended Statement of Claim that GMCL “deliberately waited” to offer the Wind Down Agreement, GMCL worked as quickly as reasonably possible to complete its intensive and comprehensive review and analysis of the GMCL Dealer Network after the announcements on April 27, 2009.

139. Further, as stated above, to avoid a court-supervised restructuring under the CCAA, GMCL needed to successfully address issues with other key groups of stakeholders prior to the May 31, 2009 deadline set by the governments.

140. GMCL offered the Wind Down Agreement to the Non-Retained Dealers as soon as it was in a reasonable position to do so and provided the Accepting Dealers with as much time to review the Wind Down Agreement as GMCL could reasonably allow in light of the intense

time constraints and other complex issues facing GMCL in the period between April 27, 2009 and May 31, 2009.

141. In any event, the Accepting Dealers had a reasonable and sufficient period of time to review, consider and seek advice on the Wind Down Agreement before the deadline for acceptance of May 26, 2009, and many executed and returned the Wind Down Agreement to GMCL in less than the time available to them.

**GMCL Did Not Mislead the Dealers**

142. With respect to the allegations in paragraph 43 of the Amended Statement of Claim that GMCL "intentionally misled" the Accepting Dealers, GMCL's statements in the Notice of Non-Renewal, during the May 19, 2009 HIDL broadcast and in the form of Wind Down Agreement offered to the Accepting Dealers were true and/or not misleading.

143. In any event, GMCL made all of these statements honestly and in good faith and did not intend to mislead any of the Accepting Dealers.

144. None of the Accepting Dealers were in fact misled by any statement made by GMCL in the Notice of Non-Renewal, during the May 19, 2009 HIDL broadcast and in the form of Wind Down Agreement offered to the Accepting Dealers.

145. In any event, the Accepting Dealers did not rely, or did not reasonably rely, on these statements in accepting a Wind Down Agreement.

**GMCL Had No Knowledge of Cassels' Retainer**

146. By May 1, 2009, or earlier, it had been publicly reported that Cassels represented the government of Canada in its negotiations with GMCL.

147. With respect to the allegations at paragraph 41 of the Amended Statement of Claim that GMCL “was also aware that the affected dealers were represented by Cassels”, in or around April or May 2009, GMCL became aware that the CADA and/or the Dealer Steering Committee had approached Cassels to provide advice and representation to the Dealers in the event of a CCAA filing by GMCL. GMCL did not know which party or parties, if any, had retained Cassels.

148. With respect to the allegations at paragraph 41 of the Amended Statement of Claim that “GM knew that [the alleged conflict of interest by Cassels] had not been disclosed to the affected dealers”, GMCL had no knowledge of:

- (a) the terms of any retainer of Cassels by the CADA, the Dealer Steering Committee and/or members of the national group of Dealers led by the Dealer Steering Committee;
- (b) any conflict of interest by Cassels;
- (c) Cassels’ intentions or actions after GMCL delivered the Notice of Non-Renewal to the Non-Retained Dealers; or
- (d) what, if anything, Cassels had disclosed to the CADA, the Dealer Steering Committee or the Non-Retained Dealers regarding its representation of the government of Canada.

---

**No Disclosure Obligation**

149. With respect to the allegation in paragraph 25 of the Amended Statement of Claim that the Ontario *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the



"*Wishart Act*") applies to all Dealers, whether located in Ontario or elsewhere in Canada, this is specifically denied.

150. To the extent either the *Wishart Act*, the *Franchises Act*, R.S.A. 2000, c. F-23 (the "*Alberta Franchises Act*") or the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 (the "*PEI Franchises Act*") applied to the dealings between GMCL and each of the Accepting Dealers, section 5 of the *Wishart Act*, section 4 of the *Alberta Franchises Act* and section 5 of the *PEI Franchises Act* did not apply to the offer of a Wind Down Agreement to any of the Accepting Dealers, for the reasons set out below.

151. The Wind Down Agreements did not require the Accepting Dealers to make a payment or continuing payments, whether direct or indirect, or have any other continuing financial obligation to GMCL.

152. GMCL did not grant the Accepting Dealers the right to sell, offer for sale or distribute goods or services under the Wind Down Agreements.

153. GMCL did not grant the Accepting Dealers any representational or distribution rights under the Wind Down Agreements.

154. GMCL did not sell or dispose of a franchise to any of the Accepting Dealers under the Wind Down Agreements.

155. The Accepting Dealers did not acquire or set up any franchise under the Wind Down Agreements.

156. The Accepting Dealers made no investment decisions when accepting a Wind Down Agreement.

157. The Wind Down Agreements did not grant, renew or extend a franchise for the purposes of the *Wishart Act*, the *Alberta Franchises Act* or the *PEI Franchises Act*.

158. The Wind Down Agreements offered to Accepting Dealers are not franchise agreements for the purposes of section 5 of the *Wishart Act*, section 4 of the *Alberta Franchises Act* or section 5 of the *PEI Franchises Act*.

159. The Accepting Dealers were not prospective franchisees for the purposes of section 5 of the *Wishart Act*, section 4 of the *Alberta Franchises Act* or section 5 of the *PEI Franchises Act* when GMCL offered each of them a Wind Down Agreement.

160. As GMCL did not grant or offer to grant a franchise in connection with the offer of the Wind Down Agreements, GMCL was not a franchisor for the purposes of section 5 of the *Wishart Act*, section 4 of the *Alberta Franchises Act* or section 5 of the *PEI Franchises Act* when offering the Wind Down Agreements.

161. Accordingly, GMCL had no obligation to deliver a disclosure document to any of the Accepting Dealers at least fourteen days prior to the signing of a Wind Down Agreement by that Accepting Dealer, or at all.

162. The Accepting Dealers therefore have no right to rescind or cancel their respective Wind Down Agreements.

163. Further, the Accepting Dealers have no right of action for damages under subsection 7(1) of the *Wishart Act* or subsection 7(1) of the *PEI Franchises Act*.

164. In the alternative, if the *Wishart Act* did apply to GMCL's dealings with any of the Accepting Dealers, which is denied, GMCL was exempt from delivering a disclosure document because the Wind Down Agreement was not valid for longer than one year and did not involve the payment of a non-refundable franchise fee. GMCL pleads and relies on s. 5(7)(g)(ii) of the *Wishart Act*.

165. In any event, by performing their obligations under their respective Wind Down Agreements, including, without limitation, accepting and retaining the Wind Down Payments and terminating their respective DSSAs, the Accepting Dealers have knowingly affirmed their Wind Down Agreements with actual or constructive knowledge of a right to rescind or cancel the agreement, the existence of such right being denied by GMCL.

**Release, Waiver and Acquiescence by the Accepting Dealers**

166. During the May 19, 2009 HIDL broadcast and in the Notice of Non-Renewal, GMCL advised Non-Retained Dealers that they should review the Wind Down Agreement with legal, tax and any other advisors of their choosing.

167. Prior to executing the Wind Down Agreements, each of the Accepting Dealers and their respective Dealer Operator(s) retained qualified lawyers to provide them with legal advice.

168. The lawyers to each of the Accepting Dealers explained to the Accepting Dealers the nature and effect of the Wind Down Agreement, including the waivers, releases and indemnification obligations of the Accepting Dealers.

169. The Accepting Dealers carefully read the Wind Down Agreement prior to executing it.

170. In addition to reviewing the Wind Down Agreement with qualified and independent legal advisors, the Accepting Dealers reviewed, or had a reasonable opportunity to review, the Wind Down Agreement with their tax and other advisors.

171. The Accepting Dealers and their respective Dealer Operators were fully advised and informed with respect to the Wind Down Agreement.

172. All of the Accepting Dealers knew, or ought to have known, prior to executing the Wind Down Agreement of any claims against GMCL, including any claim under the *Wishart Act*, the *Alberta Franchises Act* or the *PEI Franchises Act* arising from or in connection with the Notice of Non-Renewal and the offer of the Wind Down Agreement.

173. Each of the Wind Down Agreements accepted by the Accepting Dealers contains a comprehensive release of all claims against GMCL by the Accepting Dealer, including all claims arising out of or relating to the DSSA, the Wind Down Agreement, the operation of the Accepting Dealer's dealership and "any and all applicable statute, regulation, or other law, including Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*, Alberta's *Franchises Act*, Prince Edward Island's *Franchises Act* and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future".

174. By executing their respective Wind Down Agreements, each of the Accepting Dealers and their respective Dealer Operator(s) specifically acknowledged that:

it and they are hereby waiving any and all rights given to it or them under the Acts and are hereby releasing GM and the other GM Entities from any obligation or requirement imposed on GM and/or any of the other GM Entities by the Acts and further acknowledge that they are doing so with full awareness of such rights, obligations and requirements, and intend to waive its and their rights to: (1) any Claim for a breach of the duty of fair dealing in the performance or enforcement of or exercise of any right under the Dealer Agreement; (2) any Claim for GM and/or any of the other GM Entities penalizing, attempting to penalize or threatening to penalize the Dealer and/or the Dealer Operator for associating with other GM dealers or retailers; (3) any Claim for damages for a misrepresentation contained in a disclosure document or a statement of material change; (4) any Claim for rescission for failure to provide a disclosure document or a statement of material change as required by the Acts; (5) any Claim for rescission for failure to provide a disclosure document or a statement of material change within the time required by the Acts; (6) any Claim for rescission for providing a deficient disclosure document or statement of material change as required by the Acts; and (7) any other Claims arising under one or more or all of the Acts. [underlining added]

175. The Wind Down Payments to each of the Accepting Dealers were in consideration for the Accepting Dealers' and their respective Dealer Operators' "covenants, representations, warranties, releases and waivers" set out in the Wind Down Agreement.

176. By executing the Wind Down Agreement, the Accepting Dealers specifically acknowledged that their decisions and actions were entirely voluntary and free from any mental, physical and economic duress.

177. GMCL has paid the full amount of each Accepting Dealer's Wind Down Payment to the Accepting Dealer and fully performed its obligations to each of the Accepting Dealers under the Wind Down Agreements.

178. All of the Accepting Dealers accepted payment of the Wind Down Payment under their respective Wind Down Agreements and have performed their obligations under the Wind Down Agreements.

179. The Accepting Dealers had full knowledge of their rights and unequivocally and consciously intended to waive them.

180. GMCL pleads and relies on sections 2(a), 5 and 9 of the Wind Down Agreements with each of the Accepting Dealers as a full defence to all of the Accepting Dealers' claims against GMCL.

181. The release contained in section 5 of the Wind Down Agreements was a release and waiver of claims given by the Accepting Dealers, with the advice of counsel, in settlement of any and all disputes between GMCL and the Accepting Dealers, including any and all disputes regarding breaches of the DSSA, the *Wishart Act*, the *Alberta Franchises Act* or the *PEI Franchises Act*, all such breaches being denied by GMCL.

182. Further, the Accepting Dealers have waived and/or acquiesced to any non-compliance by GMCL with applicable franchise legislation or any breach by GMCL of a duty owed to the Accepting Dealers under applicable franchise legislation, which non-compliance and breach are denied by GMCL.

183. None of the Accepting Dealers, the Dealer Steering Committee or the CADA raised any concerns with GMCL in May 2009 regarding the enforceability of the Wind Down Agreement or any terms thereof or the need for GMCL to deliver a disclosure document to the Non-Retained Dealers.

184. If any Accepting Dealer executed a Wind Down Agreement not intending to be bound by the Wind Down Agreement or any term thereof, that Accepting Dealer would have been acting in bad faith.

185. As set out above, the consolidation of the GMCL Dealer Network pursuant to the Wind Down Agreements was one of the key components of the successful GMCL April Viability Plan.

186. As the Accepting Dealers knew, GMCL relied on the Accepting Dealers' acceptance of the Wind Down Agreements, including the release provisions, when deciding not to complete its restructuring under the *CCAA*.

187. Further, GM and the governments of Canada, Ontario and the United States relied on the Accepting Dealers' acceptance of the Wind Down Agreements and release of claims when making their own decisions in connection with GM and GMCL's restructuring, including decisions to provide critical financing to GM and GMCL.

188. By knowingly inducing GMCL, GM and the governments to change their positions in reliance on the Accepting Dealers' release of all claims against GMCL, the Accepting Dealers are estopped from denying the validity of the release contained in section 5 of the Wind Down Agreements.

189. Accordingly, it would be inequitable and against the public policy of encouraging the out-of-court restructuring of businesses in financial distress to allow the Accepting Dealers to avoid the effect of the release contained in section 5 of the Wind Down Agreement.

190. Sections 4 and 11 of the *Wishart Act*, section 4 and 12 of the *PEI Franchises Act* and section 18 of the *Alberta Franchises Act* therefore do not apply to a release or waiver of rights under the *Wishart Act*, the *Alberta Franchises Act* or the *PEI Franchises Act* in the circumstances of this case.

### **Damages**

191. GMCL denies that the Accepting Dealers have each in fact suffered any injury, loss or harm caused by GMCL's conduct.

192. Any injury, loss or harm suffered by the Accepting Dealers was due to factors unrelated to GMCL's conduct, including, without limitation, general and market-specific economic conditions in 2009.

193. If the Accepting Dealers had not accepted the Wind Down Agreement, GMCL would have completed its restructuring under the *CCAA*, and the unsecured claims of the Accepting Dealers and all other Non-Retained Dealers would have been compromised. The Accepting Dealers were therefore made better off by accepting the Wind Down Agreement.

194. Some of the Accepting Dealers were unprofitable in May 2009 and were made better off by accepting the Wind Down Agreement than by voluntarily terminating and accepting termination assistance owing pursuant to the terms of their DSSAs with GMCL.

195. Some of the Accepting Dealers were considering potential termination of their DSSAs or sale of their dealership businesses prior to May 19, 2009 and would have closed or sold their dealership businesses in any event.



196. In the alternative, the Accepting Dealers' alleged injuries, losses and harms are excessive, not reasonably foreseeable, speculative and too remote to be recoverable at law.

197. Some or all of the Accepting Dealers have fully mitigated any damages (such damages being denied). In particular, and without limitation:

- (a) the Accepting Dealers have received the Wind Down Payments under their respective Wind Down Agreements;
- (b) approximately 100 of the Accepting Dealers are now dealers of pre-owned vehicles;
- (c) approximately 70 of the Accepting Dealers are dealers of new vehicles under brands belonging to GMCL's competitors; and
- (d) other Accepting Dealers have repurposed their facilities as vehicle service shops and for other uses.

198. In the further alternative, some or all of the Accepting Dealers have failed to take reasonable steps to fully mitigate their alleged damages.

199. In any event, GMCL claims set-off of the amounts of the Wind Down Payments paid to the Accepting Dealers against any damages or compensation that may be awarded to the Accepting Dealers.

200. The defendant GMCL asks that this action be dismissed as against GMCL with costs on a substantial indemnity basis.

### COUNTERCLAIM

1. The plaintiff by counterclaim, GMCL, claims against the defendants by counterclaim and all members of the class of persons described below:

- (a) an order certifying this counterclaim as a class proceeding under section 4 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and appointing the defendants by counterclaim as representative defendants of the Defendant Class (as defined below);
- (b) as against the Defendant Class, indemnity from and against all costs, losses and damages suffered by GMCL as a result of the breach of the Wind Down Agreement by the members of the Dealer Subclass;
- (c) as against the Dealer Subclass, restitution of the approximately \$123,000,000 paid by GMCL under Wind Down Agreements with members of the Dealer Subclass;
- (d) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;
- (f) the costs of this proceeding, plus all applicable taxes, on a substantial indemnity basis; and,
- (g) such further and other relief as this Honourable Court may deem just.

2. The plaintiff by counterclaim, GMCL, repeats and relies upon the allegations in the Statement of Defence in support of the counterclaim. All defined terms in the Statement of Defence have the same meaning in this Counterclaim.

3. GMCL brings this counterclaim against the members of a class (the "Defendant Class") represented by Trillium and Hurdman and defined as follows:

(a) all corporations that entered into a Wind Down Agreement with GMCL as Dealers in or after May 2009 that have not opted out of or disclaimed any interest in the class proceeding with Court File No. CV-10-397096CP (collectively, the "Dealer Subclass"), represented by Trillium; and

(b) all individuals designated as Dealer Operators of members of the Dealer Subclass (collectively, the "Dealer Operator Subclass"), represented by Hurdman.

4. There are up to 208 members of the Dealer Subclass and approximately the same number of members of the Dealer Operator Subclass.

#### **The Wind Down Agreements**

5. Each member of the Defendant Class entered into a Wind Down Agreement with GMCL in or after May 2009.

6. Under section 5(b) of each of the Wind Down Agreements, the members of the Defendant Class gave a comprehensive release of all claims against GMCL, including all claims arising out of or relating to the DSSA, the Wind Down Agreement, the operation of the Accepting Dealer's dealership and "any and all applicable statute, regulation, or other law, including Ontario's *Arthur Wishart Act (Franchise Disclosure)*, 2000, Alberta's *Franchises Act*,

Prince Edward Island's *Franchises Act* and/or any other similar franchise legislation which may be enacted or proclaimed in force in the future".

7. Under section 5(c) of their respective Wind Down Agreements, the members of the Defendant Class agreed not to commence any proceedings or otherwise assert any claim covered by the release provision contained in section 5(b) of the Wind Down Agreements.

8. Each member of the Defendant Class expressly acknowledged that the release provision includes, without limitation, a complete, full and final release of any claims of any nature in any representative action or class proceeding commenced by any other past, present or future GMCL dealer or retailer.

9. Each member of the Defendant Class irrevocably agreed to take whatever affirmative steps may be necessary to opt out of or disclaim any interest in any such a representative action or class proceeding.

10. Each member of the Defendant Class agreed under section 5(d) of their respective Wind Down Agreements to jointly and severally indemnify GMCL against all claims, losses, damages, the amount of the Wind Down Payment and expenses which may be imposed upon or incurred by GMCL arising from, relating to, or caused by the Dealer's breach of the Wind Down Agreement.

**The Class Action**

11. On February 12, 2010, Trillium commenced an action against GMCL in the Ontario Superior Court of Justice under the *Class Proceedings Act* with Court File No. CV-10-397096CP (the "Class Action").

12. The claims asserted on behalf of the Dealer Subclass against GMCL in the Class Action are covered by the release provision contained in the Wind Down Agreements with each of the Defendant Class members.

13. Despite its express covenant in the Wind Down Agreement not to commence any proceedings against GMCL in respect of such claims, Trillium has nonetheless commenced the Class Action to assert those claims on behalf of the Dealer Subclass.

14. The members of the Dealer Subclass have failed or refused to take affirmative steps to opt out of or disclaim any interest in the class proceeding.

15. By commencing the Class Action or failing to opt out of the Class Action, Trillium and the other members of the Dealer Subclass have each breached section 5(c) of their respective Wind Down Agreements.

16. GMCL pleads and relies on section 5 of the Wind Down Agreements with each of the members of the Dealer Subclass.

#### **Restitution of the Wind Down Payments**

17. In the Amended Statement of Claim, Trillium pleads that the release contained in section 5 of the Wind Down Agreements with each of the Dealer Subclass members is void under sections 4 and 11 of the *Wishart Act* or corresponding provisions of franchise legislation in Alberta and Prince Edward Island.

18. In its Statement of Defence, GMCL pleads that sections 4 and 11 of the *Wishart Act*, section 4 and 12 of the *PEI Franchises Act* and section 18 of the *Alberta Franchises Act* have no application to the release contained in section 5 of the Wind Down Agreements.

19. In the alternative, in the event that the release contained in section 5 of the Wind Down Agreements is void, which is denied by GMCL, there is a failure of the basis for the Wind Down Payments by GMCL to each of the class members under the Wind Down Agreements.

20. The total amount of the Wind Down Payments is approximately \$123,000,000.

21. The members of the Dealer Subclass have been enriched by the amount of the Wind Down Payment to each of them.

22. GMCL has suffered a corresponding deprivation by paying the Wind Down Payments to the members of the Dealer Subclass under their respective Wind Down Agreements.

23. It would be unjust and inequitable to permit the class members in the Class Action to retain the Wind Down Payments when the basis for the payments has failed.

24. The members of the Dealer Subclass are therefore liable to make restitution to GMCL up to the full amount of the Wind Down Payments, whether or not the claims asserted in the Class Action are successful.

25. GMCL proposes that this counterclaim be tried together with the action.

May 2, 2011

**OSLER, HOSKIN & HARCOURT LLP**  
Barristers & Solicitors  
P. O. Box 50  
1 First Canadian Place  
Toronto ON M5X 1B8

David S. Morritt (LSUC# 24532F)  
Tel: (416) 862-6723

Jennifer Dolman (LSUC# 32213F)  
Tel: (416) 862-5911

Evan Thomas (LSUC# 54447K)  
Tel: (416) 862-4907  
Fax: (416) 862-6666

Lawyers for the defendant/plaintiff by  
counterclaim, General Motors of Canada  
Limited

**TO: WEIRFOULDS LLP**  
Barristers and Solicitors  
The Exchange Tower  
130 King Street West, Suite 1600  
Toronto, ON M5X 1J5

Bryan Finlay, QC (LSUC# 11509B)  
Tel: (416) 947-5011

Marie-Andrée Vermette (LSUC# 45008F)  
Tel: (416) 947-5049

Fax: (416) 365-1876

**SOTOS LLP**  
Barristers and Solicitors  
180 Dundas Street West, Suite 1250  
Toronto, ON M5G 1Z8

Allan D.J. Dick (LSUC# 24026W)  
Tel: (416) 977-5333 Ext. 309

David Sterns (LSUC# 36274J)  
Tel: (416) 977-5333 Ext. 313  
Fax: (416) 977-0717

Lawyers for the plaintiff/defendant by counterclaim,  
Trillium Motor World Ltd.

**AND TO: THOMAS L. HURDMAN**  
c/o Trillium Motor World Ltd.  
35 Auto Mall Drive  
Scarborough, Ontario M1B 5N5

**AND TO: LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**  
Barristers and Solicitors  
130 Adelaide Street West, Suite 2600  
Toronto, ON M5H 3P5

Peter H. Griffin (LSUC# 19527Q)  
Tel: (416) 865-2921

Rebecca Jones (LSUC# 47826M)  
Tel: (416) 865-3055  
Fax: (416) 865-9010

Lawyers for the defendant, Cassels Brock & Blackwell LLP



TRILLIUM MOTOR WORLD LTD.

Plaintiff

GENERAL MOTORS OF CANADA LIMITED

Plaintiff by Counterclaim

-and-

GENERAL MOTORS OF CANADA LIMITED et al.

Defendants

-and-

TRILLIUM MOTOR WORLD LTD. *et al.*

Defendants by Counterclaim

Court File No. CV-10-397096CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
TORONTO

**STATEMENT OF DEFENCE AND COUNTERCLAIM  
OF GENERAL MOTORS OF CANADA LIMITED**

**OSLER, HOSKIN & HARCOURT LLP**

Barristers & Solicitors

P. O. Box 50

1 First Canadian Place

Toronto ON M5X 1B8

David S. Morritt (LSUC#24532F)

Tel: (416) 862-6723

Jennifer Dolman (LSUC#32213F)

Tel: (416) 862-5911

Evan Thomas (LSUC#54447K)

Tel: (416) 862-4907

Fax: (416) 862-6666

Lawyers for the defendant/plaintiff by counterclaim,  
General Motors of Canada Limited

Matter No. 1121015