

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

TRILLIUM MOTOR WORLD LTD.

Plaintiff

- and -

**GENERAL MOTORS OF CANADA LIMITED and
CASSELS BROCK & BLACKWELL LLP**

Defendants

A N D B E T W E E N:

GENERAL MOTORS OF CANADA LIMITED

Plaintiff by Counterclaim

- and -

TRILLIUM MOTOR WORLD LTD. and THOMAS L. HURDMAN

Defendants to the Counterclaim

Proceeding under the *Class Proceedings Act, 1992*

**REPLY AND DEFENCE TO COUNTERCLAIM OF
GENERAL MOTORS OF CANADA LIMITED**

1. The same defined terms as those used in the amended statement of claim and GMCL's statement of defence and counterclaim are used in this reply.
2. The plaintiff/defendant by counterclaim ("plaintiff") admits the allegations contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 71, 72, 80, 81, 83 (except that some Notices of Non-Renewal were sent after May 20, 2009), 84, 85, 86, 87, 88, 89, 90, 111, 117, 118, 120, 123,

124, 125 and 127 of the statement of defence, and paragraphs 3, 4, 5, 11, 17 and 18 of the counterclaim of GMCL.

3. The plaintiff denies the allegations contained in paragraphs 7, 8, 10, 32, 49, 64, 68, 70, 77, 91, 92 (the purpose of the certificate of independent legal advice was not as stated in this paragraph), 93 (the reason for the non-disclosure of the identities of the Non-Retained Dealers was not as stated in this paragraph), 99, 102, 103, 104, 109, 112, 116, 119, 121 (GMCL did not send the Notice of Non-Renewal to Trillium on May 20, 2009), 122, 126, 128 (the Dealer Agreement and standard provisions thereof speak for themselves), 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140, 141, 142, 143, 144, 145, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 171, 172, 173, 174, 175, 176, 179, 180, 181, 182, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 196, 197, 198, 199 and 200 of the statement of defence, and paragraphs 6, 7, 8, 9, 10, 12, 13, 15, 16, 19, 21, 22, 23 and 24 of the counterclaim of GMCL.

4. The plaintiff has no knowledge of the allegations contained in paragraphs 4, 5, 6, 9, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 69, 73, 74, 75, 76, 78, 79, 82, 94, 95, 96, 97, 98, 100, 101, 105, 106, 107, 108, 110, 113, 114, 115, 139, 146, 166, 167, 168, 169, 170, 177, 178, 183 and 195 of the statement of defence, and paragraphs 14 and 20 of the counterclaim of GMCL.

5. The plaintiff repeats, adopts and relies upon the allegations contained in the amended statement of claim.

Economic conditions do not relieve GMCL from its obligations

6. Paragraphs 25 to 85 of GMCL's statement of defence and counterclaim emphasize the financial situation that GMCL and its parent corporation, General Motors Corporation ("GMUS"), allegedly faced, and the poor state of the economy and the automotive industry in 2008 and early 2009. GMCL, however, owed the same duties to its class members regardless of: its or GMUS's financial condition; the state of the economy generally; the state of the automotive industry; or any requirements imposed by third parties, including the U.S. Treasury, the Presidential Task Force on the Auto Industry, the Canadian Government or the Ontario Government.

7. In any event, the elimination of over 40% of GMCL's dealer network before receiving the GM auto bailout was not necessary for GMCL's survival. Dealers are self-financed entrepreneurs devoted to the selling of GMCL vehicles. The elimination of the class members, which collectively sold tens of thousands of GMCL vehicles each year, resulted in a dramatic loss of GMCL's market share to its competitors.

8. GMCL and GMUS knew in February 2009 that GMCL's survival and prosperity did not depend on the sudden elimination of over 40% of its dealer network. GMCL proposed in the GMCL February Viability Plan the phased reduction in dealer count from approximately 700 to 450-500 dealers over a five year period through normal attrition and dealer consolidation. This Plan reflected GMCL's best business judgment of what was needed to turn GMCL around, based on its in-depth knowledge of the automotive market, competitive forces, and due regard for the economic reality which GMCL faced at the time.

No right to unilaterally terminate Pontiac, Saturn, Saab & Hummer dealerships

9. Class members whose Motor Vehicle Addenda attached to their Dealer Agreement included the Pontiac, Saturn, Saab and Hummer brands had a contractual right to buy those

brands of vehicles and GMCL had a contractual obligation to sell those brands to those class members.

10. Article 1 of the Dealer Agreements states the following with respect to the class members' right to buy vehicles:

GM appoints Dealer as a non-exclusive dealer of Products at Dealer's authorized location. Dealer has the right to buy Products and the obligation to market and service these Products in accordance with this agreement and related documents.

11. The Standard DSSA Provisions incorporated into the Dealer Agreements set out the purpose of the Dealer Agreement and state, in part:

"Purpose of Agreement":

The purpose of this Agreement is to promote a relationship between GM and its dealers which encourages and facilitates cooperation and mutual effort to satisfy customers, and **permits GM and its dealers to fully realize their opportunities for business success.**

...

GM and its dealers depend upon each other to fully realize their opportunities for business success. GM relies upon its dealers to provide the sales and service expertise to effectively represent GM Products in the marketplace. **Dealer relies upon GM to provide sales and service support and to continually strive to enhance the quality and competitiveness of its Products.**

This mutual dependence requires a spirit of cooperation, trust and confidence between GM and its dealers...

The principal purposes of this Agreement are to: (i) authorize Dealer to sell and service Products and represent itself as a GM Dealer; (ii) set forth the terms and conditions which will define the business relationship between Dealer and GM; (iii) set forth the responsibilities of Dealer and GM to each other and to customers; and (iv) reflect the mutual dependence of the parties in achieving their business objectives.
(Emphasis added)

12. GMCL had no right to unilaterally discontinue the Pontiac, Saturn, Saab and Hummer lines.

13. Alternatively, if GMCL had such a right (which right is expressly denied), it could not exercise it without either offering to the affected class members a replacement line of vehicles (e.g. in the case of Pontiac, the Chevrolet line), or fully compensating the affected class members for the losses resulting from the termination of the line.

14. GMCL used the improper unilateral termination of the Pontiac, Saturn, Saab and Hummer lines to compel class members who sold those vehicles to sign the WDA. GMCL knew that certain dealers could not continue in operation without the discontinued lines or a replacement line such as Chevrolet. The unilateral termination of those lines was a breach of contract by GMCL and a breach of the duty of fair dealing under the Franchise Acts.

“Dealer network planning” subordinate to purpose of Dealer Agreement

15. With respect to the allegations in paragraphs 128-131 of the statement of defence and counterclaim regarding GMCL’s right to undertake dealer network planning, such right did not allow GMCL to send the Notices of Non-Renewal and to ask the class members to sign the WDA.

16. GMCL’s right to undertake dealer network planning pursuant to Article 4.1 of the Standard DSSA Provisions is subordinate to the purpose of the Dealer Agreement set forth at the beginning of the Standard DSSA Provisions and reproduced in paragraph 11 hereof. Neither Article 4.1 of the Standard DSSA Provisions nor any other provision thereof negates GMCL’s fundamental obligation to sell vehicles to the class members in accordance with the Dealer Agreement and GMCL’s obligation to support the class members. Moreover, GMCL’s right to plan its dealer network is for the purpose of, *inter alia*, “permit[ting] each dealer the opportunity to achieve a reasonable return on investment.”

17. Further, or in the alternative, Article 4.1 of the Standard Provisions is void for uncertainty.

DEFENCE TO COUNTERCLAIM

18. The plaintiff repeats, adopts and relies upon the allegations contained in the reply and in the amended statement of claim.

19. The release contained in section 5 of the WDA is null and void by operation of sections 4 and 11 of the *Wishart Act*, sections 4 and 11 of the PEI *Franchises Act* and section 18 of the *Alberta Franchises Act*.

20. The provisions in section 5 of the WDA that:

- (a) prohibit the class members from commencing or otherwise asserting any claim covered by the release contained in section 5(a) of the WDA;
- (b) require the class members to take whatever affirmative steps may be necessary to opt out of or disclaim any interest in any representative action or class proceeding; and
- (c) require the class members to indemnify GMCL against all claims, losses, damages, the amount of the Wind Down Payments and expenses which may be imposed upon or incurred by GMCL arising from, relating to, or caused by the class members' breach of the WDA,

are null and void as against public policy and pursuant to sections 4 and 11 of the *Wishart Act*, sections 4 and 11 of the PEI *Franchises Act* and section 18 of the *Alberta Franchises Act*. This is because these provisions prevent or attempt to prevent, or discourage or attempt to discourage

the class members from bringing, maintaining or participating in this action, or they penalize or attempt to penalize the class members for doing so.

21. With respect to GMCL's alternative claim at paragraph 19 of the counterclaim, section 16 of the WDA states that:

The invalidity or unenforceability of any provision of this Agreement or any covenant herein shall not affect the validity or enforceability of any other provision or covenant, and any such invalid or unenforceable provision or covenant shall be deemed to be severable. **If any of the provisions of this Agreement are found to be invalid or unenforceable, the remaining provisions of this Agreement will remain in full force and effect.**" (emphasis added).

22. Thus, if the release contained in section 5 of the WDA is null and void, subject to the plaintiff's right of rescission as pleaded in the amended statement of claim, the provision in the WDA regarding the Wind Down Payments remains in full force and effect.

23. For these reasons, the plaintiff requests that the counterclaim be dismissed as against the entire defendant's class and defendant's subclass with costs.

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Plaintiff

- and -

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Defendants

Court File No.: CV-10-397096CP

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Proceeding commenced at Toronto

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OF GENERAL MOTORS OF CANADA LTD.**

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