

AMENDED THIS Sept. 16/15 PURSUANT TO  
MODIFIE CE CONFORMEMENT A  
 RULE/LA RÈGLE 26.02 ( A )

THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE \_\_\_\_\_

Court File No.: CV-14-506644-00CP

REGISTRAR  
SUPERIOR COURT OF JUSTICE  
GREFFIER  
COUR SUPÉRIEURE DE JUSTICE

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN: **Y. Grant  
Registrar**

**SHERIDAN CHEVROLET CADILLAC LTD.,  
PICKERING AUTO MALL LTD., and FADY SAMAHA**

Plaintiffs

- and -

**T. RAD CO., LTD., T. RAD NORTH AMERICA INC., DENSO CORPORATION, DENSO  
INTERNATIONAL AMERICA INC., DENSO MANUFACTURING CANADA, INC.,  
DENSO SALES CANADA, INC., CALSONIC KANSEI CORPORATION, and  
CALSONIC KANSEI NORTH AMERICA, INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6

**FRESH AS AMENDED STATEMENT OF CLAIM  
(Automatic Transmission Fluid Warmers)**

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyers or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, 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 statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, 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.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 18, 2014

Issued by:

*"N. Mohammed"*

Local Registrar

Address of Court Office:  
Superior Court of Justice  
393 University Ave., 10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

TO: **T. RAD CO., LTD.**  
3-25-3 Yoyogi  
Shibuya-ku, Tokyo 151-0053, Japan

AND TO: **T. RAD NORTH AMERICA INC.**  
750 Frank Yost Lane  
Hopkinsville, Kentucky 42240, USA

AND TO: **DENSO CORPORATION**  
1-1, Showacho  
Kariya, Aichi, 448-0029, Japan

AND TO: **DENSO INTERNATIONAL AMERICA, INC.**  
24777 Denso Drive  
Southfield, Michigan 48033, USA

AND TO: **DENSO MANUFACTURING CANADA, INC.**  
900 Southgate Drive  
Guelph, Ontario, N1L 1K1, Canada

AND TO: **DENSO SALES CANADA, INC.**  
195 Brunel Road  
Mississauga, Ontario, L4Z 1X3, Canada

AND TO: **CALSONIC KANSEI CORPORATION**  
2-1917 Nisshin-cho, Kita-ku  
Saitama-city, Saitama 331-8501, Japan

AND TO: **CALSONIC KANSEI NORTH AMERICA, INC.**  
1 Calsonic Way  
Shelbyville, Tennessee 37160, USA

**CLAIM**

1. The plaintiffs claim on their own behalf and on behalf of other members of the Proposed Class (as defined in paragraph 7 below):

- (a) A declaration that the defendants conspired and agreed with each other and other unknown co-conspirators to rig bids and fix, raise, maintain, or stabilize the price of ATF Warmers (as defined in paragraph 2 below) sold in North America and elsewhere during the Class Period (as defined in paragraph 7 below);
- (b) A declaration that the defendants and their co-conspirators did, by agreement, threat, promise or like means, influence or attempt to influence upwards, or discourage or attempt to discourage the reduction of the price at which ATF Warmers were sold in North America and elsewhere during the Class Period;
- (c) Damages or compensation in an amount not exceeding \$50,000,000:
  - (i) for loss and damage suffered as a result of conduct contrary to Part VI of the *Competition Act*, RSC 1985, c C-34 (“*Competition Act*”);
  - (ii) for civil conspiracy;
  - (iii) for unjust enrichment; and
  - (iv) for waiver of tort;
- (d) Punitive, exemplary and aggravated damages in the amount of \$5,000,000;

- (e) Pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, RSO 1990, c C.43 (“*Courts of Justice Act*”), as amended;
- (f) Post-judgment interest in accordance with section 129 of the *Courts of Justice Act*;
- (g) Investigative costs and costs of this proceeding on a full-indemnity basis pursuant to section 36 of the *Competition Act*; and
- (h) Such further and other relief as this Honourable Court deems just.

### **Summary of Claim**

2. This action arises from a conspiracy to fix, raise, maintain or stabilize prices, rig bids and allocate the market and customers in North America and elsewhere of automatic transmission fluid warmers used in automobiles and other light-duty vehicles (“**ATF Warmers**”). ATF Warmers are intended to improve fuel economy by warming transmission fluid to lower its viscosity, allowing the transmission fluid to flow more easily. The unlawful conduct occurred from at least as early as November 1, 2002 and continued until at least March 1, 2010 and impacted prices for several years thereafter. The unlawful conduct was targeted at the automotive industry, raising prices to all members of the Proposed Class.

3. As a direct result of the unlawful conduct alleged herein, the plaintiffs and other members of the Proposed Class paid artificially inflated prices for ATF Warmers and/or new vehicles containing ATF Warmers manufactured, marketed, sold, and/or distributed during the Class Period and have thereby suffered losses and damages.

## The Plaintiffs

4. The plaintiff, Sheridan Chevrolet Cadillac Ltd. (“**Sheridan**”), was an automotive dealer in Pickering, Ontario pursuant to a Dealer Sales and Service Agreement with General Motors of Canada Limited (“**GMCL**”) from 1977 to 2009.

5. The plaintiff, Pickering Auto Mall Ltd. (“**Pickering**”), was an automotive dealer in Pickering, Ontario pursuant to a Dealer Sales and Service Agreement with GMCL from 1989 to 2009.

6. The plaintiff, Fady Samaha, a resident of Newmarket, Ontario, purchased a new Honda Civic in 2009.

7. The plaintiffs seek to represent the following class (the “**Proposed Class**”):

All Persons in Canada who purchased ATF Warmers;<sup>1,2</sup> or who purchased and/or leased a new Automotive Vehicle<sup>3</sup> containing an ATF Warmer during the Class Period.<sup>4</sup> Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates.

<sup>1</sup> ATF Warmers are devices located within an Automotive Vehicle’s engine that improve fuel economy by warming transmission fluid to lower its viscosity, allowing the transmission fluid to flow more easily.

<sup>2</sup> ATF Warmers purchased for repair or replacement in an Automotive Vehicle are excluded from the Class.

<sup>3</sup> Automotive Vehicle means passenger cars, SUVs, vans, and light trucks (up to 10,000 lbs).

<sup>4</sup> Class Period means between November 1, 2002 and March 1, 2010 and/or during the subsequent period during which prices were affected by the alleged conspiracy.

## The Defendants

### *T. Rad Defendants*

8. The defendant, T. Rad Co., Ltd. (“**T. Rad Co.**”), is a Japanese corporation with its principal place of business in Tokyo, Japan. During the Class Period, T. Rad Co. manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates and/or subsidiaries, including the defendant T. Rad North America Inc. (“**T. Rad NA**”).

9. The defendant, T. Rad NA, is an American corporation with its principal place of business in Hopkinsville, Kentucky. During the Class Period, T. Rad NA manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries. T. Rad NA is owned and controlled by T. Rad Co.

10. The business of each of T. Rad Co. and T. Rad NA is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, market, sale, and/or distribution of ATF Warmers in Canada and for the purposes of the conspiracy described herein. T. Rad Co. and T. Rad NA are hereinafter referred to as “**T. Rad.**”

### *Denso Defendants*

11. The defendant, Denso Corporation, is a Japanese corporation with its principal place of business in Aichi, Japan. During the Class Period, Denso Corporation manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout

Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries, including the defendants Denso International America, Inc. (“**Denso US**”), Denso Manufacturing Canada, Inc. (“**Denso Manufacturing Canada**”), and Denso Sales Canada, Inc. (“**Denso Sales Canada**”).

12. The defendant, Denso US, is an American corporation with its principal place of business in Southfield, Michigan. During the Class Period, Denso US manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries. Denso US is owned and controlled by Denso Corporation.

13. The defendant, Denso Manufacturing Canada, is a Canadian corporation with its principal place of business in Guelph, Ontario. During the Class Period, Denso Manufacturing Canada manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries. Denso Manufacturing Canada is owned and controlled by Denso Corporation.

14. The defendant, Denso Sales Canada, is a Canadian corporation with its principal place of business in Mississauga, Ontario. During the Class Period, Denso Sales Canada manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries. Denso Sales Canada is owned and controlled by Denso Corporation.

15. The business of each of Denso Corporation, Denso US, Denso Manufacturing Canada, and Denso Sales Canada is inextricably interwoven with that of the other and each

is the agent of the other for the purposes of the manufacture, market, sale, and/or distribution of ATF Warmers in Canada and for the purposes of the conspiracy described herein. Denso Corporation, Denso US, Denso Manufacturing Canada, and Denso Sales Canada are hereinafter collectively referred to as “**Denso.**”

*Calsonic Kansei Defendants*

16. The defendant, Calsonic Kansei Corporation, is a Japanese corporation with its principal place of business in Saitama, Japan. During the Class Period, Calsonic Kansei Corporation manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates and/or subsidiaries, including the defendant Calsonic Kansei North America, Inc. (“**Calsonic NA**”).

17. The defendant, Calsonic NA, is an American corporation with its principal place of business in Shelbyville, Tennessee. During the Class Period, Calsonic NA manufactured, marketed, sold, and/or distributed ATF Warmers to customers throughout Canada, either directly or indirectly through the control of its predecessors, affiliates, and/or subsidiaries. Calsonic NA is owned and controlled by Calsonic Kansei Corporation.

18. The business of each of Calsonic Kansei Corporation and Calsonic NA is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, market, sale, and/or distribution of ATF Warmers in Canada and for the purposes of the conspiracy described herein. Calsonic Kansei and Calsonic NA are hereinafter referred to as “**Calsonic Kansei.**”

### *Unnamed Co-Conspirators*

19. Various persons, partnerships, sole proprietors, firms, corporations and individuals not named as defendants in this lawsuit, the identities of which are not presently known, may have participated as co-conspirators with the defendants in the unlawful conspiracy alleged in this statement of claim, and have performed acts and made statements in furtherance of the unlawful conduct.

### *Joint and Several Liability*

20. The defendants are jointly and severally liable for the actions of and damages allocable to all co-conspirators.

21. Whenever reference is made herein to any act, deed or transaction of any corporation, the allegation means that the corporation or limited liability entity engaged in the act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of the corporation's business or affairs.

### **The ATF Warmers Industry**

22. ATF Warmers are devices located in the engine compartment of a vehicle that warm the automatic transmission fluid. ATF Warmers are intended to improve fuel economy by warming transmission fluid to lower its viscosity, allowing the transmission fluid to flow more easily.

23. ATF Warmers are installed by automobile original equipment manufacturers ("OEMs") in new vehicles as part of the automotive manufacturing process.

24. For new vehicles, the OEMs – mostly large automotive manufacturers such as General Motors, Chrysler, Toyota, and others – purchase ATF Warmers directly from the defendants. ATF Warmers may also be purchased by component manufacturers who then supply such systems to OEMs. These component manufacturers are also called “**Tier I Manufacturers**” in the industry. A Tier I Manufacturer supplies ATF Warmers directly to an OEM.

25. When purchasing ATF Warmers, OEMs issue Requests for Quotation (“**RFQs**”) to automotive parts suppliers on a model-by-model basis for model-specific parts. In at least some circumstances, the RFQ is sought from pre-qualified suppliers of the product. Typically, the RFQ would be made when there has been a major design change on a model-by-model basis. Automotive parts suppliers submit quotations, or bids, to OEMs in response to RFQs. The OEMs usually award the business to the selected automotive parts supplier for a fixed number of years consistent with the estimated production life of the parts program. Typically, the production life of the parts program is between two and five years. Typically, the bidding process begins approximately three years before the start of production of a new model. Once production has begun, OEMs issue annual price reduction requests (“**APRs**”) to automotive parts suppliers to account for efficiencies gained in the production process. OEMs procure parts for North American manufactured vehicles in Japan, the United States, Canada and elsewhere.

26. During the Class Period, the defendants and their unnamed co-conspirators supplied ATF Warmers to OEMs for installation in vehicles manufactured and sold in North America and elsewhere. The defendants and their unnamed co-conspirators manufactured ATF Warmers: (a) in North America for installation in vehicles

manufactured in North America and sold in Canada, (b) outside North America for export to North America and installation in vehicles manufactured in North America and sold in Canada, and (c) outside North America for installation in vehicles manufactured outside North America for export to and sale in Canada.

27. The defendants and their unnamed co-conspirators intended, as a result of their unlawful conspiracy, to inflate the prices for ATF Warmers and new vehicles containing ATF Warmers sold in North America and elsewhere.

28. The defendants and their unnamed co-conspirators unlawfully conspired to agree and manipulate prices for ATF Warmers and conceal their anti-competitive behaviour from OEMs and other industry participants. The defendants and their unnamed co-conspirators knew that their unlawful scheme and conspiracy would unlawfully increase the price at which ATF Warmers would be sold from the price that would otherwise be charged on a competitive basis. The defendants and their unnamed co-conspirators were aware that, by unlawfully increasing the prices of ATF Warmers, the prices of new vehicles containing ATF Warmers would also be artificially inflated. The defendants and their unnamed co-conspirators knew that their unlawful scheme and conspiracy would injure purchasers of ATF Warmers and purchasers and lessees of new vehicles containing ATF Warmers. The defendants' conduct impacted not only multiple bids submitted to OEMs, but also the price paid by all other purchasers of ATF Warmers.

29. By virtue of their market shares, the defendants are the dominant manufacturers and suppliers of ATF Warmers in Canada and the world. Their customers include Honda,

Mazda, Mitsubishi, Suzuki, Toyota, Audi, BMW, Daimler, Ford, General Motors, Isuzu, Land Rover, Nissan, Saab, and Volkswagen.

30. The automotive industry in Canada and the United States is an integrated industry. Automobiles manufactured on both sides of the border are sold in Canada. The unlawful conspiracy affected prices of ATF Warmers in the United States and Canada, including Ontario.

#### **Investigations into International Cartel and Resulting Fines**

31. T. Rad Co. has agreed to plead guilty and pay a fine of US\$13.75 million in respect of its role in various conspiracies to fix the prices of certain automotive parts, including ATF Warmers, sold to automobile manufacturers in the United States and elsewhere from at least as early as November 1, 2002 and continuing until at least February 2010.

#### **Plaintiffs Purchased New Vehicles Containing ATF Warmers**

32. During the Class Period, Sheridan purchased for resale the following brands of vehicles manufactured by GMCL or its affiliates: Chevrolet, Oldsmobile, and Cadillac.

33. During the Class Period, Sheridan also purchased for resale vehicles manufactured by the following other automotive manufacturers: Suzuki Canada Inc., CAMI Automotive Inc., GM Daewoo Auto & Technology Company, and Daewoo Motor Co.

34. During the Class Period, Pickering purchased for resale the following brands of vehicles manufactured by GMCL or its affiliates: Isuzu, Saab, and Saturn.

35. During the Class Period, Pickering also purchased for resale vehicles manufactured by the following other automotive manufacturers: Isuzu Motors Ltd., Adam Opel AG, and Subaru Canada Inc.

36. The vehicles purchased by Sheridan and Pickering were manufactured in whole or in part at various times in Ontario or other parts of Canada, the United States, Japan, and other parts of the world.

37. Sheridan and Pickering purchased new vehicles containing ATF Warmers.

38. Fady Samaha purchased a new Honda Civic in 2009, which contained an ATF Warmer.

**Breaches of Part VI of *Competition Act***

39. From at least as early as November 1, 2002 until at least March 1, 2010, the defendants and their unnamed co-conspirators engaged in a conspiracy to rig bids for and to fix, maintain, increase or control the prices of ATF Warmers sold to customers in North America and elsewhere. The defendants and their unnamed co-conspirators conspired to enhance unreasonably the prices of ATF Warmers and/or to lessen unduly competition in the production, manufacture, sale, and/or distribution of ATF Warmers in North America and elsewhere. The conspiracy was intended to, and did, affect prices of ATF Warmers and new vehicles containing ATF Warmers.

40. The defendants and their unnamed co-conspirators carried out the conspiracy by:

- (a) participating in meetings, conversations, and communications in the United States, Japan, Europe, and elsewhere to discuss the bids (including RFQs) and price

quotations (including APRs) to be submitted to OEMs selling automobiles in North America and elsewhere;

(b) agreeing, during those meetings, conversations, and communications, on bids (including RFQs) and price quotations (including APRs) to be submitted to OEMs in North America and elsewhere (including agreeing that certain defendants or co-conspirators would win the RFQs for certain models);

(c) agreeing on the prices to be charged and to control discounts (including APRs) for ATF Warmers in North America and elsewhere and to otherwise fix, increase, maintain or stabilize those prices;

(d) agreeing, during those meetings, conversations, and communications, to allocate the supply of ATF Warmers sold to OEMs in North America and elsewhere on a model-by-model basis;

(e) agreeing, during those meetings, conversations, and communications, to coordinate price adjustments in North America and elsewhere;

(f) submitting bids (including RFQs), price quotations, and price adjustments (including APRs) to OEMs in North America and elsewhere in accordance with the agreements reached;

(g) enhancing unreasonably the prices of ATF Warmers sold in North America and elsewhere;

(h) selling ATF Warmers to OEMs in North America and elsewhere for the agreed-upon prices, controlling discounts and otherwise fixing, increasing, maintaining or stabilizing prices for ATF Warmers in North America and elsewhere;

- (i) allocating the supply of ATF Warmers sold to OEMs in North America and elsewhere on a model-by-model basis;
- (j) accepting payment for ATF Warmers sold to OEMs in North America and elsewhere at collusive and supra-competitive prices;
- (k) engaging in meetings, conversations, and communications in the United States, Japan and elsewhere for the purpose of monitoring and enforcing adherence to the agreed-upon bid-rigging and price-fixing scheme;
- (l) actively and deliberately employing steps to keep their conduct secret and to conceal and hide facts, including but not limited to using code names, following security rules to prevent “paper trails,” abusing confidences, communicating by telephone, and meeting in locations where they were unlikely to be discovered by other competitors and industry participants; and
- (m) preventing or lessening, unduly, competition in the market in North America and elsewhere for the production, manufacture, sale or distribution of ATF Warmers.

41. As a result of the unlawful conduct alleged herein, the plaintiffs and other members of the Proposed Class paid unreasonably enhanced/supra-competitive prices for ATF Warmers and/or new vehicles containing ATF Warmers.

42. The conduct described above constitutes offences under Part VI of the *Competition Act*, in particular, sections 45(1), 46(1) and 47(1) of the *Competition Act*. The plaintiffs claim loss and damage under section 36(1) of the *Competition Act* in respect of such unlawful conduct.

**Breach of Foreign Law**

43. The defendants and their unnamed co-conspirators' conduct, particularized in this statement of claim, took place in, among other places, the United States, Japan, and Europe, where it was illegal and contrary to the competition laws of the United States, Japan, and Europe.

**Civil Conspiracy**

44. The defendants and their unnamed co-conspirators voluntarily entered into agreements with each other to use unlawful means which resulted in loss and damage, including special damages, to the plaintiffs and other members of the Proposed Class. The unlawful means include the following:

- (a) entering into agreements to rig bids and fix, maintain, increase, or control prices of ATF Warmers sold to customers in North America and elsewhere in contravention of sections 45(1), 46(1), and 47(1) of the *Competition Act*; and
- (b) aiding, abetting and counselling the commission of the above offences, contrary to sections 21 and 22 of the *Criminal Code*, RSC 1985, c C-46.

45. In furtherance of the conspiracy, the defendants, their servants, agents and unnamed co-conspirators carried out the acts described in paragraph 40 above.

46. The defendants and their unnamed co-conspirators were motivated to conspire. Their predominant purposes and concerns were to harm the plaintiffs and other members of the Proposed Class by requiring them to pay artificially high prices for ATF Warmers, and to illegally increase their profits on the sale of ATF Warmers.

47. The defendants and their unnamed co-conspirators intended to cause economic loss to the plaintiffs and other members of the Proposed Class. In the alternative, the defendants and their unnamed co-conspirators knew, in the circumstances, that their unlawful acts would likely cause injury.

### **Discoverability**

48. ATF Warmers are not exempt from competition regulation and thus, the plaintiffs reasonably considered the ATF Warmers industry to be a competitive industry. A reasonable person under the circumstances would not have been alerted to investigate the legitimacy of the defendants' prices for ATF Warmers.

49. Accordingly, the plaintiffs and other members of the Proposed Class did not discover, and could not discover through the exercise of reasonable diligence, the existence of the alleged conspiracy during the Class Period.

### **Fraudulent Concealment**

50. The defendants and their co-conspirators actively, intentionally and fraudulently concealed the existence of the combination and conspiracy from the public, including the plaintiffs and other members of the Proposed Class. The defendants and their co-conspirators represented to customers and others that their pricing and bidding activities were unilateral, thereby misleading the plaintiffs. The affirmative acts of the defendants alleged herein, including acts in furtherance of the conspiracy, were fraudulently concealed and carried out in a manner that precluded detection.

51. The defendants' anti-competitive conspiracy was self-concealing. As detailed in paragraph 40 above, the defendants took active, deliberate and wrongful steps to conceal their participation in the alleged conspiracy.

52. Because the defendants' agreements, understandings and conspiracies were kept secret, plaintiffs and other members of the Proposed Class were unaware of the defendants' unlawful conduct during the Class Period, and they did not know, at the time, that they were paying supra-competitive prices for ATF Warmers and new vehicles containing ATF Warmers.

### **Unjust Enrichment**

53. As a result of their conduct, the defendants benefited from a significant enhancement of their revenues on the sale of ATF Warmers. All members of the Proposed Class have suffered a corresponding deprivation as a result of being forced to pay inflated prices for ATF Warmers and/or new vehicles containing ATF Warmers. There is no juristic reason or justification for the defendants' enrichment, as such conduct is tortious, unjustifiable and unlawful under the *Competition Act* and similar laws of other countries in which the unlawful acts took place.

54. It would be inequitable for the defendants to be permitted to retain any of the ill-gotten gains resulting from their unlawful conspiracy.

55. The plaintiffs and other members of the Proposed Class are entitled to the amount of the defendants' ill-gotten gains resulting from their unlawful and inequitable conduct.

**Waiver of Tort**

56. In the alternative to damages, in all of the circumstances, the plaintiffs plead an entitlement to “waive the tort” of civil conspiracy and claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the defendants as a result of their unlawful conspiracy.

57. As a direct, proximate, and foreseeable result of the defendants’ wrongful conduct, the plaintiffs and other members of the Proposed Class overpaid for ATF Warmers. As a result of the unlawful conspiracy, the defendants profited from the sale of ATF Warmers at artificially inflated prices and were accordingly unjustly enriched. The defendants accepted and retained the unlawful overcharge. It would be unconscionable for the defendants to retain the unlawful overcharge obtained as a result of the alleged conspiracy.

**Damages**

58. The conspiracy had the following effects, among others:

- (a) price competition has been restrained or eliminated with respect to ATF Warmers sold directly or indirectly to the plaintiffs and other members of the Proposed Class in Ontario and the rest of Canada;
- (b) the prices of ATF Warmers sold directly or indirectly to the plaintiffs and other members of the Proposed Class in Ontario and the rest of Canada have been fixed, maintained, increased or controlled at artificially inflated levels;  
and

- (c) the plaintiffs and other members of the Proposed Class have been deprived of free and open competition for ATF Warmers in Ontario and the rest of Canada.

59. ATF Warmers are identifiable, discrete physical products that remain essentially unchanged when incorporated into a vehicle. As a result, ATF Warmers follow a traceable chain of distribution from the defendants to the OEMs (or alternatively to the Tier I Manufacturers and then to OEMs) and from the OEMs to automotive dealers to consumers or other end-user purchasers. Costs attributable to ATF Warmers can be traced through the distribution chain.

60. By reason of the wrongful conduct alleged herein, the plaintiffs and the members of the Proposed Class have sustained losses by virtue of having paid higher prices for ATF Warmers and/or new vehicles containing ATF Warmers than they would have paid in the absence of the illegal conduct of the defendants and their unnamed co-conspirators. As a result, the plaintiffs and other members of the Proposed Class have suffered loss and damage in an amount not yet known but to be determined. Full particulars of the loss and damage will be provided before trial.

#### **Punitive, Aggravated and Exemplary Damages**

61. The defendants and their unnamed co-conspirators used their market dominance, illegality and deception in furtherance of a conspiracy to illegally profit from the sale of ATF Warmers. They were, at all times, aware that their actions would have a significant adverse impact on all members of the Proposed Class. The conduct of the defendants and

their unnamed co-conspirators was high-handed, reckless, without care, deliberate, and in disregard of the plaintiffs' and Proposed Class members' rights.

62. Accordingly, the plaintiffs request substantial punitive, exemplary and aggravated damages in favour of each member of the Proposed Class.

**Service of Statement of Claim Outside Ontario**

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

- (a) Rule 17.02 (g) – the claim relates to a tort committed in Ontario;
- (b) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort; and
- (c) Rule 17.02 (o) – the defendants residing outside of Ontario are necessary and proper parties to this proceeding.

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

Date: June 18, 2014

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Lawyers for the Plaintiffs

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

**FRESH AS AMENDED STATEMENT OF CLAIM  
(ATF Warmers)**

**SOTOS LLP**

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