

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE BELOBABA)
)
)
)

TUESDAY THE 19
DAY OF JULY 2022

BETWEEN:

KATE O'LEARY SWINKELS

Plaintiff

- and -



ZF FRIEDRICHSHAFEN AG, TRW AUTOMOTIVE GMBH, TRW VEHICLE SAFETY SYSTEMS INC., KELSEY-HAYES COMPANY, TRW CANADA LIMITED, KELSEY- HAYES CANADA LIMITED, ROBERT BOSCH GMBH, ROBERT BOSCH LLC, ROBERT BOSCH NORTH AMERICA CORPORATION, BOSCH BRAKE COMPONENTS LLC, ROBERT BOSCH INC., CONTINENTAL AG, CONTINENTAL AUTOMOTIVE GMBH, CONTINENTAL AUTOMOTIVE SYSTEMS, INC., and CONTINENTAL TIRE CANADA, INC. (FORMERLY KNOWN AS CONTINENTAL AUTOMOTIVE CANADA, INC.)

Defendants

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

**ORDER
- Braking Systems -
Consent Certification**

THIS MOTION, made by the Plaintiff, Kate O'Leary Swinkels, for an Order certifying this proceeding as a class proceeding, was heard this day by judicial videoconference at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the materials filed by the parties, and upon hearing the submissions of counsel for the parties;

AND ON BEING ADVISED that the deadline for opting out of the Ontario Action has passed, and one person validly and timely exercised the right to opt out;

AND ON BEING ADVISED that the litigation has been resolved against all defendants with exception of Continental AG, Continental Automotive GmbH, Continental Automotive Systems, Inc., and Continental Tire Canada, Inc. (formerly known as Continental Automotive Canada, Inc.) (collectively, the “Continental Defendants”);

AND ON BEING ADVISED that the Plaintiff and Continental Defendants consent to this Order, save for paragraph 1, in respect of which the Continental defendants take no position:

1. **THIS COURT ORDERS** that the Claim be amended in the form of Schedule “A” attached and that the title of proceeding be amended accordingly.
2. **THIS COURT ORDERS** that the within action is certified as a class proceeding against the Continental Defendants pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
3. **THIS COURT ORDERS** that the certified Class is defined as:

All Persons in Canada who, during the Class Period,¹ purchased Braking Systems^{2, 3} for installation in an Affected Automotive Vehicle⁴ or who purchased and/or leased a new Affected Automotive Vehicle containing a Braking System (the “Class Members”).

Excluded from the class are the Defendants, their parent companies, subsidiaries, and affiliates, and any person who validly opted out of the action in accordance with the orders of the Ontario or British Columbia Courts.

¹ Class Period means between February 1, 2007, and December 31, 2017.

² Braking Systems refers to hydraulic or electronic braking systems. Hydraulic braking systems are automotive systems that transmit brake pedal force to automotive wheel brakes through pressurized fluid contained in brake cylinders. Electronic braking systems are electronically activated automotive braking systems that reduce response and build-up times in brake cylinders.

³ Braking Systems purchased for repair or replacement in an Affected Automotive Vehicle are excluded from the Class, unless the repair or replacement Braking System was a Genuine or OEM replacement part purchased by a Canadian distributor of an original equipment manufacturer or by an automotive dealer.

⁴ Affected Automotive Vehicle means new passenger cars, sport utility vehicles (SUVs), vans, and light trucks (up to 10,000 lbs) manufactured by Bayerische Motoren Werke AG, Daimler AG, and Volkswagen AG and/or their subsidiaries or affiliated companies, under the following brand names: BMW, MINI, Mercedes-Benz, Smart, Volkswagen, and Audi. Affected Automotive Vehicles include, but are not limited to:

Electronic Braking Systems:

Vehicle Models	Year Range
Audi A4	MY14–MY17
Audi A5	MY14–MY17
Audi A6	MY16–MY17
Audi A8	MY16–MY17
Audi Q5	MY14–MY17
Audi Q7	MY14–MY17
Volkswagen Touareg	MY16–MY17
Porsche Cayenne	MY14–MY17

Hydraulic Braking Systems:

Vehicle Models	Year Range
Smart Fortwo	MY08–MY17
Mercedes GLK-Class	MY10–MY15
Mercedes E-Class	MY07–MY17
Mercedes Sprinter	MY10–MY16
Mercedes G-Class	MY07–MY16
Mercedes Sprinter II	MY10–MY16
BMW 1 Series	MY08–MY13
BMW 2 Series	MY14–MY17
BMW 3 Series	MY07–MY17
BMW 4 Series	MY14–MY17
BMW X3	MY07–MY17

4. **THIS COURT ORDERS** that Kate O’Leary Swinkels and Stuart Budd & Sons Ltd. are appointed as the representative plaintiffs on behalf of the Class.
5. **THIS COURT ORDERS** that Siskinds LLP and Sotos LLP are appointed as Class Counsel in this action.
6. **THIS COURT DECLARES** that the following claims for unlawfully conspiring to rig bids, allocate markets, and/or fix, maintain, and/or increase the price of Braking Systems are asserted on behalf of the Class against the Continental Defendants:
 - (a) A claim under s. 36(1) of the *Competition Act*, 1985 R.S.C. c. C-34 for breaches of ss. 45–47 of the *Competition Act*;
 - (b) Unlawful means conspiracy; and
 - (c) Unjust enrichment.
7. **THIS COURT DECLARES** that the relief sought by the Class is as set out in the Fresh as Amended Statement of Claim, attached as Schedule “A”:
8. **THIS COURT ORDERS** that the certified common issues on behalf of the Class are as follows:

Breach of the *Competition Act*

- (a) During the Class Period, did the Defendants, or any of them, engage in conduct contrary to s. 45(1) of the *Competition Act*?
 - (i) Between the start of the Class Period and March 10, 2010, did the Defendants and/or any unnamed co-conspirators conspire, agree, or arrange with each other to:
 - (A) enhance unreasonably the price of Braking Systems contrary to s. 45(1)(b) of the *Competition Act* [s. 45 as it appeared on March 10, 2010]; and/or
 - (B) prevent or lessen, unduly, competition in the sale or supply of Braking Systems contrary to s. 45(1)(c) of the *Competition Act* [s. 45 as it appeared on March 10, 2010]?
 - (ii) Between March 11, 2010, and the end of the Class Period, did the Defendants and/or any unnamed co-conspirators conspire, agree, or arrange with each other to:
 - (A) fix, maintain, increase, or control the price of Braking Systems contrary to s. 45(1)(a) of the *Competition Act*;
 - (B) allocate sales, territories, customers or markets for the production or supply of Braking Systems contrary to s. 45(1)(b) of the *Competition Act*; and/or

- (C) fix, maintain, control, prevent, lessen, or eliminate the production or supply of Braking Systems contrary to s. 45(1)(c) of the *Competition Act*?

- (b) During the Class Period, did the Defendants, or any of them, engage in conduct contrary to s. 46(1) of the *Competition Act*?
 - (i) Did the Defendants, or any one of them, carry on business in Canada and implement a directive, instruction, intimation of policy or other communication for the purpose of giving effect to a conspiracy, combination, agreement, or arrangement entered into outside Canada that, if entered into Canada, would have been in contravention of s. 45 of the *Competition Act*?

- (c) During the Class Period, did the Defendants, or any of them, engage in conduct contrary to s. 47(1) of the *Competition Act*?
 - (i) In response to a call or request for bids or tenders relating to Braking Systems, did the Defendants and/or any unnamed co-conspirators:
 - (A) agree, arrange, or undertake not to submit a bid or tender;
 - (B) agree, arrange, or undertake to withdraw a bid or tender; and/or
 - (C) submit bids or tenders that were arrived at by agreement or arrangement between the Defendants and/or their unnamed co-conspirators?

- (ii) If the answer to (c)(i) is yes, was the agreement or arrangement not made known to the person calling for or requesting the bids or tenders relating to Braking Systems at or before the time when the bids or tenders were submitted and/or withdrawn by the Defendants and/or their unnamed co-conspirators?

- (d) Did the Class suffer loss or damage because of any of the conduct referred to in issues (a), (b), or (c)?

- (e) What damages, if any, are payable by the Defendants, or any of them, to the Class pursuant to s. 36 of the *Competition Act*?

- (f) Should the Defendants, or any of them, pay the full costs, or any costs, of investigation in connection with this matter, including the cost of the proceeding or part thereof, pursuant to s. 36 of the *Competition Act*? If so, in what amount?

Unlawful Means Conspiracy

- (g) Are the Defendants, or any of them, liable in tort under the unlawful means conspiracy?
 - (i) Did the Defendants and/or any unnamed co-conspirators engage in unlawful conduct (by contravening ss. 45, 46, and/or 47 of the *Competition Act*)?

 - (ii) Was the Defendants' unlawful conduct directed towards the Class?

 - (iii) Did the Defendants know, or should they have known in the circumstances, that injury to the Class was likely to result?

- (iv) Did the Class suffer injury as a result?

Duration and Effect of Conspiracy

- (h) Over what period did the conspiracy take place?
- (i) Over what period did the conspiracy affect the price of Braking Systems and/or Affected Automotive Vehicles?

Concealment of Conspiracy

Did the Defendants, or any of them, take affirmative or fraudulent steps to conceal the conspiracy?

Damages

- (j) Can damages for the Class (or any subset of the Class) be measured on an aggregate basis, and, if so, what are the aggregate damages for the Class (or any subset of the Class)?
- (k) Was the conduct of the Defendants, or any of them, such that they ought to pay global, exemplary, or punitive damages to the Class?

Unjust Enrichment

- (l) Have the Defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of Braking Systems?
- (m) Has the Class suffered a corresponding deprivation in the amount of overcharges on the sale of Braking Systems?

- (n) Is there a juridical reason why the Defendants, or any of them, should be entitled to retain the overcharges on the sale of Braking Systems?
- (o) What restitution, if any, is payable by the Defendants, or any of them, to the Class based on unjust enrichment?

9. **THIS COURT ORDERS** that the Litigation Plan attached as Schedule "B" (the "Litigation Plan") is approved. The Defendants take no position with respect to the Litigation Plan, do not consent to the Plaintiffs' assertions regarding their conduct of this litigation, and reserve all rights they may have to oppose any and all steps the Plaintiffs may take as stipulated in the Litigation Plan or otherwise.
10. **THIS COURT ORDERS** that Class Members shall be given notice of the certification of this action as part of the next notice of settlement approval hearing in the Auto Parts cases.
11. **THIS COURT ORDERS** that the costs of notice of certification will be paid by the Plaintiffs in the first instance with the right reserved to the Plaintiffs to seek the recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues..
12. **THIS COURT ORDERS** that no costs are payable in respect of this motion.

Justice Edward Belobaba

The Honourable Justice Belobaba

Schedule "A"

Court File No.: CV-18-604648-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KATE O'LEARY SWINKELS and STUART BUDD & SONS LTD.

Plaintiffs

- and -

**CONTINENTAL AG, CONTINENTAL AUTOMOTIVE GMBH, CONTINENTAL
AUTOMOTIVE SYSTEMS, INC. and CONTINENTAL TIRE CANADA, INC.
(FORMERLY KNOWN AS CONTINENTAL AUTOMOTIVE CANADA, INC.)**

Defendants

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

**FRESH AS AMENDED STATEMENT OF CLAIM
(Braking Systems)**

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 plaintiff's lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, 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: September 6, 2018

Issued by: _____

Local Registrar

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

TO: CONTINENTAL AG
Vahrenwalder Straße 9,
30165 Hanover, Germany

AND TO: CONTINENTAL AUTOMOTIVE GMBH
Vahrenwalder Straße 9,
30165 Hanover, Germany

AND TO: CONTINENTAL AUTOMOTIVE SYSTEMS, INC.
40600 Ann Arbor Road East
Plymouth, MI 48170-4675 USA

AND TO: CONTINENTAL TIRE CANADA, INC. (formerly known as Continental Automotive Canada, Inc.)
6110 Cantay Road
Mississauga, ON L5R 3W5 Canada

CLAIM

1. The plaintiffs claim on their own behalf and on behalf of other members of the Proposed Class (as defined in paragraph 5 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 Hydraulic and/or Electronic Braking Systems (as defined in paragraph 2 below) sold in North America and elsewhere during the Class Period (as defined in paragraph 5 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 Hydraulic and/or Electronic Braking Systems were sold in North America and elsewhere during the Class Period;
 - (c) Damages or compensation in an amount not exceeding \$50,000,000 for:
 - (i) 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) civil conspiracy; and
 - (iii) unjust enrichment;
 - (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 “**Braking Systems**”. Braking Systems may be hydraulic or electronic. “**Hydraulic Braking Systems**” are automotive systems that transmit brake pedal force to automotive wheel brakes through pressurized fluid contained in brake cylinders, which include, but are not limited to, various related components (to the extent included in the relevant requests for quotation (“**RFQs**”)) such as brake lines, master and slave cylinders, and/or drum or disc brakes, installed in Affected Automotive Vehicles. “**Electronic Braking Systems**” are electronically activated automotive braking systems that reduce response and build-up times in brake cylinders, which include, but are not limited to, various related components (to the extent included in the relevant RFQs) such as brake lines, master and slave cylinders, drum or disc brakes, electronic control units, and/or electrically actuated valves, installed in Affected Automotive Vehicles (as defined in paragraph 5). The unlawful conduct occurred from at least as early as February 1, 2007 and continued until at least July , 2011 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 Hydraulic and Electronic Braking Systems and/or Affected Automotive Vehicles containing Hydraulic or Electronic Braking

Systems manufactured, marketed, sold and/or distributed during the Class Period and have thereby suffered losses and damages.

The Plaintiffs

4. The plaintiff Kate O’Leary Swinkels, a resident of Dublin, Ontario, purchased a new BMW in 2008.
5. The plaintiff Stuart Budd & Sons Ltd. owns a BMW dealership and service centre in Oakville, Ontario and in Hamilton, Ontario, operating under the trading name Budds’ BMW Oakville and Budds’ BMW Hamilton, respectively.
6. The plaintiffs seek to represent the following class (the “**Proposed Class**”):

All Persons in Canada who, during the Class Period,¹ purchased Braking Systems^{2,3} for installation in an Affected Automotive Vehicle⁴ or who purchased and/or leased a new Affected Automotive Vehicle containing a Braking System.

Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates.

¹ Class Period means between February 1, 2007 and December 31, 2017.

² Braking Systems refers to hydraulic or electronic braking systems. Hydraulic braking systems are automotive systems that transmit brake pedal force to automotive wheel brakes through pressurized fluid contained in brake cylinders. Electronic braking systems are electronically activated automotive braking systems that reduce response and build-up times in brake cylinders.

³ Braking Systems purchased for repair or replacement in an Affected Automotive Vehicle are excluded from the Class, unless the repair or replacement Braking System was a Genuine or OEM replacement part purchased by a Canadian distributor of an original equipment manufacturer or by an automotive dealer.

⁴ Affected Automotive Vehicle means passenger cars, sport utility vehicles, vans, and light trucks (up to 10,000 lbs) manufactured by Bayerische Motoren Werke AG, Daimler AG, and Volkswagen AG

and/or their subsidiaries or affiliated companies, under the following brand names: BMW, MINI, Mercedes-Benz, Smart, Volkswagen, and Audi. Affected Automotive Vehicles include, but are not limited to:

Electronic Braking Systems:

Vehicle Models	Year Range
Audi A4	MY14 - MY17
Audi A5	MY14 - MY17
Audi A6	MY16 - MY17
Audi A8	MY16 - MY17
Audi Q5	MY14 - MY17
Audi Q7	MY14 - MY17
Volkswagen Touareg	MY16 - MY17
Porsche Cayenne	MY14 - MY17

Hydraulic Braking Systems:

Vehicle Models	Year Range
Smart Fortwo	MY08 - MY17
Mercedes GLK-Class	MY10 - MY15
Mercedes E-Class	MY07 - MY17
Mercedes Sprinter	MY10 - MY16
Mercedes G-Class	MY07 - MY16
Mercedes Sprinter II	MY10 - MY16
BMW 1 Series	MY08 - MY13
BMW 2 Series	MY14 - MY17
BMW 3 Series	MY07 - MY17

BMW 4 Series	MY14 - MY17
BMW X3	MY07 - MY17

7. Prior to 2021, counsel for the plaintiffs were not aware of the information in the above table, listing the allegedly impacted vehicles. To the best of counsel's knowledge, information and belief, there is evidentiary support or there will be evidentiary support for the allegedly impacted vehicles listed above after a reasonable opportunity for further investigation or discovery.

The Defendants

Continental Defendants

8. Continental AG is a German corporation with its principal place of business in Hanover, Germany. During the Class Period, Continental AG manufactured, marketed, sold and/or distributed Hydraulic and/or Electronic Braking Systems for inclusion in Affected Automotive Vehicles sold in Canada, either directly or indirectly, through the control of its predecessors, affiliates and subsidiaries, including the defendants Continental Automotive GmbH ("**Continental Automotive**"), Continental Automotive Systems, Inc. ("**Continental US**") and Continental Tire Canada, Inc. (formerly known as Continental Automotive Canada, Inc.) ("**Continental Canada**").
9. Continental Automotive is a German corporation with its principal place of business in Hanover, Germany. During the Class Period, Continental Automotive manufactured, marketed, sold and/or distributed Hydraulic and/or Electronic Braking Systems for inclusion in Affected Automotive Vehicles sold in Canada, either directly or indirectly, through the control of its predecessors, affiliates and/or subsidiaries. Continental Automotive is owned and controlled by Continental AG.

10. Continental US is an American corporation with its principal place of business in Plymouth, Michigan. During the Class Period, Continental US manufactured, marketed, sold and/or distributed Hydraulic and/or Electronic Braking Systems for inclusion in Affected Automotive Vehicles sold in Canada, either directly or indirectly, through the control of its predecessors, affiliates and/or subsidiaries. Continental US is owned and controlled by Continental AG.

11. Continental Canada is a Canadian corporation with its principal place of business in Mississauga, Ontario. During the Class Period, Continental Canada manufactured, marketed, sold and/or distributed Hydraulic and/or Electronic Braking Systems for inclusion in Affected Automotive Vehicles sold in Canada, either directly or indirectly, through the control of its predecessors, affiliates and/or subsidiaries. Continental Canada is owned and controlled by Continental AG.

12. The business of each of Continental AG, Continental Automotive, Continental US and Continental 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 Hydraulic and/or Electronic Braking Systems for inclusion in Affected Automotive Vehicles sold in Canada and for the purposes of the conspiracy described hereinafter. Continental AG, Continental Automotive, Continental US and Continental Canada are collectively referred to herein as "**Continental**".

Unnamed Co-conspirators

13. Various persons, partnerships, sole proprietors, firms, corporations and individuals not named as defendants in this lawsuit, including, but not limited to, ZF Friedrichshafen AG, TRW Automotive GmbH, TRW Vehicle Safety Systems Inc., Kelsey-Hayes Company,

TRW Canada Limited and Kelsey-Hayes Canada Limited (collectively, “ZF TRW”), and Robert Bosch GmbH, Robert Bosch LLC, Robert Bosch North America Corporation, Bosch Brake Components LLC and Robert Bosch Inc. (collectively, “Bosch”), 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. Other 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

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

15. 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 Braking Systems Industry

16. Braking Systems slow or stop the movement of an automotive vehicle by absorbing energy. Braking Systems transmit brake pedal force to automotive wheel brakes through pressurized fluid, exerting force on the disc or drum brakes. In Electronic Braking Systems, this process is electronically activated, thus reducing response and build-up times in brake

cylinders. Braking Systems include, but are not limited to, various related components such as brake lines, master and slave cylinders, drum or disc brakes, electronic control units, and/or electrically actuated valves.

17. Braking Systems are installed by automobile original equipment manufacturers (“OEMs”) in new vehicles as part of the automotive manufacturing process.
18. For new vehicles, the OEMs—mostly large automotive manufacturers such as BMW, Daimler, Volkswagen and others—purchase Braking Systems directly from the defendants. Braking Systems, or components thereof, 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 Braking Systems directly to an OEM.
19. When purchasing Braking Systems, OEMs issue 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 and European manufactured vehicles in Europe, Japan, the United States, Canada and elsewhere.

20. The RFQ process also involves Automotive parts suppliers bidding and agreeing to supply Genuine or OEM Braking Systems repair or replacement parts for the estimated production life of the vehicle, as well as for three to four years after the end of production of the Automotive Vehicle. These repair or replacement parts are purchased by automotive dealers of Affected Automotive Vehicles and installed pursuant to automotive warranty programs or out-of-warranty repairs.
21. The impacted RFQ processes in this case for supplying Genuine or OEM Braking Systems repair or replacement parts to Canadian distributors of OEMs and automotive dealers occurred in conjunction with the RFQ processes for supplying Braking Systems for installation in new model vehicles. These RFQ processes were distinct from the processes used to price and supply Braking Systems repair or replacement parts to retailers like Canadian Tire and NAPA Auto Parts. Counsel for the plaintiffs were not aware of this fact before 2021. To the best of counsel's knowledge, information and belief, there is evidentiary support or there will be evidentiary support for these allegations after a reasonable opportunity for further investigation or discovery.
22. During the Class Period, the defendants and their co-conspirators supplied Hydraulic and Electronic Braking Systems to OEMs for installation in Affected Automotive Vehicles manufactured and sold in North America, Europe and elsewhere, including as Genuine or OEM Braking Systems repair or replacement parts to Canadian distributors of OEMs and to automotive dealers of Affected Automotive Vehicles. The defendants and their co-conspirators manufactured Hydraulic and Electronic Braking Systems: (a) in North

America for installation in Affected Automotive Vehicles manufactured in North America and sold in Canada, (b) outside North America for export to North America and installation in Affected Automotive Vehicles manufactured in North America and sold in Canada, and (c) outside North America for installation in Affected Automotive Vehicles manufactured outside North America for export to and sale in Canada, and (d) as replacement parts for Affected Automotive Vehicles in Canada and elsewhere.

23. The defendants and their co-conspirators intended as a result of their unlawful conspiracy to inflate the prices for Hydraulic and Electronic Braking Systems and Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems sold in North America and elsewhere.

24. The defendants and their co-conspirators unlawfully conspired to agree and manipulate prices for Hydraulic and Electronic Braking Systems and conceal their anti-competitive behaviour from OEMs and other industry participants. The defendants and their co-conspirators intended that their unlawful scheme and conspiracy would unlawfully increase the price at which Hydraulic and Electronic Braking Systems would be sold from the price that would otherwise be charged on a competitive basis. The defendants and their co-conspirators were aware that, by unlawfully increasing the prices of Hydraulic and Electronic Braking Systems, the prices of Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems would also be artificially inflated. The defendants and their co-conspirators intended that their unlawful scheme and conspiracy would injure purchasers of Hydraulic and Electronic Braking Systems and purchasers and lessees of Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems. The defendants were aware that their conduct would impact the prices of Braking Systems

beyond the specific RFQs for which they submitted conspiratorial bids and would impact the prices of all Hydraulic and Electronic Braking Systems sold directly or indirectly into Canada, including as a component of an Affected Automotive Vehicle.

25. The defendants and their co-conspirators are the dominant manufacturers and suppliers of Hydraulic and Electronic Braking Systems to the major German OEMs. Their customers include many OEMs with direct or indirect sales into Canada, including BMW, Volkswagen and Daimler. The automotive parts industry is characterized by high financial and relational barriers to entry, which were known to the defendants. Many OEMs invited only certain preferred or pre-qualified suppliers to bid on RFQs. These barriers to entry, coupled with the defendants' high market share among OEMs supplying Affected Automotive Vehicles to the North American market and the commodity-like nature of Hydraulic and Electronic Braking Systems, meant that the defendants intended and were able to increase the prices of all Hydraulic and Electronic Braking Systems sold directly or indirectly into Canada, including those manufactured by non-cartel members, and including as a component of an Affected Automotive Vehicle, to supra-competitive levels during the Class Period.
26. Relying on higher prices set by the defendants and given capacity constraints, the non-cartel suppliers were able to, and did, maximize their profits by charging higher prices for Hydraulic and Electronic Braking Systems than they would have in a competitive market. The non-cartel suppliers' conduct in charging higher prices was a direct response to the higher Hydraulic and Electronic Braking Systems prices caused by the defendants' collusive conduct and exercise of collective market power. But for the conspiracy, the

defendants would have charged lower, competitive prices, and the non-cartel suppliers would have needed to follow those lower prices or risk losing market share.

27. During the Class Period, members of the Proposed Class who directly and indirectly purchased Hydraulic and Electronic Braking Systems manufactured by non-cartel suppliers (“**Umbrella Purchasers**”), including as a component of an Affected Automotive Vehicle, suffered damages measured as the difference between the actual prices paid by them and the “but for” prices that they would have obtained in a competitive market. The defendants were aware and intended that the alleged conspiracy would result in Umbrella Purchasers paying supra-competitive prices for Hydraulic and Electronic Braking Systems and Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems during the Class Period.
28. The automotive industry in Canada and the United States is an integrated industry. Vehicles manufactured on both sides of the border are sold in Canada. The unlawful conspiracy affected prices of Hydraulic and Electronic Braking Systems, and Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems, in the United States and Canada, including Ontario.

Investigations into International Cartel and Resulting Fines

Europe

29. The European Commission fined Continental a total of €44,006,000 for its role in an alleged conspiracy to fix the prices of Hydraulic Braking Systems, sold to Daimler and BMW, involving conspiratorial conduct occurring between 2007 and 2011. The European Commission granted immunity to Continental for revealing a cartel respecting Electronic Braking Systems sold to Volkswagen.

30. The European Commission granted immunity to TRW for revealing a cartel respecting Hydraulic Braking Systems sold to Daimler and BMW.

Plaintiffs Purchased Affected Automotive Vehicles Containing Braking Systems

31. Kate O’Leary Swinkels purchased a new BMW 328i Coupe in 2008, which contained a Braking System.
32. During the Class Period, Stuart Budd & Sons Ltd. purchased for resale Affected Automotive Vehicles manufactured by BMW containing Braking Systems, and also purchased BMW Genuine or OEM Braking System repair or replacement parts pursuant to automotive warranty programs or out-of-warranty repairs.

Breaches of Part VI of *Competition Act*

33. From at least as early as February 1, 2007 until at least December 31, 2017, the defendants and their co-conspirators engaged in conspiracies to rig bids for and to fix, maintain, increase or control the prices of Hydraulic and Electronic Braking Systems sold to customers in North America, Europe, and elsewhere. The defendants and their co-conspirators conspired to enhance unreasonably the prices of Hydraulic and Electronic Braking Systems and/or to lessen unduly competition in the production, manufacture, sale and/or distribution of Hydraulic and Electronic Braking Systems in North America, Europe, and elsewhere. The conspiracies were intended to, and did, affect prices of Hydraulic and Electronic Braking Systems and Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems sold in Canada.

34. The defendants and their co-conspirators carried out the conspiracies by:

(a) participating in meetings, conversations and communications in the United States, Europe, and elsewhere to discuss the bids (including RFQs) and price quotations to be submitted to OEMs selling Affected Automotive Vehicles 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, Europe, 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 Braking Systems in North America, Europe, 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 Braking Systems sold to OEMs in North America, Europe, and elsewhere on a model-by-model basis;

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

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

- (g) enhancing unreasonably the prices of Braking Systems sold in North America, Europe, and elsewhere;
- (h) selling Braking Systems to OEMs in North America, Europe, and elsewhere for the agreed-upon prices, controlling discounts and otherwise fixing, increasing, maintaining or stabilizing prices for Braking Systems in North America, Europe, and elsewhere;
- (i) allocating the supply of Braking Systems sold to OEMs in North America, Europe, and elsewhere on a model-by-model basis;
- (j) accepting payment for Braking Systems sold to OEMs in North America, Europe, and elsewhere at collusive and supra-competitive prices;
- (k) engaging in meetings, conversations and communications in the United States, Europe 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, Europe, and elsewhere for the production, manufacture, sale or distribution of Braking Systems.

35. 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 Hydraulic and Electronic Braking Systems and/or Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems.
36. The conduct described above constitutes offences under Part VI of the *Competition Act*, in particular, sections 45(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.
37. Further or alternatively, the Canadian defendant, Continental Canada, implemented a directive, instruction, intimation of policy or other communication from their related entities identified herein, which communication was for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside of Canada that, if entered into in Canada, would have been in contravention of section 45, and therefore acted in contravention of section 46(1) of the *Competition Act* and are liable to the plaintiffs and other class members pursuant to section 36 of the *Competition Act*.

Breach of Foreign Law

38. The defendants' conduct, particularized in this statement of claim, took place in, among other places, the United States and Europe, where it was illegal and contrary to Section 1 of the *Sherman Antitrust Act*, Article 101 of the Treaty of the Functioning of the European Union, and Article 53 of the European Economic Area Agreement.

Civil Conspiracy

39. The defendants and their co-conspirators are liable for the tort of civil conspiracy—both under unlawful means conspiracy and predominant purpose conspiracy. The defendants

and their 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 Hydraulic and Electronic Braking Systems sold to customers in North America, Europe, and elsewhere in contravention of sections 45(1), 46(1), and 47(1) of the *Competition Act*.
40. In furtherance of the conspiracy, the defendants, their servants, agents and co-conspirators carried out the acts described in paragraph 35 above.
 41. The acts particularized in paragraph 35 were unlawful acts directed towards purchasers of Hydraulic and Electronic Braking Systems and/or Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems, including the plaintiffs, which unlawful acts the defendants and their co-conspirators knew in the circumstances would likely cause injury to those purchasers and the plaintiffs.
 42. The defendants and their 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 Hydraulic and Electronic Braking Systems, and to illegally increase their profits on the sale of Hydraulic and Electronic Braking Systems.
 43. The defendants and their co-conspirators intended to cause economic loss to the plaintiffs and other members of the Proposed Class. In the alternative, the defendants and their co-conspirators knew, in the circumstances, that their unlawful acts would likely cause injury.

Discoverability

44. Hydraulic and Electronic Braking Systems are not exempt from competition regulation and thus, the plaintiffs reasonably considered the Hydraulic and Electronic Braking Systems industries to be competitive industries. A reasonable person under the circumstances would not have been alerted to investigate the legitimacy of the defendants' prices for Hydraulic and Electronic Braking Systems.
45. 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

46. 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.
47. The defendants and their co-conspirators' anti-competitive conspiracy was self-concealing. As detailed in paragraph 35 above, the defendants took active, deliberate and wrongful steps to conceal their participation in the alleged conspiracy.
48. Because the defendants' agreements, understandings and conspiracies were kept secret, the 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 Hydraulic and Electronic Braking Systems and/or Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems.

Unjust Enrichment

49. As a result of their conduct, the defendants benefited from a significant enhancement of their revenues on the sale of Hydraulic and Electronic Braking Systems. All members of the Proposed Class, to the extent that they purchased Hydraulic and Electronic Braking Systems or Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems manufactured by the defendants, have suffered a corresponding deprivation. There is no juristic reason or justification for the defendants' enrichment—the defendants' receipt of the overcharge is the result of wrongful or unlawful acts. As such, there is and can be no juridical reason justifying the defendants' retention of the overcharge and, in particular, any contracts upon which the defendants purport to rely to receive the overcharge are void and illegal.

Damages

50. The conspiracy had the following effects, among others:
- (a) price competition has been restrained or eliminated with respect to Hydraulic and Electronic Braking Systems 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 Hydraulic and Electronic Braking Systems sold directly or indirectly to the plaintiff 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 Hydraulic and Electronic Braking Systems in Ontario and the rest of Canada.

51. Hydraulic and Electronic Braking Systems are identifiable, discrete physical products that remain essentially unchanged when incorporated into an Affected Automotive Vehicle. As a result, Hydraulic and Electronic Braking Systems follow a traceable chain of distribution from the defendants and their co-conspirators 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 Hydraulic and Electronic Braking Systems can be traced through the distribution chain.

52. By reason of the wrongful conduct alleged herein, the plaintiffs and other members of the Proposed Class have sustained losses by virtue of having paid higher prices for Hydraulic and Electronic Braking Systems and/or Affected Automotive Vehicles containing Hydraulic or Electronic Braking Systems than they would have paid in the absence of the illegal conduct of the defendants and their 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

53. The defendants and their co-conspirators used their market dominance, illegality and deception in furtherance of a conspiracy to illegally profit from the sale of Hydraulic and Electronic Braking Systems. They were aware that their actions would have a significant adverse impact on the Proposed Class. The conduct of the defendants and their co-

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

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

Service of Statement of Claim Outside Ontario

55. 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; and
- (b) Rule 17.02 (p) – the claim relates to a person ordinarily resident or carrying on business in Ontario.

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

Date: September 6, 2018

SOTOS LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns LSO# 36274J
Jean-Marc Leclerc LSO# 43974F
Tel: (416) 977-0007
Fax: (416) 977-0717

SISKINDS LLP
Barristers and Solicitors
680 Waterloo Street
London, ON N6A 3V8

Charles M. Wright LSO# 36599Q
Linda Visser LSO# 52158I
Tel: (519) 672-2121
Fax: (519) 672-6065

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
(Braking Systems)**

SOTOS LLP

Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns LSO# 36274J
Jean-Marc Leclerc LSO# 43974F
Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the Plaintiffs

SISKINDS LLP

Barristers and Solicitors
680 Waterloo Street
London, ON N6A 3V8

Charles M. Wright LSO# 36599Q
Linda Visser LSO# 52158I
Tel: (519) 672-2121
Fax: (519) 672-6065

Schedule "B"

Court File No. CV- 18-00604648-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KATE O'LEARY SWINKELS and STUART BUDD & SONS LTD.

Plaintiffs

and

CONTINENTAL AG, CONTINENTAL
AUTOMOTIVE GMBH, CONTINENTAL AUTOMOTIVE SYSTEMS, INC. and
CONTINENTAL TIRE CANADA, INC. (FORMERLY KNOWN AS CONTINENTAL
AUTOMOTIVE CANADA, INC.)

Defendants

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

PLAINTIFFS' LITIGATION PLAN

[May 5, 2022]

A. DEFINITIONS 3

B. REPORTING TO AND COMMUNICATING WITH CLASS MEMBERS 5

C. LITIGATION SCHEDULE PRIOR TO THE COMMON ISSUES TRIAL 6

Notice of Certification..... 6

Pleadings 9

Document Exchange and Management 10

Examinations for Discovery 10

Expert Reports 11

Production from Non-Parties..... 11

Motions..... 11

Mediation 11

Clarification of the Common Issues	12
Amendment of Class Definition	12
D. TRIAL OF THE COMMON ISSUES.....	13
E. LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL.....	14
Division of Class Members into Purchaser Groups.....	14
Example 1 - Resolution of Individual Issues if Aggregate Damages are Awarded.....	14
Example 2 - Resolution of Damages on an Individual Basis.....	18
<i>Cy Près</i> Distribution	19
Notice of the Resolution.....	20
Adjudicator's Report to the Court.....	20
Orders Relating to the Costs of Administration	21
F. AMENDMENT OF THIS PLAN	21

A. DEFINITIONS

1. In this Plan,

- (a) **“Affected Automotive Vehicle”** means new passenger cars, sport utility vehicles (SUVs), vans, and light trucks (up to 10,000 lbs) manufactured by Bayerische Motoren Werke AG, Daimler AG, and Volkswagen AG and/or their subsidiaries or affiliated companies, under the following brand names: BMW, MINI, Mercedes-Benz, Smart, Volkswagen, and Audi. Affected Automotive Vehicles include, but are not limited to:

Electronic Braking Systems:

Vehicle Models	Year Range
Audi A4	MY14 - MY17
Audi A5	MY14 - MY17
Audi A6	MY16 - MY17
Audi A8	MY16 - MY17
Audi Q5	MY14 - MY17
Audi Q7	MY14 - MY17
Volkswagen Touareg	MY16 - MY17
Porsche Cayenne	MY14 - MY17

Hydraulic Braking Systems:

Vehicle Models	Year Range
Smart Fortwo	MY08 - MY17
Mercedes GLK-Class	MY10 - MY15
Mercedes E-Class	MY07 - MY17

Mercedes Sprinter	MY10 - MY16
Mercedes G-Class	MY07 - MY16
Mercedes Sprinter II	MY10 - MY16
BMW 1 Series	MY08 - MY13
BMW 2 Series	MY14 - MY17
BMW 3 Series	MY07 - MY17
BMW 4 Series	MY14 - MY17
BMW X3	MY07 - MY17

- (b) **“Braking Systems”** refers to hydraulic or electronic braking systems. Hydraulic braking systems are automotive systems that transmit brake pedal force to automotive wheel brakes through pressurized fluid contained in brake cylinders. Electronic braking systems are electronically activated automotive braking systems that reduce response and build-up times in brake cylinders. Braking Systems purchased for repair or replacement in an Affected Automotive Vehicle are excluded from the Class, unless the repair or replacement Braking System was a Genuine or OEM replacement part installed by an automotive dealer of an Affected Automotive Vehicle.
- (c) **“Class”** means all Persons in Canada who, during the Class Period, purchased Braking Systems for installation in an Affected Automotive Vehicle or who purchased and/or leased an Affected Automotive Vehicle containing a Braking System. Excluded from the class are the Defendants, their parent companies, subsidiaries, and affiliates, and any person who validly opted out of the action in accordance with the orders of the Ontario or British Columbia Courts.

- (d) “**Class Action**” means Ontario Superior Court of Justice Action No. CV-18-00604648-00CP (Toronto).
- (e) “**Class Counsel**” means Sotos LLP and Siskinds LLP.
- (f) “**Class Period**” means between February 1, 2007 and December 31, 2017.
- (g) “**Court**” means the Ontario Superior Court of Justice.
- (h) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
- (i) “**Notice of Certification**” shall have the meaning attributed to it in paragraph 5(a).
- (j) “**Notice Plan**” shall have the meaning attributed to it in paragraph 5(b).
- (k) “**Notice of Resolution**” shall have the meaning attributed to it in paragraph 48.
- (l) “**Parties**” means the Defendants and the Plaintiff.

B. REPORTING TO AND COMMUNICATING WITH CLASS MEMBERS

2. Class Counsel will regularly report to the Class through their respective firm websites and as otherwise provided in this Litigation Plan. The websites shall include an electronic form that can be completed in order to receive updates about the Class Action.

3. Each Class Counsel firm will designate a person to answer communications from putative Class Members concerning the Class Action. Class Counsel are capable of answering communications from French-speaking Class Members.

C. LITIGATION SCHEDULE PRIOR TO THE COMMON ISSUES TRIAL

4. After disposition of the certification motion on consent, the Parties shall attend a case management conference to set a schedule for the remaining steps in the Class Action, which are described below.

Notice of Certification

5. The Plaintiffs will ask the Court to:

- (a) settle the form and content of the notice of certification (the “Notice of Certification”); and
- (b) settle the means by which the Notice of Certification will be disseminated to Class Members (the “Notice Plan”).

6. The scope of the Notice Plan will depend on notice previously given in the Class Action and other actions relating to alleged price-fixing of auto parts. The Notice Plan might include one or more of the following elements:

- (a) The Notice of Certification will be sent by direct mail to:
 - (i) Canadian distributors;
 - (ii) automotive dealers of Affected Automotive Vehicles with annual sales over \$50 million in Canada;
 - (iii) any person who has registered to receive updates on Class Counsel’s respective websites; and

- (iv) any person (or their counsel) known by Class Counsel as having commenced a similar action in Canada;
- (b) Where the person is located in Quebec, the Notice of Certification will be sent in English and French;
- (c) The Notice of Certification will be posted by Class Counsel, in English and French, on their respective websites;
- (d) The Notice of Certification will be published once in the following newspapers, in either English or French, as is appropriate for each newspaper, subject to each having reasonable publication deadlines and costs:
 - (i) The Globe and Mail, national edition;
 - (ii) The National Post, national edition;
 - (iii) Le Journal de Montreal;
 - (iv) The Montreal Gazette;
 - (v) Le Soleil (Québec City);
- (e) The Notice of Certification will be sent to the following industry associations, in either English or French, as is appropriate for each association, requesting voluntary distribution to their membership:
 - (i) Automobile Protection Association;
 - (ii) Alberta Motor Vehicle Industry Council (AMVIC);

- (iii) Motor Vehicles Sales Authority of British Columbia;
- (iv) Canadian Automobile Association (CAA);
- (v) Alberta Motor Association (AMA);
- (vi) British Columbia Automobile Association (BCAA);
- (vii) CAA Saskatchewan;
- (viii) CAA Manitoba;
- (ix) CAA South Central Ontario;
- (x) CAA Niagara;
- (xi) CAA North & East Ontario;
- (xii) CAA Quebec;
- (xiii) CAA Atlantic;
- (xiv) Automobile Journalists Association of Canada;
- (xv) Consumer Interest Alliance Inc.;
- (xvi) Consumers' Association of Canada;
- (xvii) Consumer Council of Canada;
- (xviii) Union des consommateurs;
- (xix) Option Consommateurs;

- (xx) Protégez-Vous;
- (xxi) Canadian Automotive Dealers Association;
- (xxii) Motor Dealers' Association of Alberta;
- (xxiii) Trillium Automobile Dealers Association;
- (xxiv) La Corporation des Concessionnaires d'Automobiles du Québec;
- (xxv) Manitoba Motor Dealer Association
- (xxvi) New Brunswick Automotive Dealers Association;
- (xxvii) Nova Scotia Automotive Dealers Association;
- (xxviii) Prince Edward Island Automotive Dealers Association; and
- (xxix) Newfoundland & Labrador Automotive Dealers Association.

7. The costs of Notice Plan will be paid by the Plaintiffs in the first instance with the right reserved to the Plaintiffs to seek the recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.

Pleadings

8. The Defendants shall each provide a statement of defence no later than seventy-five (75) days following the date on which the Court renders a decision with respect to certification.

Document Exchange and Management

9. Within sixty (60) days after the close of pleadings or as otherwise agreed to by the Parties, the Parties shall attend a “meet and confer” in order to develop a discovery plan in accordance with Rule 29.1. In developing the discovery plan, the Parties shall consult with the Sedona Canada Principles Addressing Electronic Discovery.

10. In accordance with Rule 30 and the discovery plan, the Parties shall provide documentary discovery.

11. Class Counsel are able to handle the intake and organization of the documents that will likely be produced by the Defendants and will use data management systems to organize, code and manage the documents.

Examinations for Discovery

12. The Parties shall conduct examinations for discovery in accordance with Rule 31.

13. The Plaintiffs may examine for discovery one representative from each of the Defendants, subject to the Defendants’ right under rule 31.03 (9) to request the court to impose limits on such discovery. The Plaintiffs shall estimate the time required for each examination after the production of documents has been completed.

14. The Plaintiffs may ask the Court for an order allowing them to examine multiple representatives of one or more Defendant and/or for an order allowing more than seven hours of oral examinations for discovery.

15. The Parties may elect to conduct examinations for discovery by written questions in accordance with Rule 35 of the *Rules of Civil Procedure*.

16. The Parties can agree to conduct some or all examinations for discovery by way of video conferencing. If no agreement can be reached, any party can seek directions from the Court.

Expert Reports

17. The Parties shall make reasonable efforts to agree on a schedule or timetable for the exchange of all expert reports, with the first such report to be exchanged within one hundred and eighty (180) days of the completion of examinations for discovery, unless the Parties agree or the Court orders otherwise.

Production from Non-Parties

18. In accordance with the expert report of Dr. Russell Lamb filed in support of certification, the Plaintiffs may seek the following additional documents and/or data from non-parties:

- (a) price information from non-Defendant manufacturers of Braking Systems; and/or
- (b) if sufficient information is not available from public sources, price data from Canadian distributors and/or Canadian dealers of Affected Automotive Vehicles.

19. If any of the above-noted data and/or other documents cannot be obtained cooperatively, the Plaintiffs may bring a motion pursuant to Rule 31.10 of the *Rules of Civil Procedure* for leave to obtain discovery from non-parties.

Motions

20. Although no motions other than those indicated in this plan are currently anticipated by the Plaintiffs, additional motions may be required and will be scheduled as the case progresses.

Mediation

21. The Plaintiffs will participate in mediation if the Defendants are prepared to do so.

Clarification of the Common Issues

22. Following certification, examinations for discovery and the exchange of expert opinions and before the trial of the common issues, the Plaintiffs may ask the Court for an order to clarify and/or redefine the common issues, if required.

Amendment of Class Definition

23. The statement of claim alleges that the alleged unlawful conduct might have impacted prices after the end of the Class Period. Following discovery, the Plaintiffs may ask the Court for an order amending the Class Period to include such period during which prices were impacted.

24. Furthermore, following the receipt of cooperation and/or discovery, the Plaintiffs may ask the Court for an order amending the Class (specifically, the definition of Affected Automotive Vehicle) to include additional brands of automotive vehicles or remove certain enumerated brands of automotive vehicles.

25. In the event the Plaintiffs seek amendments in accordance with this section, the Plaintiffs may also ask the Court for an order for leave to amend the Statement of Claim (if the pleadings have closed, otherwise the Plaintiffs may amend the Statement of Claim as of right) and, if appropriate, approving a notice to affected persons.

26. Depending on the timing of when any cooperation is received, the Plaintiffs may seek to amend the Class.

27. The Defendants reserve all rights they may have to oppose any steps taken or relief sought by the Plaintiffs prior to the common issues trial.

D. TRIAL OF THE COMMON ISSUES

28. The common issue trial will determine whether the Defendants, or any of them, or any of their unnamed co-conspirators unlawfully conspired to fix prices of Braking Systems. The common issues trial will also determine whether the Defendants, or any of them, or any of their unnamed co-conspirators unlawfully conspired to rig bids relating to Braking Systems and/or allocate markets. If the Court determines that some or all of the Defendants and their unnamed co-conspirators conspired to fix prices of, rig bids relating to, or allocate markets for Braking Systems, the common issues trial will determine the duration of the unlawful conduct and whether the Plaintiffs and Class Members were injured as a result, whether an aggregate assessment of damages is appropriate having regard to ss. 23 and 24 of the CPA, and if so, the amount of aggregate damages.

29. The common issues trial will proceed pursuant to the *Rules of Civil Procedure*.

30. The proposed common issues relating to the existence and scope of the alleged conspiracy depend solely on the conduct of the Defendants and can be determined without reference to the circumstances of individual Class Members.

31. The proposed common issues relating to fact of harm will be determined, in part, by expert evidence regarding the nature of the market for Braking Systems. The expert evidence put forward by the Plaintiff's certification expert provides an indication of the type of evidence that might be used to attempt to establish fact of harm on a class-wide basis, if any.

32. The proposed common issues relating to the aggregate assessment of damages will be determined, in part, by expert evidence. The expert evidence put forward by the Plaintiff's

certification expert provides an indication of the type of evidence that might be used to attempt to determine aggregate damages on behalf of the Class, if any.

E. LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL

33. Following the common issues trial, assuming success in favour of the Plaintiffs, the Parties shall attend a case management conference to set a schedule and confirm the process to be followed in bringing the Class Action to a final resolution, including a resolution of any individual issues.

Division of Class Members into Purchaser Groups

34. It may be necessary to divide Class Members into purchaser groups, including Canadian distributors who purchased Affected Automotive Vehicles for import into Canada, dealers who purchased Affected Automotive Vehicles, and end users who purchased Affected Automotive Vehicles. The Court, or a referee appointed by the Court, will be asked to approve such division.

35. The Plaintiffs are cognizant of the need to accommodate varying interests amongst and potentially within these purchaser groups possibly through independent representation and/or expert advice.

Example 1 - Resolution of Individual Issues if Aggregate Damages are Awarded

36. If aggregate damages are determined and awarded at the common issues trial, a plan for distributing the aggregate damage award between Canadian distributors, dealers, and end users will be developed by the Plaintiffs in accordance with s. 24 of the CPA to provide fair compensation through an efficient, timely and impartial distribution process. It is anticipated that this process will involve expert evidence regarding the extent to which any unlawful overcharge was passed through the distribution chain to Canadian distributors, dealers, and end users.

37. Pursuant to ss. 24(2)-(4) and 26(2) of the CPA, the Court (or a referee, if one is appointed) will be asked to determine:

- (a) the allocation of the aggregate damages recovery among the purchaser groups; and
- (b) whether the claims of Class Members in each purchaser group should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

38. Once the division of the aggregate damage award between the purchaser groups has been determined, and assuming it is determined that the claims of Class Members may be assessed in a summary claims procedure, the Plaintiffs may ask the Court (or a referee, if one is appointed) to approve a summary claims procedure, pursuant to ss. 24(5)-(7) of the CPA, through which Class Members can claim compensation. The claims procedure may include the following aspects:

- (a) setting a claims bar date by which date eligible Class Members will be required to file their claims.
- (b) creating a standard claim form and filing procedure. As part of the claim form, claimants might be required to file evidence establishing, *inter alia*:
 - (i) that the claimant is a Class Member;
 - (ii) the amount of the claimant's indirect purchases of Braking Systems as part of the purchase or lease of an Affected Automotive Vehicle(s); and
 - (iii) whether the purchases were made in the capacity of a Canadian distributor, dealer or end user.

The claim form will contain detailed instructions regarding the nature of the evidence required to support the claim.

(c) appointing an independent third-party to receive and process claims (the “Adjudicator”). The Adjudicator must have English and French capabilities. The Adjudicator will be responsible for *inter alia*:

- (i) responding to Class Member inquiries regarding the claims process;
- (ii) receiving claim forms;
- (iii) reviewing claims for completeness, notifying Class Members of any deficiencies in their claim forms and providing Class Members with the opportunity to remedy any deficiencies;
- (iv) assessing claims, including determining whether the claimant:
 - (1) is a Class Member;
 - (2) the amount of the claimant’s purchases of Braking Systems, as a component of an Affected Automotive Vehicle;
 - (3) whether the purchases were made in the capacity of a Canadian distributor, dealer or end user; and
 - (4) the claimant’s share of the aggregate damage award, punitive damages award, investigation costs, and/or prejudgment and post-judgment interest award;

- (v) issuing a decision to the claimant in respect of the matters outlined in paragraph 39(c)(iv) above; and
 - (vi) reporting to counsel and the Court as required.
- (d) Creating a mechanism for claimants to dispute the Adjudicator's findings pursuant to paragraph 39(c)(iv). The mechanism for disputing claims might include the following aspects:
- (i) if a referee has not already been appointed, the appointment of a referee to resolve disputed findings. The referee must have English and French capabilities;
 - (ii) the development of a standardized form for claimants to dispute the Adjudicator's findings;
 - (iii) to the extent possible, the referee shall resolve the dispute based on the claim form and standardized review forms. Where, in the referee's view, additional submissions are necessary, the referee can request additional submissions from the claimant, the Adjudicator and/or Class Counsel in the form of written submissions or by way of teleconference or video-conference;
 - (iv) the referee shall issue a decision to the claimant regarding the subject-matter of the dispute;

(v) the referee's decision shall be final and binding, and shall be subject to no further right to review.

(e) Payment of eligible claims. After the proposed distribution is approved in accordance with paragraphs 49 to 50 below, the Adjudicator shall issue payment to all eligible claimants.

39. The Plaintiffs may also seek to use the sales records of Canadian distributors to facilitate the claims process for dealers and end users. For example, the sales records of Canadian distributors might be used as presumptive proof of a dealer's or end user's purchases of Affected Automotive Vehicles, where the dealer or end user does not contest those records. If the Canadian distributors are unwilling to provide this information cooperatively, the Plaintiffs may bring a motion for production.

40. The summary claims procedure shall, wherever practical, use a paperless, electronic web-based technology system.

Example 2 - Resolution of Damages on an Individual Basis

41. If the Court does not award aggregate damages, the amount and distribution of damages would need to be determined on an individual basis. The following process is an example of how the amount and distribution of damages could be determined.

42. Pursuant to s. 23 of the CPA, the Court will be asked, based on expert evidence and other evidence which may be necessary, to determine the amount of damages to be awarded to Class Members in each purchaser group. For example, the Court might be asked to determine that Class Members included in a particular purchaser group are entitled to damages equal to 5% of the

Braking Systems purchased indirectly as part of an Affected Automotive Vehicle during the Class Period, while those Class Members included in another purchaser group might only be entitled to damages equal to 2% of the Braking Systems purchased indirectly as part of an Affected Automotive Vehicle.

43. Once the amount of damages to be awarded to each purchaser group is determined, a process similar to that described in paragraphs 38 to 41 could likely be used to determine the claims of each individual Class Member.

44. If the Plaintiffs or their experts conclude that damages cannot be determined either in whole or in part using purchaser groups, evidence will be led to prove the damages for some or all Class Members individually. Many Class Members would have significant purchases of Braking Systems purchased indirectly as part of an Affected Automotive Vehicle and, in many circumstances, the value of the claims would justify proving damages individually. The Plaintiffs might ask the Court, or a referee if one is appointed, to set a minimum monetary value of Braking Systems purchased indirectly as part of an Affected Automotive Vehicle that a Class Member must have in order to file a claim.

***Cy Près* Distribution**

45. If after all approved payments are made to eligible Class Members, there remain monies available for distribution by virtue of the failure of Class Members to cash the cheques received as compensation for their claims, interest earned or otherwise, the Plaintiffs will ask the Court (or a referee, if one is appointed) to approve, pursuant to s. 27.2 of the CPA, a *cy près* distribution to organizations that operate for the benefit of Class Members.

46. The Plaintiffs might also ask the Court (or a referee, if one is appointed) to approve, pursuant to s. 27.2 of the CPA, the compensation of small volume purchasers of Braking Systems purchased indirectly as part of an Affected Automotive Vehicle through a *cy prè*s distribution to organizations that operate for the benefit of those Class Members.

Notice of the Resolution

47. Class Counsel will prepare a notice, the form and content of which is to be approved by the Court, informing Class Members of the resolution of the common issues trial, the amount and allocation of damages and the individual claims process, including the claims deadline (the “Notice of Resolution”). The Plaintiffs might ask that the Notice of Resolution be published in the same or similar manner as the Notice of Certification. The scope of the publication will depend on notices previously given in the Class Action and other actions relating to alleged price-fixing of auto parts, and might involve a digital aspect.

Adjudicator’s Report to the Court

48. As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the Adjudicator shall report to the Court the proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award and/or prejudgment and post-judgment interest award.

49. The Court will decide whether to authorize the Adjudicator to distribute the award to eligible Class Members. No distribution to eligible Class Members shall be made until authorized by the Court. The Adjudicator may make an interim distribution, if authorized by the Court.

50. After the Adjudicator makes its final distribution, it shall report to the Court and be discharged as the Adjudicator.

Orders Relating to the Costs of Administration

51. The Plaintiffs will ask the Court to order that the Defendants pay all administration costs, including the costs of the Notice of Resolution and the fees of the Adjudicator and the referee. If the Court does not so order, the Plaintiffs will seek an order that these costs be paid out of the total recovery after payment of counsel fees, disbursements and applicable taxes but before any distribution to the eligible Class Members.

F. AMENDMENT OF THIS PLAN

52. This Litigation Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**ORDER
- Braking Systems -
- Consent Certification -**

Sotos LLP
Barristers and Solicitors
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns LSO #36274J
dsterns@sotosllp.com
Jean-Marc Leclerc LSO #43974F
jleclerc@sotosllp.com
Tel: (416) 977-0007
Fax: (416) 977-0717

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street
London, ON N6A 3V8

Charles M. Wright LSO #36599
charles.wright@siskinds.com
Linda Visser LSO#82158I
linda.visser@siskinds.com
Tel: (519) 672-2121
Fax: (519) 672-6065

Lawyers for the Plaintiffs