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Ottawa

**ONTARIO
SUPERIOR COURT OF JUSTICE**

R. & C. GOERING

Plaintiffs

- and -

MERCEDES-BENZ CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

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 lawyer 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: May 29, 2020

Issued by

(S) Signature

Local Registrar

Address of
court office:

161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: Mercedes-Benz Canada Inc.

98 Vanderhoof Avenue
Toronto, Ontario
M4G 4C9

Tel: (416) 425-3550

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) “**Subject Vehicles**” means the following Mercedes vehicles, which were designed, tested, manufactured, marketed, distributed, supplied, warranted, leased, and/or sold by the

Defendant:

- 2008-2019 Mercedes C-Class
- 2012-2017 Mercedes CLS-Class
- 2010-2019 Mercedes E-Class
- 2013-2016 Mercedes GL-Class
- 2017-2019 Mercedes GLS-Class
- 2015-2019 Mercedes GLA-Class
- 2012-2015 Mercedes M-Class
- 2016-2019 Mercedes GLE-Class
- 2010-2015 Mercedes GLK-Class
- 2016-2019 Mercedes GLC-Class;

(b) “**HVAC Systems**” means the defective heating, ventilation, and air-conditioning systems equipped in the **Subject Vehicles**;

(c) “**Design Defect**” means the serious and pervasive design and manufacturing defects, which cause the **HVAC Systems to** accumulate mould and mildew residue and growth that, when in use, emits a moldy, mildewy, or sour odour that permeates the vehicle cabin a creates unacceptable air quality, and even more pungently in humid weather and after it has rained;

- (d) “**Class**” or “**Class Members**” means all persons, entities or organizations resident in Canada, excluding Quebec, who purchased or leased the **Subject Vehicles** containing the defective **HVAC Systems**;
- (e) “*Class Proceedings Act*” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (f) “*Sale of Goods Act*” means the *Sale of Goods Act*, RSO 1990, c S.1, as amended, including ss. 15 & 51;
- (g) “**Sale of Goods Legislation**” means:
- (i) The *Sale of Goods Act*, RSBC 1996, c 410, as amended (British Columbia);
 - (ii) The *Sale of Goods Act*, RSA 2000, c S-2, as amended (Alberta);
 - (iii) The *Sale of Goods Act*, RSS 1978, c S-1, as amended (Saskatchewan);
 - (iv) The *Sale of Goods Act*, CCSM c S10, as amended (Manitoba);
 - (v) The *Sale of Goods Act*, RSNL 1990. c S-6, as amended (Newfoundland);
 - (vi) The *Sale of Goods Act*, RSNB 2016, c 110, as amended (New Brunswick);
 - (vii) The *Sale of Goods Act*, RSNS 1989, c 408, as amended (Nova Scotia);
 - (viii) The *Sale of Goods Act*, RSPEI I 988, c S-1, as amended (Prince Edward Island);
 - (ix) The *Sale of Goods Act*, RSY 2002, c 198, as amended (Yukon);
 - (x) The *Sale of Goods Act*, RSNWT 1988, c S-2, as amended (Northwest Territories and Nunavut);

- (h) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14 & 15;
- (i) “**Consumer Protection Legislation**” means:
- (i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia);
 - (ii) The *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta);
 - (iii) The *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan);
 - (iv) The *Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba);
 - (v) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland);
 - (vi) The *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick);
 - (vii) The *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia);
 - (viii) The *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island);
 - (ix) The *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon);

- (x) The *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and
- (xi) The *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut);
- (j) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended, including ss. 36 & 52;
- (k) “**Courts of Justice Act**” means the *Courts of Justice Act*, RSO 1990, c C.43, as amended, including ss. 128, 129, & 130;
- (l) “**Defendant**” or “**Mercedes**” means Mercedes-Benz Canada Inc.;
- (m) “**Plaintiffs**” mean R. and C. Goering; and
- (n) “**Representation(s)**” means the **Defendant’s** false, misleading or deceptive representations that its **Subject Vehicles**, including the defective **HVAC Systems** therein
 - (a) have performance characteristics, uses, benefits or qualities, which they do not have,
 - (b) are of a particular standard, quality, or grade, which they are not; and (c) their use of exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the **Design Defect** as such use or failure deceives or tends to deceive.

THE CLAIM

2. The proposed Representative Plaintiffs, R. and C. Goering, claim on their own behalf and on behalf of the members of the Class as defined in paragraph 5 below (the “Class”) as against Mercedes-Benz Canada Inc. (the “Defendant”):
 - (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiffs as Representative Plaintiffs for the Class Members;
 - (b) A declaration that in designing, testing, manufacturing, marketing, distributing, supplying, warranting, leasing, and/or selling the Subject Vehicles with the Design Defect, the Defendant committed the following:
 - (i) Breach of the express and/or implied warranties;
 - (ii) Negligence in the design, testing, manufacture, marketing, distribution, supply, warranty, lease, and/or sale of the Subject Vehicles;
 - (iii) Fraudulent concealment in material omission and affirmative misrepresentations regarding the Design Defect;
 - (iv) Breach of the implied covenant of good faith and fair dealing;
 - (v) Committed unfair practices in violation of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*, the *Sale of Goods Act* and the Sale of Goods Legislation;

- (c) A declaration that the present Statement of Claim is considered as notice given by the Plaintiffs on their own behalf and on behalf of “persons similarly situated” and is sufficient to give notice to the Defendant on behalf of all Class Members;
- (d) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation;
- (e) General damages in an amount to be determined in the aggregate for the Class Members for, *inter alia*, pain, suffering, anxiety/anguish, embarrassment, trouble and inconvenience;
- (f) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*,
 - (i) Overpayment for the purchase price and/or lease payments of the Subject Vehicles,
 - (ii) Lower resale value/ diminished value of the Subject Vehicles,
 - (iii) Out-of-pocket costs of attempting to identify, repair, and replace the HVAC Systems, including the purchase of replacement air filters, cleaners, AC and heater housing unit, evaporators, other parts and labour related thereto, including future costs of repair and including deductibles paid when repairs were covered by warranty and the full cost of repair when they were not covered,

- (iv) Out-of-pocket loss, such as buying air fresheners to help mask the smell,
- (v) Loss of full use and enjoyment of the Subject Vehicles by having to endure a noxious odour and/or driving with the windows open in undesirable conditions,
- (vi) Costs of purchasing a Mercedes service plan to avoid having to pay future costs related to the smell;
- (vii) Expenditures for rental vehicles;
- (g) Punitive (exemplary) and aggravated damages in the aggregate in an amount that this Honourable Court deems appropriate;
- (h) An order that Class Members are entitled to a refund of the purchase price of their Subject Vehicles, including, but not limited to sales taxes, license and registration fees based *inter alia* on revocation of acceptance and rescission or, in the alternative, the diminished value of the Subject Vehicles;
- (i) In the alternative, an order for an accounting of revenues received by the Defendant resulting from the sale of the Subject Vehicles;
- (j) A declaration that any funds received by the Defendant through the sale of the Subject Vehicles are held in trust for the benefit of the Plaintiffs and Class Members;

- (k) Restitution and/or a refund of all monies paid to or received by the Defendant from the sale of its Subject Vehicles to members of the Class on the basis of unjust enrichment;
- (l) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendant from the sale of its Subject Vehicles to members of the Class on the basis of *quantum valebant*;
- (m) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (n) A mandatory injunction requiring the Defendant to recall, repair and/or replace the HVAC Systems in the Subject Vehicles free of charge;
- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128, 129, and 130 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiffs

3. The Plaintiffs, R. and C. Goering, are a married couple that resides together in the city of Newmarket, in the province of Ontario.

4. On January 4, 2018, the Plaintiffs purchased a used 2014 Mercedes-Benz ML350 BlueTEC 4MATIC (M-Class) installed with the defective HVAC System for \$54,802.17 including taxes.

The Class

5. The Plaintiffs seek to represent the following class of which they are members (the “Proposed Class”):

All persons, entities or organizations resident in Canada, excluding Quebec, who purchased or leased a:

- 2008-2019 Mercedes C-Class
- 2012-2017 Mercedes CLS-Class
- 2010-2019 Mercedes E-Class
- 2013-2016 Mercedes GL-Class
- 2017-2019 Mercedes GLS-Class
- 2015-2019 Mercedes GLA-Class
- 2012-2015 Mercedes M-Class
- 2016-2019 Mercedes GLE-Class
- 2010-2015 Mercedes GLK-Class
- 2016-2019 Mercedes GLC-Class

(the “Subject Vehicles”).

The Defendant

6. The Defendant, Mercedes-Benz Canada Inc. (hereinafter “Mercedes”), is a Canadian corporation with its principal place of business in Toronto, Ontario. It designed, tested, manufactured, marketed, distributed, supplied, warranted, leased, and/or sold the Subject Vehicles equipped with uniformly defective HVAC Systems.

THE NATURE OF THE CLAIM

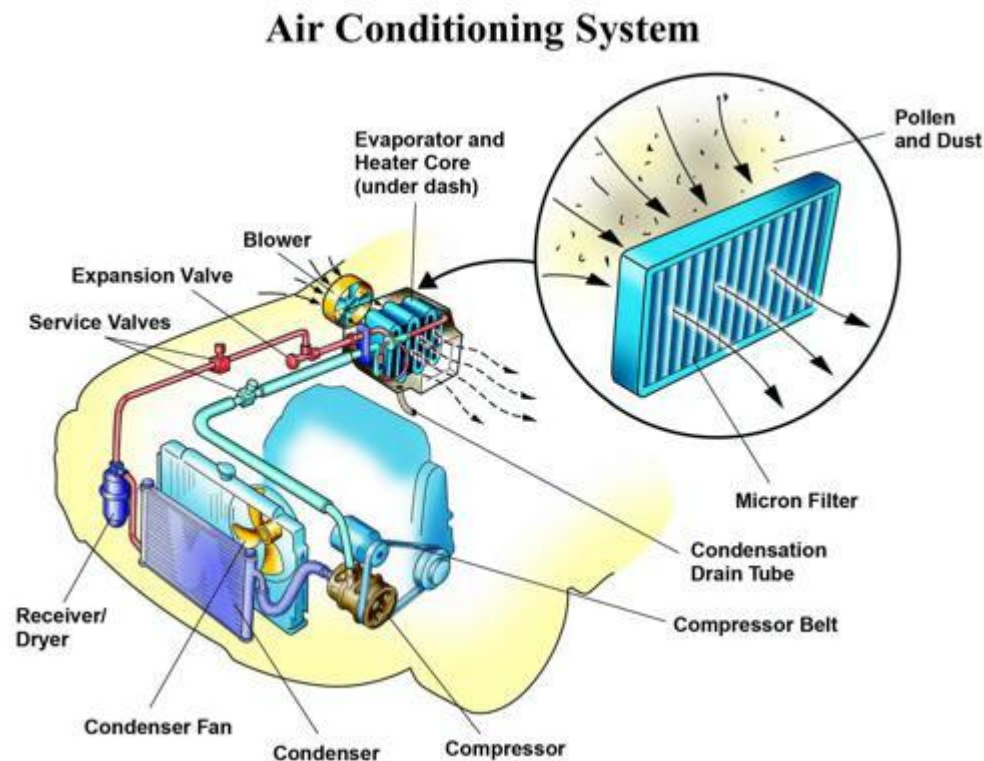
7. These class proceedings concern the quality, design, and manufacturing defects with the HVAC Systems installed in the Subject Vehicles, which cause them to accumulate mould and mildew residue and growth that, when in use, emits a moldy, mildewy, or sour odour that permeates the vehicle cabin that render them unmerchantable and unsuitable for use.

8. Despite longstanding knowledge, the Defendant failed to disclose and/or actively concealed the reality that the HVAC Systems installed in the Subject Vehicles are uniformly defective and predisposed to the Design Defect. Mercedes actively concealed the Design Defect and the fact that its existence would diminish both the intrinsic and resale value of the Subject Vehicles. As a result, the cost of repairs was transferred to Class Members, who were left completely unaware of the Design Defect until the warranty period had expired, based on the Defendant’s representations.

I. The HVAC System Design Defect and Mercedes' Response

9. The Subject Vehicles' HVAC Systems are all substantially the same from a mechanical engineering standpoint and they employ the same general components (evaporator, evaporator housing, ducting, fan, filter, drain lines, etc...).

10. A well-functioning air-conditioning system should be a standard feature of any new vehicle. Below is an illustration of the components and functioning of an HVAC system:



11. When a vehicle's HVAC system cools air, it is normal that condensation forms on evaporator. In a non-defective system, this condensation is typically evaporated through the activation of a fan and airflow over the evaporator; however, in the Subject Vehicles, the

condensation that builds on the evaporator does not get properly and fully evaporated, creating a moist, hospitable environment for the growth of bacteria, fungus, mould, and spores.

12. Due to the HVAC System Design Defect, several mould species, including *Aspergillus/Penicillium*, *Ascospores*, and *Smut/Periconia/Myxomy*, are present in the evaporator of the Subject Vehicles. Over time, these moulds will secrete mycotoxins, such as Patulin, leading to noxious odours. The time necessary for the Design Defect to lead to a discernable smell is variable – it may be as early as 30 days or can take as long as 2-3 years.

13. Mycotoxins are toxic to humans and animals and are known to cause some or all of the following: allergic reactions, infections, cellular damage, DNA damage, interference with RNA synthesis, inflammation, gastroenteritis, and other harmful effects.

14. Once the mycotoxins have taken hold, when the HVAC Systems are in use, the mouldy air gets blown into the vehicle cabin, which emits a foul smell that is terribly unpleasant, and further, can also cause occupants to suffer respiratory problems (especially for people with asthma) and aggravate their existing allergies.

15. Further, when the mould/mildew/fungus growing in the evaporator spreads, it can result in reduced HVAC System efficiency, while also becoming more difficult to remove and requiring evaporator replacement in many instances.

16. In addition, the tightly sealed and enclosed passenger compartment causes concentration levels of toxic smells and chemicals to become much higher than in larger and less tightly sealed spaces.

17. Unfortunately, Class Members are most oftentimes not aware of the source of the odour – they logically surmise that there is some organic material (such as food) decomposing somewhere in their vehicle. Further, after a few minutes, the human body’s odour receptors experience temporary sensory fatigue or olfactory adaptation and stop sending messages to the brain about a lingering odour – all of this to say that it may take months or years for Class Members to fully realize that there is a persistent smell and that this smell is emanating from their HVAC Systems.

18. Even if a Class Member does make the connection; i.e. that the odour is permanent and that it is coming out of their HVAC Systems, when they complain to Mercedes about the problem, Mercedes merely performs “band-aid” solutions that only serve to mask the issue, such as (i) replacement of the cabin air filter (which is not a permanent fix for the HVAC System because the filter is “upstream” from the evaporator); (ii) “flushing” the system by disassembling the dashboard and drilling a hole in the HVAC Systems and applying a disinfecting solution to the evaporator coil; (iii) applying various cleaners – all of which Mercedes touts as resolving the issue, but instead only temporarily eliminate the smell problem, but does not and cannot address the real issue of the Defect – therefore, in time, the smell will inevitably return.

19. To make matters worse, Mercedes charges customers for these non-permanent “solutions”, even when the Subject Vehicles are still under warranty, instead often telling people that this is a “maintenance issue” and blaming Class Members who experienced foul odours for failing to properly maintain their vehicles, when in fact, no amount of “maintenance” can possibly fix the Design Defect.

20. By virtue of Mercedes' conduct as described above, it has actively concealed the Defect, thereby suspending any prescriptive period that could begin to run against Class Members until such time as they learn of the Design Defect on their own.

II. Mercedes' Knowledge of the HVAC System Design Defect

21. Making the matter even more egregious, Mercedes' knew for some time about the Design Defect (as will be expanded upon herein), yet Mercedes failed to disclose, denied, and actively hid the Design Defect from Class Members – instead it continued to advertise its vehicles as having state-of-the-art engineering and a comfortable interior.

22. As early as 2008, Mercedes was aware of the HVAC system defect when a customer won a consumer arbitration against it in the case of *Fattah v. Mercedes-Benz USA, Inc*, 2008-0441/MIA (Fla. NMVAB November 14, 2008). A summary of the case states:

“The Consumer complained of a foul musty odor coming from the air conditioner vents in her 2007 Mercedes C230. The Consumer testified that the severity of the odor had reduced; however, the odor still existed. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. While not denying the existence of the odor, the Manufacturer asserted that “outside elements and humid South Florida temperatures” contributed to the odor. The Board rejected the Manufacturer’s argument and found that the odor substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.”

23. Mercedes' knowledge of the Design Defect is also evident from its U.S. Technical Service Bulletins (“TSB”s) issued concerning mouldy / musty smells emanating from the HVAC Systems, including:

- On March 5, 2007, TSB T-B-83.30/91a was issued in the U.S. instructing its service center that for “Air Conditioning Musty/Moldy Odor complaints: Use Contra Sept cleaner”;
- On January 23, 2009, TSB LI83.00-P-045755 titled “Unpleasant Odor from Air Conditioning Vents” was issued in the U.S., which states that “A “damp air or musty odor just after engine start” is due to the moisture that accumulates at the evaporator and gets absorbed by the air in the evaporator housing when the blower is shut off. When the blower is activated again, the damp air is carried into the interior compartment within the first few minutes. There is no fix for this, as this is due to various laws of physics. Please explain this to the customer”;
- On June 5, 2009, TSB LI83.30-P-045340 titled “Air Conditioning Musty/Moldy Odor Complaints” was issued in the U.S. which states that “Under certain environmental conditions, typically in a hot and humid climate, the vehicle may emit a musty/moldy odor from the air conditioning system. This may be more noticeable when starting the vehicle due to a residual condensation on the evaporator and interior surface of the heater box”;
- On September 22, 2011, TSB LI83.00-P-051588 titled “Smell of Mold, Decay or Urine from Ventilation” was issued in the U.S. which states that “A moldy (foul) odor can typically occur for a short time after the engine start in all vehicles with air conditioning, is a technical inherent effect which likewise cannot be eliminated by cleaning the evaporator...In these vehicle models the evaporator can be ruled out as the cause of the odor and cleaning the evaporator is not an appropriate remedial measure. As a result evaporator cleaning is not covered under warranty”;
- On October 20, 2011, TSB 83.30-134A titled “Air Conditioning Musty/Moldy Odor Complaints Cleaning Procedure” was issued in the U.S. which states that “Under certain environmental conditions, typically in a hot and humid climate, the vehicle may emit a musty/moldy odor from the air conditioning system. This may be more noticeable when starting the vehicle due to residual condensation on the evaporator and on the interior surface of the heater box... In these vehicle models the evaporator can be ruled out as the cause of the odor. Cleaning the evaporator is not an appropriate remedial measure. Therefore MBUSA does not recognize the cleaning of the evaporator under warranty. The procedure if completed on these models can only be billed as customer pay”;
- On June 26, 2016, TSB LI83.30-P-059119 titled “Odor from Air Conditioning” was issued in the U.S. which states that “In the first few minutes after an engine start, damp

air may be blown out (“laundry smell”). This is due to natural causes, repairs do not remedy the problem”.

24. In response to the above, Mercedes released “XENTRY Tips” and Star Bulletins for its Mercedes groups companies and authorized dealers worldwide to specify cleaning procedures and remedies.

25. Mercedes collects, reviews, and analyzes detailed information about repairs made on vehicles under warranty at its dealerships and service centers. In consequence, Mercedes would have known about the Design Defect from the large number of HVAC Systems services, repairs, cleaning treatments, and component replacements, at the very least, those made during the Subject Vehicles’ warranty periods.

26. Mercedes dealerships and service centers order parts directly from Mercedes. In consequence, the higher-than-expected replacement cabin air filters alerted Mercedes about the Design Defect and the fact that it affected a wide range of its vehicles.

27. Mercedes also received complaints directly from customers or indirectly when customers complained to their dealerships. There are examples of this on the U.S. National Highway Traffic Safety Administration (NHTSA) database and in online forums.

28. NHTSA’s Office of Defect Investigations received many complaints from U.S. vehicle owners regarding the HVAC System Defect, beginning as early as 2008, and likely earlier.

29. The U.S. Transportation Recall Enhancement, Accountability and Documentation Act (the TREAD Act) requires automakers like Mercedes to be in close contact with HNTSA regarding

potential auto defects, including imposing a legal requirements, backed by criminal penalties for violation, of confidential disclosure of defects by automakers to NHTSA, including field reports, customer complaints, and warranty data. Thus, automakers must monitor the NHTSA databases for consumer complaints regarding their automobiles as part of their ongoing obligation to identify potential defects in their vehicles, such as failures of the HVAC Systems to filter air and emit air free of mould and odors as intended.

30. NHTSA's publicly-available Office of Defect Investigations database contains only complaints made in the past 5 years on its website; thus, complaints made prior to 2015 are not readily-accessible. Nonetheless, the Petitioner was able to find a complaint as early as October 28, 2008 (likely a system glitch) – a small sampling of consumer complaints follows:

- October 28, 2008 (Mercedes C300 2008):

My car smells like mildew and moldy. I have taken it to the dealer about 3 times about this situation. I have respiratory problems and allergies and i can hardly used this car, it stinks and bothers my breathing

- July 12, 2014 (Mercedes E350 2010):

Molds and mildew build up in the air condition ducts placing people who are susceptible for infection (people with weak immune system) at risk for fatal infection. The dealer stated that this is a known and common condition for this car because the ac box does not drain the condensed water. This is because the way the car was designed. The dealer recommended turning off the ac for 30 seconds while keeping just the fan on every time before turning off the car to dry up the condensed water on the ac coils, not practical.

The dealer has a known service to disinfect the ac system but because of the car design could not guarantee that the condition will not return.

There is no warning or any instructions in the manual regarding this potentially fatal condition for susceptible people.

- July 1, 2016 (Mercedes GL550 2015):

My car has an ongoing problem with the HVAC system. It generates a mold and mildew smell while using the AC and heat. Mercedes says they no [sic] of this issue but have no permanent fix. The smell is so bad that it is almost undrivable. Mercedes dealerships have bulletins that denote the issue is known, but their work around only temporarily improves the smell. There is an obvious engineering issue with the hvac system that is unhealthy. There is apparently that forms around the mold around the ac evaporator. Mercedes has an internal alert # TSB LI83-30-P-059119. This is not a permanent fix and only improved the smell for 3-4 weeks and took over two days to implement. The smell occurs all the time when either the ac or heater is on. This started at 2200 miles and continues today (i have 17k miles now).

- July 20, 2017 (Mercedes ML350 2014):

The vehicle's heating, ventilation, and air conditioning systems (□HVACsystems□) have a serious design defect that causes the HVAC system to (a) accumulate mold and mildew residue or growth within the HVAC system; (b) emit a moldy or mildewy odor that permeates the vehicle cabin when the HVAC system is activated; and (c) cause the vehicle□spassenger cabin to be unbearable and thus unusable for its intended purpose. It lacks a way to properly dispose of the water left in the system due to condensation and this in turns creates a suitable environment for the growth of bacteria, fungus, mold, and spores, which then are blown into the passenger cabin when the HVAC system is in use. This seems to be a known issue with Mercedes-Benz cars which has not been addressed by the manufacturer. It makes it very unpleasant to drive the car when you need to turn on the a/c for a car that is practically new.

31. Further, Mercedes was sued for this exact issue in several U.S. class actions starting as early as 2016 where several of the plaintiffs sent demand letters directly to Mercedes-Benz USA, LLC and/or their parent company Daimler AG starting as early as 2015.

32. Mercedes also would have monitored and seen consumer complaints that were made on public online forums, such as www.mbworld.com, www.benzworld.com, www.repairpal.com, cargurus.com, etc... A small sampling of the public online forum content follows:

MB World (i.e. Mercedes-Benz World):

- 07-05-2012 – frtdog:

It seems to me that the smell is generated from within the system itself. If the water is indeed draining onto a panel or where ever, then one would think there should be no smell. If I were going to Star Fest it would be interesting to take a mason jar filled with the air conditioning aroma and put in on the table where the M-B big wigs sit and explain to them that this is what their \$50K + cars smell like.

- 07-10-2012 – GA350:

Finally got a chance to go to the service center. They accepted the smell was real and changed the cabin filters and dual filter (something that nature). Initially wanted me to pay indicating that it's a maintainance [*sic*] issue and not covered warranty, but I showed my extreme unhappiness on this remark as the car is hardly 3000 miles old. Then they agree to do it free of cost to me. It saved \$200 from my expenses.

So far no smell, but will watch.

I was told the super condenser which gets the drainage needs drying on and off, and they recommend me keeping the car few hours out in sun once in a while. They also told me that they have noticed this in those cars parked in garages(mine is 100% times).
Wearied ...

- 09-12-2012 – Tahoeoz:

Im having the same problem since the day I drove off the lot. It's been in the shop three times and I still have the same horrible smell. It's beyond ridiculous I am going to hire an attorney to get out of this lemon. No water drips out while the AC is on I think it is collecting somewhere and its creating mold. Someone needs to bring this to light I'm getting sick head aches everyday now. I have never had this problem with any other car I've owned Mercedes-Benz for 20 years and this has never happened before.

- 09-14-2012 – JAM:

Have had this on MANY MB products including my 07 S550 and 12 ML. Issue is always the condensor needs to be cleaned out. Have NEVER had this issue on any car other than MB product. No excuse for it in my mind. My 2001 Range Rover has never had to have the condensor core cleaned and has no odor to the AC whatsoever.

- 06-24-2013 – Rinial:

I'm getting the same smell at start up.

Get this really foul smell at start up that lasts for about 15 seconds.

We have had this vehicle for 9 months.

This started once the weather started warming up in May.

The other issue is that this odour seems to have permeated into the vehicle and whenever we get into the vehicle there is a trace of this foul odour in the car.

I've been to the dealer twice for this issue. The problem I have is that both times we haven't been able to reproduce the smell.

They have sprayed whatever they use into the AC system and there's still no improvement.

To make matters worse, the dealer is claiming this is not a warranty issue and has charged me for this "service".

This is our second ML. First was a 2009 which never had this issue.

I have never had a previous or current vehicle with this issue.

It's bad enough that unless this gets resolved I will be trading in this vehicle soon, which is not something I would want to do. I think its a great vehicle otherwise.

BenzWorld:

- January 27, 2010 – Sialkot:

:crybaby2 please help me!!!!!!!

I have a mercedes [sic] 320 tdi 2003 which gives a VERY bad smell through the air conditioning and heating.

- January 30, 2010 - nopcbs:

It's a poor AC condensate drain design and resulting fungi.

Complain to dealer. He will fog your car with a Wynn's fungicide. If that fails, he can replace a plastic cavity that may be contaminated beyond what the fungicide can fix.

Very common in areas where AC is used part of year only. You seldom get the problem where it is always hot and always use AC. It shows up where you have seasons that do not require AC and then you smell it. Been there. Done that.

- March 21, 2010 – nopcbs:

There is a two stage treatment that MB does. When you first report the problem, the dealer is to try fogging the system with the Wynn's fungicide spray. If this works, you are done. If it does the work the dealer is to move to stage 2 which is the replacement of some plastic parts of your AC, condencor I think, which are too infected with fungi to be affected by the spray. Since this cost more money, it is only done if the spray fails. Keep on the dealer. There is a tech. service bulletin on this. If you search the boards you will find the number. You are right, the stink is worse with the AC off and just the gan on. That is what happened in my '06...I only became aware of the smell as summer ended and the AC was not used. Makes sense, fungi do no thrive in cold and volatiles are less volatile at low T's.

The smell is NOT normal.

- April 28, 2011

Car was ready today but could not pick it up. Evaporator and drier replaced, I'll get the repair order tomorrow.

Also had galley plugs replaced as we noticed some oil under the car when it was parked.

Service advisor said without warranty \$3500-4000 repair bill.

RepairPal:

- Problem Description
The heating, ventilation and AC (HVAC) heater box is susceptible to mildew buildup. This can result in a musty odor from the HVAC system, most noticeable when the system is first turned on.
- 2007 Mercedes-Benz CLK350 41,700 mi,

Definitely a strong odor coming from the HVAC system that makes it a little embarassing [*sic*] to have others ride along in your "luxury" automobile. Any advice on how to completely correct this would be appreciated.
- 2009 Mercedes-Benz CLK350 34,000 mi,

Crayon type smell in the HVAC system that is so pungent that the wife can't even stand to be in the car.

- 2007 Mercedes-Benz CLK350 124,000 mi,

Smells like a *[sic]* old tent

- 2009 Mercedes-Benz CLK350 20,000 mi,

Same situation, Contacted dealer paid 250.00 for the service at the Grapevine TX dealership. Cost of service included, the air filter change, and to flush the system with a solvent, to help eliminate the odor...Smell came back with in 60 days.

Cargurus:

- Anyone else having problems w/ horrible vinegar/mold smell in ac of 2015 ML 350 (Mercedes)

Last week the car started emitting a horrible vinegar smell from the ac when first turned on. Took it to the dealership (still under warranty) and they want \$330 to flush and clean the mold out of the ac unit and replace the filters. Claimed it not covered. Said that we need to turn ac off 5 minutes prior to reaching destination to let moisture out so it doesn't stay in unit and become moldy !

What !? I don't think I should have to babysit an ac unit in a \$65K car !
All I can think about is Legionnaires Disease....caused by mold in a ventilation system.

Mercedes told us some BS that this is common in all luxury cars. We've owned new BMW, Audi, and Lexus' that have never had this issue.
They acted very casual about it, but yet its not covered, AND we'll probably have to have this done every year.

III. The Mercedes Warranties

33. Mercedes sold and leased Subject Vehicles with a “New Vehicle Limited Warranty” which stated:

“DEFECTS: Mercedes-Benz Canada Inc. (MBC) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-

Benz dealer will make any repairs or replacements necessary, to correct defects in material or workmanship arising during the warranty period.

...

WARRANTY PERIOD: This warranty is for the first to occur of 48 months or 80,000 km, whichever comes first, from the vehicle's date of delivery or when placed into service if earlier.

...

NO CHARGE: Warranty repairs and adjustments will be made at no charge for parts and labour."

34. Mercedes also offers an Extended Limited Warranty beyond the 48-month or 80,000 km new vehicle warranty to "protect your budget against unforeseen repair costs" whereby the customer has the option of extending the warranty by 12, 24, or 36 months.

35. Mercedes represents the following about its certified Pre-Owned vehicles:

So you can rest assured you're getting all the engineering excellence, innovation, performance and style you expect only in a Mercedes-Benz

...

'Certified Pre-Owned' is more than a designation. It's a process. One that ensures you enjoy all the benefits that come from owning a Mercedes-Benz vehicle. So you can rest assured you're getting all the engineering excellence, innovation, performance and style you expect only in a Mercedes-Benz.

...

When a Mercedes-Benz vehicle receives certification, you can be certain that it meets the most stringent requirements of quality, reliability, performance and safety.

Every vehicle must go through a 150-point certification inspection of all of its mechanical and electronic components. Its appearance is scrutinized inside and out – and under.

...

Any coverage left on the vehicle's original factory warranty of 4 years or 80,000 km remains in effect throughout its original term. Afterwards, the standard Mercedes-Benz Star Certified Pre-Owned Warranty term provides protection for up to another 2 years or a total of 120,000 accumulated kilometres.

...

Reassurance: 120-point certification inspection.

36. Both Mercedes' New Vehicle Limited Warranty and its Certified Pre-Owned Limited Warranty and Extended Warranty extend coverage to the climate control system, which includes the HVAC System.

37. Notwithstanding these express warranties, Mercedes does not (i) correct the defect in material or workmanship and (ii) refuses to cover their "fixes" under warranty and instead routinely makes Class Members pay out-of-pocket.

38. With regard to the HVAC System, these warranties mean naught as the Defendant actively concealed the Design Defect from the public and from Class Members, which negated their utility to correct the problem before their expiry. Further, Mercedes has refused to take any action to correct this concealed Design Defect when it occurs in the Subject Vehicles outside of the applicable warranty period. Since the first signs of the Design Defect typically surfaces within the warranty period for the Subject Vehicles, and continues unabated after the expiration of the warranty, given the Defendant's knowledge of this concealed Design Defect – any attempt by Mercedes to limit its warranty with respect to the Design Defect is unconscionable.

39. For the most part, Mercedes refuses to cover the nonpermanent "fixes" under warranty and instead, requires Class Members to pay out-of-pocket for these non-permanent "fixes" for the Design Defect even where Class Members' Subject Vehicles remained under warranty at the time, oftentimes calling it a maintenance issue.

IV. Summative Remarks

40. Although Mercedes knew of the HVAC System's propensity to pool water and foster the growth of mould and other odour-causing growths, it failed to notify the Plaintiffs and Class Members of this prior to the purchase of their Subject Vehicles.

41. Mercedes concealed the fact that its luxury vehicles are not even comfortable or enjoyable under ordinary conditions because the HVAC Systems repeatedly and consistently emit foul odours into the passenger cabin.

42. Despite Mercedes' knowledge of the Defect, it told Class Members who called customer service about the symptoms of the Design Defect that they had never heard of the problem before and that no others had reported issues with their Subject Vehicles' HVAC Systems and made Class Members pay for temporary band aid measures out-of-pocket. The Plaintiffs, on behalf of the Class Members, seeks an award of damages against Mercedes for its intentional, willful, and/or negligent failure to disclose and/or active concealment of the inherently defective condition posed by the HVAC System and its failure to honour its warranty obligation to repair the Design Defect.

43. The Plaintiffs and the Class Members that he seeks to represent suffered economic damages by purchasing and/or leasing Defendant's Subject Vehicles; they did not receive the benefit of the bargain, suffered out-of-pocket loss and are, therefore, entitled to damages.

44. The Plaintiffs and members of the Class (as defined in paragraph 5 above) would not have purchased and/or leased the Subject Vehicles or would not have paid the high price had they known that the HVAC Systems installed in the Subject Vehicles were prone to accumulate mould and mildew residue and growth, would emit a mouldy, mildewy, or sour odour that permeates the vehicle cabin. When the Plaintiffs and members of the Class purchased and/or leased the Vehicles,

they relied on their reasonable expectation that they would not emit a rancid odour. Furthermore, had Mercedes timely disclosed to consumers the material fact that HVAC Systems installed in the Subject Vehicles were suffering from a Design Defect, Class Members would have required Mercedes to replace their HVAC Systems before the expiration of the warranty period. Mercedes neither disclosed material facts to consumers at the time of purchase, nor anytime thereafter.

45. The Defendant placed the Subject Vehicles into the stream of commerce in Canada with the intention and expectation that customers, such as the Plaintiffs and Class Members, would purchase and/or lease them based on their representations.

THE REPRESENTATIVE PLAINTIFFS

46. On January 4, 2018, the Plaintiffs purchased a used 2014 Mercedes-Benz ML350 BlueTEC 4MATIC (VIN 4JGA2EB2EA354507) from Mercedes-Benz Newmarket at 230 Mulock Drive, in Newmarket, Ontario for a total cost of \$54,802.17; having obtained financing from Mercedes-Benz Financial Services, which provided for a cost of \$892.67 per month for 60 months (the Plaintiffs having paid a down payment of \$10,000.00).

47. Mr. Goering is the primary driver of the Subject Vehicle; he takes care of all maintenance issues and drives it on an almost daily basis, though it is registered in his wife's name.

48. At the end of the summer of 2018, Mr. Goering noticed a faint smell in his vehicle, but he could not figure out where it was coming from; he assumed that it was his floor mats, so he had them washed.

49. The next summer, in 2019, Mr. Goering noticed the same smell as before, but this time, it was much worse. He could now discern that it was coming from his air conditioner. In order to resolve the issue, he replaced his air filters and spray-cleaned the HVAC system. This appeared to resolve the problem at the time.

50. However, by the end of the summer of 2019, the smell came back. Mr. Goering has at times experienced throat irritation while driving his vehicle, though he did not understand why (until now).

51. When Mr. Goering drives friends in his vehicle, he is oftentimes embarrassed by the smell; at this point, all of his friends have informed him that they do not wish to be passengers in his vehicle due to the unpleasant odour.

52. The Plaintiffs expected their vehicle to be of good and merchantable quality and not defective. They had no reason to know or expect that mould would develop in the vehicle's HVAC Systems. Had they known the truth, they would not have purchased the vehicle and certainly would have paid significantly less for it.

53. In fact, due to Mercedes' marketing and advertisements, the Plaintiffs expected that they were getting a luxury vehicle – due to the Design Defect, such was not the case.

54. On or about January 2020, the Plaintiffs become aware of the existence of a class action and subsequent settlement in the United States related to this exact issue.

55. Upon learning of the U.S. class action and settlement, the Plaintiffs have now come to the realization that the odour and problems that Mr. Goering has been experiencing with the vehicle is related to a design defect of his HVAC system.

56. Plaintiffs have suffered ascertainable loss as a result of the Design Defect and Mercedes' concealment thereof, including, but not limited to, overpayment of the purchase price, out-of-pocket expenses for filters and cleaning supplies, loss of full use and enjoyment, pain, suffering, trouble and inconvenience.

57. Plaintiffs' damages are a direct and proximate result of the Defendant's conduct.

58. In consequence of the foregoing, the Plaintiffs are justified in claiming damages.

CAUSES OF ACTION

59. The Defendant knew that the HVAC Systems installed in the Subject Vehicles were defective and that it posed serious safety risks to consumers like the Plaintiffs and Class Members, when it expressly warranted against the Design Defect, when it was negligent in the design, testing, manufacture, marketing, distribution, supply, warranty, lease, and/or sale of the Subject Vehicles, when it wrongfully and fraudulently concealed material facts regarding the Design Defect, when it failed to inform Class Members that the Subject Vehicles had the Design Defect, when it induced the Plaintiffs and the Class Members to purchase or lease the Subject Vehicles under false pretenses, and in so doing, breached the implied covenant of good faith and fair dealing.

A. Breach of Express and Implied Warranties

60. The Defendant expressly or impliedly warranted to Class Members that the Subject Vehicles would be reasonably fit for the purposes of driving on roads, that the Subject Vehicles were of merchantable quality, that the Subject Vehicles were free from defects, and/or that the Subject Vehicles were of acceptable quality, when in fact, they were not.

61. Mercedes expressly warranted to Plaintiffs and to Class Members that the HVAC Systems were free from defects in material and workmanship and in the event that a defect manifested, the Defendant would be obligated to correct the defect. This express representation becomes a basis of the bargain, implicating the Defendant's liability in the event of breach.

62. As described above, the HVAC System in the Subject Vehicles is defective. The HVAC System Design Defect substantially impairs the use, value, and safety of the Subject Vehicles to reasonable consumers, including the Plaintiffs and Class Members.

63. Without limiting the generality of the foregoing, according to the terms of its express written warranties, the Defendant must, within the warranty period, or extended warranty period if applicable, properly repair any issues connected to a manufacturer defect in material or workmanship and specifically warranted, *inter alia*, the following:

(a) "Your vehicle is covered under the terms of these "Warranties" and your Mercedes-Benz dealer will exchange or repair any defective parts in accordance with the terms of such warranties within stated limits";

(b) New Vehicle Limited Warranty - Basic Coverage

Items Which Are Covered:

DEFECTS: Mercedes-Benz Canada Inc. (MBC) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz dealer will make any repairs or replacements necessary, to correct defects in material or workmanship arising during the warranty period;

(c) NO CHARGE: Warranty repairs and adjustments will be made at no charge for parts and labour;

(d) Our intention is to repair under warranty, without charge to you, anything that goes wrong with your vehicle during the warranty period which is our fault. All we ask is that you properly maintain and care for the vehicle and that you have warranty repairs or adjustments performed by an authorized Mercedes-Benz dealer;

(e) Defects are covered since we, the manufacturer or distributor are responsible;

64. In spite of and, contrary to the foregoing warranties and representations, the Subject Vehicles were sold and/or leased with defective HVAC Systems, which the Defendant failed to properly repair/replace during the warranty period, oftentimes, making Class Members pay out-of-pocket for same.

65. The HVAC Systems were defective in that the condensation that builds on the evaporator does not get properly and fully evaporated, creating a moist, hospitable environment for the growth of bacteria, fungus, mould, and spores. Due to the nature of the defect, Class Members frequently have experienced, and will continue to experience, unexpected foul odours in the interior cabin of their Subject Vehicles. This has resulted in significant damages.

66. The Defendant knew that the HVAC Systems installed in the Subject Vehicles were defective and that it posed serious safety risks to consumers like the Plaintiffs and Class Members, when it expressly warranted against the Design Defect and it breached its express and implied warranties when it designed, tested, manufactured, marketed, distributed, supplied, warranted,

leased, and/or sold the Subject Vehicles that did not conform to its affirmations of fact and industry standards.

67. The Design Defect at issue in this Statement of Claim was present at the time of sale and/or lease to the Plaintiffs and to the members of the Class.

68. Defendant breached its express warranties (and continue to breach these express warranties) because they did not (and do not) cover the expenses associated with replacing the defective HVAC Systems in the Class Members' Subject Vehicles with a non-defective HVAC System to permanently correct the Design Defect.

69. Pursuant to the express warranties, Defendant was obligated to pay for or reimburse the Class Members for costs incurred in replacing the defective HVAC Systems and to repair the Design Defect permanently and to provide a product that conformed to the qualities and characteristics that it expressly warranted when it sold and leased the Subject Vehicles to Class Members.

70. The Class Members did rely on the express warranties of the Defendant herein.

71. By failing to provide an HVAC System that could function properly and on a reliable basis, the Defendant's behaviour has caused a failure of the essential purpose of the warranty to provide a HVAC System capable of functioning as required under all operating conditions for the reasonably expected life of the Subject Vehicles.

72. Furthermore, Class Members were "buyers" as defined at s.1 of the *Sale of Goods Act* and Sale of Goods Legislation who entered into "contracts of sale" for the Subject Vehicles. The

contracts of sale were subject to a “warranty” and/or “warranty of quality” as defined in the *Sale of Goods Act* and Sale of Goods Legislation. As particularized herein the Defendant breached the warranties contrary to s. 51 of the *Sale of Goods Act* and similar provisions in Sale of Goods Legislation causing the Class harm. Class Members are therefore entitled to damages for breach of warranty and diminution of the value of the Subject Vehicles.

73. As a direct and proximate result of Mercedes’ breach of express and implied warranties, the Class Members have received goods that are unreasonably dangerous and have substantially impaired value, and they have suffered damages, entitling them to compensatory damages, punitive damages and/or, in the alternative, equitable and declaratory relief as elaborated further below.

B. Negligence

74. The Defendant had a positive legal duty to use reasonable care to perform its legal obligations to the Class Members, including, but not limited to designing, testing, manufacturing, marketing, distributing, supplying, warranting, leasing, and/or selling Subject Vehicles free from the Design Defect.

75. The Defendant knew and it was reasonably foreseeable that in leasing or purchasing the Subject Vehicles, the Plaintiffs and Class Members would trust and rely on the Defendant’s skill and integrity. The Defendant also knew and it was reasonably foreseeable that, if the Subject Vehicles contained a Design Defect, which emitted mouldy air into the interior, that the value of the Subject Vehicles would diminish and that Class Members would suffer damages as detailed herein.

76. The standard of care reasonably expected in the circumstances required the Defendant to act fairly, reasonably, honestly, candidly and with due care in the course of designing, testing, manufacturing, marketing, distributing, supplying, warranting, leasing, and/or selling the Subject Vehicles and their components, including the HVAC Systems. The Defendant, through its employees, officers, directors, and agents, failed to meet the reasonable standard of care. The aforesaid loss suffered by the Class Members was caused by this negligence, particulars of which include, but are not limited to, the following:

- a) The Defendant failed to properly design the HVAC System such that, under normal usage conditions, the condensation that builds on the evaporator does not get properly and fully evaporated, which causes it to accumulate mould and mildew residue and growth that, when in use, emits a mouldy, mildewy, or sour odour that permeates the vehicle cabin. Further, the mould species described above (which cause the odour) are toxic to humans and animals and are known to cause some or all of the following: allergic reactions, infections, cellular damage, DNA damage, interference with RNA synthesis, inflammation, gastroenteritis, and other harmful effects;
- b) The Defendant failed to properly manufacture and install the HVAC System such that, under normal conditions, Class Members experienced the above Design Defect;
- c) The Defendant failed to properly market the HVAC System such that it failed to reveal the deficiencies with the HVAC System and the associated serious consequences;

- d) The Defendant failed to adequately test the HVAC System to ensure a proper design and to ensure proper and timely modifications to the HVAC System to eliminate the foreseeable risks;
- e) The Defendant failed to accurately, candidly, promptly and truthfully disclose the defective nature of the HVAC Systems;
- f) The Defendant failed to conform with good manufacturing and distribution practices;
- g) The Defendant failed to disclose to and/or to warn Class Members that the HVAC Systems were defective when knowledge of the defects became known to them;
- h) The Defendant failed to recall and to carry out the proper repairs or to replace said defective HVAC Systems;
- i) The Defendant continued to sell the HVAC System for years when they knew or ought to have known of the defective nature and other associated problems with said HVAC System;
- j) The Defendant consciously accepted the risk of the Design Defect;
- k) The Defendant failed to establish any adequate procedures to educate their distributors, dealerships or the ultimate users;
- l) The Defendant failed to identify, implement and verify that procedures were in place to address the HVAC System defects;

- m) The Defendant failed to change their design, manufacturing, inspection, marketing, maintenance, and testing process with respect to the HVAC System in a reasonable and timely manner;
- n) The Defendant failed to engage in adequate pre-market and production testing of the HVAC System; and
- o) The Defendant continues to fail to fulfill its ongoing obligations.

77. By virtue of the acts and omissions described above, the Defendant was negligent and caused damage and posed a real and substantial risk to the health of the Class Members.

78. The loss, damages and injuries were foreseeable.

79. The Defendant's negligence proximately caused the loss, damage, injury and damages to the Class Members.

80. By reason of the foregoing, the Class Members are entitled to recover damages and other relief from Defendant.

C. Fraudulent Concealment

81. The Defendant made material omissions as well as affirmative misrepresentations regarding the HVAC System and the Subject Vehicles.

82. The Defendant knew that the representations were false at the time that they were made.

83. The Defendant concealed and/or suppressed material facts concerning the HVAC Systems and the Subject Vehicles.

84. The Subject Vehicles that were purchased or leased by Class Members were, in fact, defective and unreliable as the HVAC System was suffering from the Design Defect.

85. The Defendant had a duty to disclose that the Subject Vehicles and the HVAC System installed therein were defective and all the more so as it was selling a luxury line of vehicles at a far higher price.

86. The Defendant had a duty to disclose these omitted material facts because they were known and/or accessible only to the Defendant who had superior knowledge and access to the facts and the Defendant knew that they were not known to or reasonably discoverable by the Class Members. These omitted facts were material because they directly impact the usage and value of the Subject Vehicles. The Defendant possessed exclusive knowledge of the defects.

87. The Defendant actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce the Class Members to purchase and/or lease the Subject Vehicles and the HVAC Systems at a higher price, which did not match the Subject Vehicles' true value.

88. The Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. The Class Members' actions were reasonable and justified. The Defendant was in exclusive control of the material facts concerning the HVAC System defects and such facts were not known to the public or to the Class Members.

89. In addition, Class Members relied on the Defendant's Representation in relation to the HVAC System and Subject Vehicles that they were purchasing or leasing and they purchased or leased such Subject Vehicles. Said reliance was reasonable. The Class Members were without the ability to determine the truth on their own and could only rely on the Defendant's statements and representations.

90. As a result of the concealment and/or suppression of facts, the Class Members have sustained and will continue to sustain damages.

91. As a result of their reliance, the Class Members have been injured in an amount to be proven at trial.

D. Breach of Implied Covenant of Good Faith and Fair Dealing

92. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

93. The Class Members entered into agreements to purchase or to lease Subject Vehicles containing the HVAC System, and/or were in contractual privity with Defendant as a result of the express warranties described herein.

94. In addition, in bringing their Subject Vehicles to the Defendant's dealerships for diagnosis, repair, and/or replacement, the implied covenant of good faith and fair dealing equally applies.

95. The contracts and warranties were subject to the implied covenant that the Defendant would conduct business with the Plaintiffs and the Class Members in good faith and would deal fairly with them.

96. The Defendant breached those implied covenants by selling and leasing to the Class Members, Subject Vehicles installed with HVAC System with the Design Defect, when they knew, or should have known, that the contracts and/or warranties were unconscionable and by abusing their discretion in the performance of the contract or by intentionally subjecting the Plaintiffs and the Class Members to a risk beyond that which they would have contemplated at the time of purchase and/or lease as well as failing to provide for proper parts and service of the HVAC System they sold and installed.

97. The Defendant also breached the implied covenants by not placing terms in the contracts and/or warranties that conspicuously disclosed to the Plaintiffs and the Class Members that the HVAC System was defective as described herein.

98. Lastly, the Defendant breached the implied covenants when they failed to disclose the Design Defect to Class Members when they brought their Subject Vehicles in for repairs and/or diagnosis of the problem, particularly so when Class Members were charged for these as they are quite costly.

99. As a direct and proximate result of Defendant's breach of its implied covenants, the Plaintiffs and the Class Members have been damaged in an amount to be determined at trial.

STATUTORY REMEDIES

100. The Defendant are in breach of the *Sale of Goods Act*, the Sale of Goods Legislation, the *Consumer Protection Act*, the Consumer Protection Legislation, the *Competition Act*, and/or other similar/equivalent legislation.

101. The Plaintiffs pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and upon consumer protection legislation and the equivalent/similar legislation and common law in the other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendant's inappropriate and unfair business practices.

A. Breach of the *Sale of Goods Act* and the Sale of Goods Legislation

102. At all times relevant to this Claim, the Class Members were “buyer[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

103. At all times relevant to this action, the Defendant was a “seller” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

104. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased or leased the Subject Vehicles, are buyers located in those provinces for the purposes of the Sale of Goods Legislation. The Defendant carried on business in those provinces and territories and was, among other things, a seller for the purposes of the Consumer Protection Legislation.

105. There were implied conditions as to merchantable quality or fitness pursuant to s. 15 of the *Sale of Goods Act* as well as an implied condition as regards defects as the Design Defect could not have been revealed upon examination.

106. The Defendant was aware that the customers purchased and/or leased the Subject Vehicles with HVAC System based on their representations and based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will perform as presented.

107. The Defendant committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s. 15 of the *Sale of Goods Act*, the Defendant are liable. The Class is entitled to maintain an action for breach of warranty under s. 51 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act* and Consumer Protection Legislation

108. The Defendant is resident in Ontario for the purpose of s.2 of the *Consumer Protection Act*.

109. At all times relevant to this action, many of the Class Members were “consumer[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

110. The Plaintiffs and Class Members who purchased or leased the Subject Vehicles for personal, family or household purposes are consumers for the purposes of the *Consumer Protection Act*.

111. At all times relevant to this action, the Defendant was a “supplier” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

112. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased or leased the Subject Vehicles for personal, family or household purposes and/or not for resale or for the purpose of carrying on business (as those concepts apply in the various provinces and territories), are consumers located in those provinces for the purposes of the Consumer Protection Legislation. The Defendant carried on business in those provinces and territories and was, among other things, a supplier for the purposes of the Consumer Protection Legislation.

113. The transactions by which many of the Class Members purchased or leased the Subject Vehicles containing Defendant’s defective HVAC Systems were “consumer transaction[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

114. The Defendant has engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Subject Vehicles, including the HVAC Systems therein, have performance characteristics, uses, benefits and/or qualities, which they do not have;
- (b) Representing that the Subject Vehicles, including the HVAC Systems therein, are of a particular standard, quality, or grade, which they are not; and

(c) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the Design Defect as such use or failure deceives or tends to deceive.

115. The Representation was and is unconscionable because *inter alia* the Defendant knows or ought to know that consumers are likely to rely, to their detriment, on Defendant's misleading statements.

116. The Representation was and is false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Class to purchase and/or lease the Subject Vehicles containing defective HVAC Systems as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

117. The Class Members relied on the Representation.

118. The reliance upon the Representation by the Class Members is established by his or her purchase and/or lease of the Subject Vehicles. Had the Class Members known that the Representation was false and misleading they would either not have purchased and/or leased the Subject Vehicles or would not have paid such a high price.

C. Breach of the *Competition Act*

119. At all times relevant to this action, the Defendant's design, testing, manufacture, marketing, distribution, supply, warranty, lease, and/or sale of the Subject Vehicles business was a "business" and the HVAC System was a "product" within the meaning of that term as defined in s. 2 of the *Competition Act*.

120. The Defendant's acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendant liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

121. The Defendant made the Representations to the public and in so doing breached s.52 of the *Competition Act* because the Representations:

- (a) Were made for the purpose of promoting, directly or indirectly, the use of the Subject Vehicles or for the purpose of promoting, directly or indirectly, the business interests of the Defendant;
- (b) Were made knowingly or recklessly;
- (c) Were made to the public; and
- (d) Were false and misleading in a material respect;

122. The Class Members relied upon the Representations by purchasing or leasing the Subject Vehicles to their detriment as they contained defective HVAC Systems, causing them to suffer damages and loss.

123. Class Members would not have purchased or leased the Subject Vehicles without the Representations in breach of section 52 of the *Competition Act*.

124. Pursuant to s. 36 of the *Competition Act*, the Defendant are liable to pay the damages which resulted from the breach of s. 52 and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid.

125. The Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

CAUSATION

126. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendant are the direct and proximate cause of the Plaintiffs' and Class Members' injuries.

127. The Plaintiffs pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendant, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

128. By reason of the acts, omissions and breaches of legal obligations of the Defendant, the Plaintiffs and Class Members have suffered injury, economic loss and damages, the particulars of which include, but are not limited to, the following general, special, and punitive damages:

A. General Damages (Non-Pecuniary Losses)

129. The general damages being claimed herein include:

- (a) Pain;
- (b) Suffering;
- (c) Anxiety/anguish;

- (d) Embarrassment;
- (e) Trouble; and
- (f) Inconvenience.

B. Special Damages

130. The special damages being claimed herein include:

- (a) Overpayment for the purchase price and/or lease payments of the Subject Vehicles,
- (b) Lower resale value/ diminished value of the Subject Vehicles,
- (c) Out-of-pocket costs of attempting to identify, repair, and replace the HVAC Systems, including the purchase of replacement air filters, cleaners, AC and heater housing unit, evaporators, other parts and labour related thereto, including future costs of repair and including deductibles paid when repairs were covered by warranty and the full cost of repair when they were not covered,
- (d) Out-of-pocket loss, such as buying air fresheners to help mask the smell,
- (e) Loss of full use and enjoyment of the Subject Vehicles by having to endure a noxious odour and/or driving with the windows open in undesirable conditions,
- (f) Costs of purchasing a Mercedes service plan to avoid having to pay future costs related to the smell;
- (g) Expenditures for rental vehicles;

C. Punitive (Exemplary) and Aggravated Damages

131. The Defendant has taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

132. At all material times, the conduct of the Defendant as set forth was malicious, deliberate and oppressive towards its customers and the Defendant conducted itself in a wilful, wanton and reckless manner.

133. By engaging in such deplorable conduct and tactics, the Defendant committed a separate actionable wrong for which this Honourable Court should voice its disapproval and displeasure with an award of punitive damages.

134. In addition, it should be noted since the Defendant is part of a highly-revered, multi-billion-dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Should the Defendant only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations in Canada.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

135. The Plaintiffs pleads and relies on the doctrine of waiver of tort and states that the Defendant's conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, including the similar/equivalent Sale of Goods and Consumer Protection

legislation, and/or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

136. The Plaintiffs reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to the gross revenues earned by the Defendant or the net income received by the Defendant or a percent of the sale of the Subject Vehicles as a result of the Defendant's unfair practices and false representations which resulted in revenues and profit for the Defendant.

137. Further, the Defendant has been unjustly enriched as a result of the revenues generated from the sale of the Subject Vehicles and as such, *inter alia*, that:

- (a) The Defendant has obtained an enrichment through, *inter alia*:
 - (i) Revenues and profits from the sale of the Subject Vehicles;
 - (ii) The saving of costs of recalling the Subject Vehicles;
 - (iii) The saving of costs of replacing the HVAC System with a properly designed and manufactured HVAC System; and
 - (iv) The saving of costs of repair by recommending repairs that simply covered up the root cause defects in the HVAC Systems to postpone recurrence of the malfunctions until the warranty expired.
- (b) Class Members have suffered a corresponding deprivation; and

(c) The benefit obtained by the Defendant and the corresponding detriment experienced by the Plaintiffs and Class Members has occurred without juristic reason. Since the monies that were received by the Defendant resulted from the Defendant's wrongful acts, there is and can be no juridical reason justifying the Defendant's retaining any portion of such money paid.

138. Further, or in the alternative, the Defendant are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

(a) The Defendant was unjustly enriched by receipt of the monies paid for the Subject Vehicles;

(b) The Class Members suffered a corresponding deprivation by purchasing and/or leasing the Subject Vehicles;

(c) The monies were acquired in such circumstances that the Defendant may not in good conscience retain them;

(d) Equity, justice and good conscience require the imposition of a constructive trust;

(e) The integrity of the market would be undermined if the court did not impose a constructive trust; and

(f) There are no factors that would render the imposition of a constructive trust unjust.

139. Further, or in the alternative, the Plaintiffs claims an accounting and disgorgement of the benefits which accrued to the Defendant.

EFFICACY OF CLASS PROCEEDINGS

140. The members of the proposed Class potentially number in the thousands – the precise number of Class Members would be obtainable from information and records in the Defendant’s possession. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members’ claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

141. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendant. Even if the Class Members themselves could afford such individual litigation, it would place an unjustifiable and enormous burden on the courts and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendant would increase delay and expense to all parties and to the court system.

142. This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

143. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the Class.

144. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the class to effectively pursue their respective rights and have access to justice.

145. The Plaintiffs have the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

146. The Plaintiffs plead and rely on the *Class Proceedings Act*, the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, and other Sales of Goods and Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

147. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Mercedes-Benz Canada Inc. has its head office in Ontario;
- (b) The Defendant engages in business with residents of Ontario;
- (c) The Defendant derives substantial revenue from carrying on business in Ontario;
- and
- (d) The damages of Class Members were sustained in Ontario.

148. The Plaintiffs proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

SERVICE OUTSIDE ONTARIO

149. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));

(e) The claim is authorized by statute, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and

(f) Against a person carrying on business in Ontario (rule 17.02(p)).

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CONSUMER LAW GROUP P.C.

251 Laurier Ave. West
Suite 900
Ottawa, Ontario
K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiffs

R. & C. GOERING Plaintiffs

MERCEDES-BENZ CANADA INC.
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

CONSUMER LAW GROUP P.C.
251 Laurier Ave. West, Suite 900
Ottawa, Ontario, K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiffs