

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )

THURSDAY, THE 20<sup>TH</sup> DAY

JUSTICE MORGAN )

OF DECEMBER, 2018

BETWEEN :

BARRY REBUCK

Plaintiff

- and -

FORD MOTOR COMPANY and FORD MOTOR COMPANY OF CANADA,  
LIMITED and YONGE-STEELES FORD LINCOLN SALES LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION** by the Plaintiff for an order that this action be certified pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, was heard on September 26-27, 2018 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING**

Notice of Motion (Certification Motion) returnable September 26, 2018;

Affidavit of Barry Rebuck, sworn December 22, 2017;

Affidavit of David Taub sworn January 15, 2018;

Affidavit of Farley J. Cohen, sworn January 12, 2018;

Affidavit of Edward M. Stockton, sworn April 30, 2018;

Supplementary Affidavit of David Taub, sworn June 4, 2018;

Transcript from Cross-Examination of Barry Rebuck, taken June 8, 2018;

Affidavit of Erin Hotrum, sworn March 28, 2018;

Transcript from Cross-Examination of Erin Hotrum, taken June 8, 2018;

Affidavit of Mark P. Berkman, sworn April 3, 2018

**AND ON HEARING** the submissions of counsel for the parties, for reasons delivered this day;

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
  2. **THIS COURT ORDERS** that Barry Rebuck is hereby appointed as the representative Plaintiff for the Class;
  3. **THIS COURT ORDERS** that Counsel for the Plaintiff shall act as class counsel.
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4. **THIS COURT ORDERS** that the Class is defined as

All persons who purchased or leased a new 2013 or 2014 model year Ford vehicle in Canada (the "Vehicles"). For the purposes of the class definition, "Vehicle" includes those vehicles listed on Schedule "A" attached

5. **THIS COURT ORDERS** that the certified common issues are as follows:

*Consumer Protection Act*

1. Did the Defendants, or any one of them, contravene sections 14 and 17 of the Ontario *Consumer Protection Act*, and parallel provisions of the provincial Consumer Protection Legislation (as referenced in the Statement of Claim) by making any false, misleading or deceptive representations?
2. If so, can the Plaintiff rely on the waiver of notice provisions of section 101 of the Ontario *Consumer Protection Act* (and parallel provisions of the Consumer Protection Legislation)?
3. If a consumer must demonstrate contractual privity to avail themselves of Part III of the Ontario *Consumer Protection Act*, are dealers, and/or third party sellers designated by the Defendants to sell the Vehicles, agents of the Defendants? If so, can privity be established through such agency?

*Competition Act*

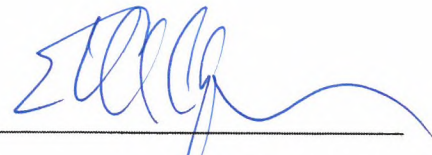
4. Did the Defendants contravene section 52 of the *Competition Act*?
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*Damages*

5. Should exemplary, punitive, and/or aggravated damages be awarded against the Defendants?
  6. Are the Class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Ontario Consumer Protection Act*, and the parallel provisions of the Consumer Protection Legislation and if so, can the amount of damages payable by the Defendants be determined on an aggregate basis and in what amounts?
  6. **THIS COURT ORDERS** that the claims asserted and the relief sought against the Defendants on behalf of the Class are in respect of alleged breaches of the *Ontario Consumer Protection Act*, the parallel provisions of the Consumer Protection Legislation and the *Competition Act* as set out in the Statement of Claim.
  7. **THIS COURT ORDERS** that the litigation plan is hereby approved in the form attached as Schedule "B" ("Litigation Plan").
  8. **THIS COURT ORDERS** that counsel shall schedule a case conference at which the Court will be asked to:
    - a. settle the form of the notice (the "Notice of Certification");
    - b. set an opt-out date;
    - c. determine the method by which Notice of Certification will be given;
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- d. determine the Class Members' names and contact information in the possession of the Defendant to be disclosed to Class Counsel;
- e. determine the responsibility for paying the costs of the Notice of Certification;
- f. schedule the balance of the proceedings; and
- g. determine any other administrative issues.

9. **THIS COURT ORDERS** that the costs of the certification motion shall be addressed by this Court by way of a separate order.

  
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JUSTICE MORGAN

Approved as to  
form and content  
Feb 8, 2019  
Robins. Appleby per   
Blake, Cassels per 

ENTERED AT / INSCRIPT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

FEB 13 2019

PER / PAR: 



## "SCHEDULE A"

### C-MAX

C-MAX HYBRID-FULL-SIZE-2-4-AV-X

### E-SERIES

E150 VAN FFV-VAN - CARGO-4.6-8-A4-X

E150 VAN FFV-VAN - CARGO-5.4-8-A4-X

E150 WAGON FFV-VAN - PASSENGER-4.6-8-A4-X

E150 WAGON FFV-VAN - PASSENGER-5.4-8-A4-X

E350 WAGON FFV-VAN - PASSENGER-5.4-8-A4-X

E350 WAGON-VAN - PASSENGER-6.8-10-A5-X

### EDGE

EDGE-SUV - SMALL-2-4-A6-X

EDGE-SUV - SMALL-3.5-6-AS6-X

EDGE AWD-SUV - SMALL-3.5-6-AS6-X

EDGE AWD-SUV - SMALL-3.7-6-AS6-X

### ESCAPE

ESCAPE-SUV - SMALL-1.6-4-AS6-X

ESCAPE-SUV - SMALL-2-4-AS6-X

ESCAPE-SUV - SMALL-2.5-4-AS6-X

ESCAPE AWD-SUV - SMALL-1.6-4-AS6-X

ESCAPE AWD-SUV - SMALL-2-4-AS6-X

### EXPEDITION

EXPEDITION 4X4 FFV-SUV - STANDARD-5.4-8-A6-X

### EXPLORER

EXPLORER-SUV - STANDARD-2-4-A6-X

EXPLORER FFV-SUV - STANDARD-3.5-6-AS6-X

EXPLORER FFV AWD-SUV - STANDARD-3.5-6-AS6-X

EXPLORER AWD-SUV - STANDARD-3.5-6-AS6-X

### F-SERIES

F150-PICKUP TRUCK - STANDARD-3.5-6-A6-X

F150-PICKUP TRUCK - STANDARD-3.5-6-AS6-X

F150-PICKUP TRUCK - STANDARD-6.2-8-AS6-X

F150 4X4-PICKUP TRUCK - STANDARD-3.5-6-A6-X

F150 4X4-PICKUP TRUCK - STANDARD-3.5-6-AS6-X

F150 4X4-PICKUP TRUCK - STANDARD-6.2-8-AS6-X

F150 FFV-PICKUP TRUCK - STANDARD-3.7-6-A6-X

F150 FFV-PICKUP TRUCK - STANDARD-3.7-6-AS6-X

F150 FFV-PICKUP TRUCK - STANDARD-5-8-A6-X

F150 FFV-PICKUP TRUCK - STANDARD-5-8-AS6-X

F150 FFV 4X4-PICKUP TRUCK - STANDARD-3.7-6-A6-X

F150 FFV 4X4-PICKUP TRUCK - STANDARD-3.7-6-AS6-X

F150 FFV 4X4-PICKUP TRUCK - STANDARD-5-8-A6-X

F150 FFV 4X4-PICKUP TRUCK - STANDARD-5-8-AS6-X  
F150 RAPTOR 4X4-PICKUP TRUCK - STANDARD-6.2-8-AS6-X

**FIESTA**

FIESTA-SUBCOMPACT-1.6-4-A6-X  
FIESTA-SUBCOMPACT-1.6-4-M5-X  
FIESTA SFE-SUBCOMPACT-1.6-4-A6-X  
FIESTA-SUBCOMPACT-1.6-4-AS6-X  
FIESTA SFE-SUBCOMPACT-1-4-M5-X  
FIESTA SFE-SUBCOMPACT-1.6-4-AS6-X  
FIESTA ST-COMPACT-1.6-4-M6-X

**FLEX**

FLEX-SUV - STANDARD-3.5-6-AS6-X  
FLEX AWD NA-SUV - STANDARD-3.5-6-AS6-X  
FLEX AWD TC-SUV - STANDARD-3.5-6-AS6-X  
FLEX AWD-SUV - STANDARD-3.5-6-AS6-X  
FLEX AWD (EcoBoost)-SUV - STANDARD-3.5-6-AS6-X

**FOCUS**

FOCUS-COMPACT-2-4-M6-X  
FOCUS FFV-COMPACT-2-4-A6-X  
FOCUS FFV-COMPACT-2-4-AS6-X  
FOCUS FFV-COMPACT-2-4-M5-X  
FOCUS SFE FFV-COMPACT-2-4-A6-X

**FUSION**

FUSION-MID-SIZE-1.6-4-AS6-X  
FUSION-MID-SIZE-1.6-4-M6-X  
FUSION-MID-SIZE-2-4-AS6-X  
FUSION-MID-SIZE-2.5-4-AS6-X  
FUSION (Auto Start-Stop)-MID-SIZE-1.6-4-AS6-X  
FUSION AWD-MID-SIZE-2-4-AS6-X  
FUSION HYBRID-MID-SIZE-2-4-AV-X  
FUSION-MID-SIZE-1.5-4-AS6-X  
FUSION (Start/Stop)-MID-SIZE-1.5-4-AS6-X

**MUSTANG**

MUSTANG-SUBCOMPACT-3.7-6-A6-X  
MUSTANG-SUBCOMPACT-3.7-6-M6-X  
MUSTANG-SUBCOMPACT-5-8-A6-X  
MUSTANG-SUBCOMPACT-5-8-M6-X  
MUSTANG-SUBCOMPACT-5.8-8-M6-Z  
MUSTANG CONVERTIBLE-SUBCOMPACT-3.7-6-A6-X

**TAURUS**

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TAURUS-FULL-SIZE-2-4-AS6-X  
TAURUS AWD-FULL-SIZE-3.5-6-AS6-X  
TAURUS FFV-FULL-SIZE-3.5-6-AS6-X  
TAURUS FFV AWD-FULL-SIZE-3.5-6-AS6-X

TRANSIT

TRANSIT CONNECT VAN-SPECIAL PURPOSE VEHICLE-2-4-A4-X  
TRANSIT CONNECT WAGON-SPECIAL PURPOSE VEHICLE-2-4-A4-X  
TRANSIT CONNECT-SPECIAL PURPOSE VEHICLE-1.6-4-AS6-X  
TRANSIT CONNECT-SPECIAL PURPOSE VEHICLE-2.5-4-AS6-X  
TRANSIT CONNECT TAXI-SPECIAL PURPOSE VEHICLE-1.6-4-AS6-X  
TRANSIT CONNECT WAGON-SPECIAL PURPOSE VEHICLE-2.5-4-AS6-X

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## "SCHEDULE B"

### LITIGATION PLAN

Section 5(1)(e)(ii) of the *CPA* requires the plaintiff to produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding." The Plaintiff proposes the following plan, subject to amendments suggested by the Defendants and ordered by the Court.

#### CLASS COUNSEL AND THEIR TEAM

1. Class Counsel is comprised of lawyers from Robins Appleby LLP and McKenzie Lake Lawyers LLP.
2. Counsel at Robins Appleby LLP are experienced commercial litigators, including product liability claims and class action defence work. Robins Appleby LLP possesses the requisite knowledge, skill, experience, personnel, and financial resources to prosecute this class action on behalf of all entities who purchased one of the Vehicles in Canada.
3. Counsel at McKenzie Lake Lawyers LLP have been Class Counsel in many class proceedings, including many product consumer protection cases. McKenzie Lake Lawyers LLP possesses the requisite knowledge, skill, experience, personnel, and financial resources to prosecute this class action on behalf of all entities who purchased one of the Vehicles in Canada.

#### THE DEFINITION OF THE CLASS

4. The "Class" and "Class Members" are defined as: All persons who purchased or leased a new 2013 or 2014 model year Ford vehicle in Canada (the "Vehicles").

#### REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS

5. Information on the status of this class action will be posted on [www.robinsapplebyllp.com](http://www.robinsapplebyllp.com) and [www.mckenzielake.com](http://www.mckenzielake.com) (the "Websites"). The Websites will be updated as pertinent information comes to pass including court decision and notices.

6. The Websites allow Class Members to request to be notified of any Court approved notices.

7. The Websites allow Class Members to submit inquiries to Class Counsel and receive a response.

#### LITIGATION SCHEDULE

8. The Plaintiff will ask Justice Morgan to set a litigation schedule for:

- (a) the completion of pleadings;
- (b) motion(s) for judgment;
- (c) the documentary production and delivery of affidavits of documents by the parties;
- (d) examinations for discovery;
- (e) delivery of expert reports; and
- (f) the trial of the common issues, if necessary.

9. The Plaintiff may ask that the litigation schedule be amended, from time to time, as required.

#### DOCUMENT EXCHANGE AND MANAGEMENT

10. The Defendants possess most of the documents relating to the common issues such as: documents related to the marketing and advertisement of the Vehicles, representations made by the Defendants, and knowledge of the testing models utilized by the Defendants, including actual sales/lease volumes of the Vehicles by model year, model description, and province of sale; percentage of the Vehicles leased and purchased; and average term of lease and period of ownership of the Vehicles.

11. These documents will be produced to Class Counsel through the normal production processes such as the Defendants' affidavit of documents, cross-examination, and examination for discovery.

12. Class Counsel will handle the documents produced by the Defendants and use data management systems to organize, code, and manage these documents, if necessary. For example, Class Counsel will establish and maintain a secure, password protected website.

13. The Plaintiff will produce all relevant documents in his possession or under his control.

#### DOCUMENTS PRODUCED FROM NON-PARTIES

14. The Plaintiff may seek orders for production of relevant documents in the possession or under the control of non-parties and/or affiliated parties.

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## PLAINTIFF'S EXPERTS

15. The Plaintiff has retained an expert in valuation to establish the Class Members' damages. The Plaintiff may retain other experts.

## NOTICE OF CERTIFICATION OF THIS ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

16. If the action is certified as a class proceeding, the Court will be asked to:
- (a) settle the form of the notice (the "Notice of Certification");
  - (b) set an opt-out date;
  - (c) determine the method by which Notice of Certification will be given; and
  - (d) order the Defendant to disclose to Class Counsel the names and contact information of the Class Members in the possession of the Defendant.
17. The Plaintiff proposes that the Notice of Certification be disseminated by ("Notice Plan"):
- (a) publishing it once in the national edition of the Globe and Mail (in English);
  - (b) sending the Notice of Certification by email directly to Class Members who have given an email address to Class Counsel;
  - (c) sending the Notice of Certification directly to the Class Members for whom contact information was disclosed by the defendant;
  - (d) posting it in English and French on the Website;
  - (e) posting it in English and French on the Defendants' website(s);
  - (f) delivering it to any person who requests it; and
  - (g) issuing a press release to Canada Newswire in English and French along with a copy of the Notice of Certification in English and French.



18. The Plaintiff will ask the Court to order the Defendants to pay the costs of the Notice Plan.

19. The Plaintiff proposes the following opt-out procedure:

- (a) the Court will approve the form and content of an opt-out form (the "Opt-Out Form");
- (b) a person may opt out of the action by sending an Opt-Out Form before the opt-out date to a person designated by the Court;
- (c) no person shall be permitted to opt-out a minor or a person who is mentally incapable without leave of the Court after notice to the Children's Lawyer and/or the Public Guardian and Trustee, as appropriate; and
- (d) no Class Member may opt out of the action after the expiration of the opt-out date.

#### EXAMINATIONS FOR DISCOVERY

20. The Plaintiff intends to examine for discovery at least one representative of each of the Defendants and will seek leave to extend the discovery period beyond 7 hours.

21. The Plaintiff may ask the Court for an order allowing them to examine multiple representatives of the Defendants, if necessary.

#### AGGREGATE DAMAGES

22. Section 24(1) of the *Class Proceedings Act* allows the Court to award aggregate damages to the Class if certain criteria are established.



23. The Plaintiff plans to deal with aggregate damages by way of a motion for judgment or at the common issues trial.

#### DISPUTE RESOLUTION DURING THE CURRENCY OF THE ACTION

24. The Plaintiff is willing to participate in mediation or non-binding alternative dispute resolution efforts if the Defendants are prepared to do so.

#### THE TRIAL OF THE COMMON ISSUES

25. The Plaintiff will ask the Court to hold a trial of the common issues six (6) months after the completion of examinations for discovery, undertakings, and any motions for refusals.

26. The findings of fact and conclusions on the common issues may permit the judge at the common issues trial to give directions, pursuant to s. 25(3) of the *CPA*, to deal with any remaining individual issues.

#### THE PROCESS AFTER THE COMMON ISSUES TRIAL

27. If the Plaintiff is successful at the common issues trial or after a motion for judgment, the Court will be asked under s. 25 of the *Class Proceedings Act* to:

- (a) settle the form and content of a notice of resolution of the common issues (the "Notice of Resolution");
- (b) order that the Notice of Resolution be distributed substantially in accordance with the Notice Plan, except that the Notice of Resolution shall not be emailed to any person who validly opted out of this class action; and
- (c) order that payments be sent directly to Class Members based on purchase information pursuant to s. 26 of the *Class Proceedings Act* and/or set a deadline

by which Claimants must file a claim to establish eligibility as a Class Member ("Claims' Bar Date").

#### APPOINTMENT OF AN ADMINISTRATOR AND REFEREE(S) AND THEIR COSTS

28. The Plaintiff will ask the Court to appoint an Administrator and Referee(s), fix their compensation and order the Defendants to pay the cost of this Administration.

#### THE CLAIM FORM AND DECISIONS ON ELIGIBILITY

29. The Claim Form shall be approved by the Court.

30. Each Claimant must deliver a completed Claim Form by the Claims' Bar Date.

31. The Administrator must decide in writing whether or not a Claimant is a Class Member and send the decision to the Claimant and, if appropriate, to the Defendants and Class Counsel.

#### REVIEW OF ADMINISTRATOR'S ELIGIBILITY DECISION BY THE REFEREE(S)

32. Within a period approved by the Court, the Claimant and, if appropriate, the Defendants may appeal the Administrator's decision on eligibility to the Referee.

33. The eligibility review will be dealt with as a paper record review unless a Referee orders otherwise.

34. The review of the Administrator's eligibility decision shall proceed in such manner as the Referee directs.

35. The Referee's decision on eligibility shall be final.

**THE DISTRIBUTION PROCESS ON THE ASSUMPTION THAT THE JUDGE  
AWARDED AGGREGATE DAMAGES TO THE CLASS**

36. As soon as practicable after all eligibility reviews are completed, the Administrator shall by motion on notice to Class Counsel and the Defendants, if necessary, report to the Court the proposed distribution of the aggregate damages for each eligible Class Members.

37. No distribution to eligible Class Members shall be made until authorized by the Court. The Administrator may make an interim distribution if authorized by the Court.

38. Each eligible Class Member shall sign such documents as the Administrator may require, in accordance with a protocol approved by the Court, as a condition precedent to receiving any money from the Administrator.

39. In the event the Defendants do not pay the judgment(s) in full, the Court will be asked to give further directions to ensure that there are no priorities among eligible Class Members.

**THE PROCESS ON THE ASSUMPTION THAT ALL INDIVIDUAL DAMAGE ISSUES ARE NOT RESOLVED AT THE COMMON ISSUES TRIAL**

40. After determining the common issues, the trial judge will be asked to give directions to resolve any remaining individual issues. The Plaintiff will ask the trial Judge to order test cases to be heard by a Referee(s) by model.

41. The Plaintiff will ask the Court to order the following procedure:

- (a) delivery of pleadings, affidavits of documents, and examinations for discovery;
- (b) the Referee has the power to award prejudgment interest and costs of the hearings; and
- (c) the Referee has the power to make any order to allow the fair determination of the hearings.

42. Following any hearing, the Referee shall prepare a written report setting out his or her reasons for the decision. The Referee will send the report by mail or fax or email to the Defendants, the Administrator, Class Counsel, and shall file the report with the Court. The Referee's report shall be deemed to be confirmed upon the expiration of 15 days after it is filed with the Court unless the Defendants or Class Counsel serve a notice of motion to oppose confirmation of the report within that 15 day period as required by rule 54.09(b).

43. If there is no overall settlement or judgment with the Defendants and each claim must be proven and assessed, then the Defendants should be required to pay to Class Counsel or the Administrator the amount of each judgment immediately after each report becomes final. The money shall be held in trust and invested as the Court directs.



#### CLASS COUNSEL FEES

44. The Court will be asked to fix the amount of Class Counsel fees, disbursements, and applicable taxes and authorize payment as a fixed charge on the recovery.

#### FUNDER

45. The Court will be asked to fix the amount payable to/from the Funder pursuant to the approved Funding Agreement

#### CY-PRÈS DISTRIBUTION

46. If there is any residue from the amounts recovered in this action, the Court will be asked to distribute this residue cy-près to a recipient approved by the Court.

#### FINAL REPORT

47. After the Administrator makes its final distribution, the Administrator shall make its final report to the Court, in such manner as the Court directs, and the Court may then discharge the Administrator.

#### REVIEW OF THE LITIGATION PLAN

48. This plan will be reconsidered before, during, and after the common issues trial and may be revised by Court order.



BARRY REBUCK  
Plaintiff

-and- FORD MOTOR COMPANY, et al  
Defendants

Court File No. CV-16-544545-00 CP

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

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**ORDER**  
**(CERTIFICATION)**

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**ROBINS APPLEBY LLP**

Barristers + Solicitors  
2600-120 Adelaide Street West  
Toronto ON M5H 1T1

**Irving Marks** (LSO# 19979H)

**David Taub** (LSO #33518M)

Tel: 416-360-3329

Fax: 416-868-0306

**MCKENZIE LAKE LAWYERS LLP**

140 Fullarton Street, Suite 1800  
London ON N6A 5P2

**Michael J. Peerless** (LSO# 34127P)

**Matthew D. Baer** (LSO# 48227K)

Tel: 519-672-5666

Fax: 519-672-2674

Lawyers for the Plaintiff