

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

EDWARD OBERSKI, AMANDA OBERSKI, and STACEY GREEN

Plaintiffs

and

GENERAL MOTORS LLC and GENERAL MOTORS OF CANADA LIMITED (now  
known as GENERAL MOTORS OF CANADA COMPANY)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE PLAINTIFFS**

**(Settlement Approval and Plaintiffs' Counsel Fees)**

**ROCHON GENOVA LLP**  
900-121 Richmond Street West  
Toronto, ON M5H 2K1

Joel P. Rochon (LSO#: 28222Q)  
Pritpal Mann (LSO#: 87637E)

Tel: 416.363.1867  
Fax: 416.363.0263

**KIM SPENCER MCPHEE**  
**BARRISTERS P.C.**  
1200 Bay Street, Suite 1203  
Toronto, ON M5R 2A5

Won J. Kim (LSO#: 32918H)  
Megan B. McPhee (LSO#:48351G)

Tel: 416.596.1414  
Fax: 416.598.0601

*Co-Lead Counsel*

**MCKENZIE LAKE LAWYERS LLP**  
140 Fullarton Street, Suite 1800  
London ON N6A 5P2

Michael Peerless (LSO #34127P)  
Sabrina Lombardi (LSO#52116R)

Tel: 519.672.5666  
Fax: 519.672.2674

**MERCHANT LAW GROUP LLP**  
240 Richmond Street West  
Toronto, ON M5V 1V6

Evatt F.A. Merchant (LSO #51811C)

Tel: 416.828.7777  
Fax: 647.478.1967

**STROSBERG SASSO SUTTS LLP**  
1561 - Ouellette Avenue  
Windsor ON N8X 1K5

Harvey T. Strosberg, Q.C. (LSO#12640O)  
William V. Sasso (LSO #12134I)  
S. Alex Constantin (LSO# 63097W)

Tel: 519.258.9527  
Fax: 519.561.6203

**TO:**  
**BENNET JONES LLP**  
3400-1 First Canadian Place  
Toronto, ON M5X 1A4

Cheryl Woodin (LSO#: 40720P)  
Michael Smith (LSO#: 41037Q)  
Peter Douglas (LSO#: 82442G)

Tel: 416-863-1200

## TABLE OF CONTENTS

|   |            |
|---|------------|
| <b>I. OVERVIEW .....</b>  | <b>1</b>   |
| <b>I. DEFINED TERMS .....</b>   | <b>2</b>   |
| <b>II. FACTS .....</b>  | <b>3</b>   |
| <b>a) Background .....</b>  | <b>3</b>   |
| <b>b) Subject of the Action.....</b>  | <b>4</b>   |
| <b>c) Parallel U.S. Litigation and Settlement.....</b>  | <b>5</b>   |
| <b>d) Procedural History.....</b>   | <b>6</b>   |
| <b>e) The Economic Loss Settlement.....</b>   | <b>7</b>   |
| <b>f) Certification and Authorization for Settlement Purposes .....</b>                         | <b>9</b>   |
| <b>g) Settlement Agreement .....</b>  | <b>11</b>  |
| <b>i) Criteria for Eligibility and the Claims Program.....</b>                                  | <b>11</b>  |
| <b>h) Formula for the Calculation of Settlement Benefits .....</b>                              | <b>12</b>  |
| <b>i) Administrative Expenses.....</b>  | <b>14</b>  |
| <b>ii) Net Settlement Benefits by Subclass and take-up rate .....</b>                           | <b>14</b>  |
| <b>III. Plaintiffs’ Counsel Fees, Disbursements, Expenses, Costs and Applicable Taxes .....</b> | <b>15</b>  |
| <b>IV. ISSUES.....</b>  | <b>16</b>  |
| <b>V. LAW AND ARGUMENT.....</b>   | <b>16</b>  |
| <b>a) The Settlement Is Fair, Reasonable And In The Best Interests Of Class Members .....</b>   | <b>16</b>  |
| <b>i) The likelihood of recovery or success and litigation risks.....</b>                       | <b>18</b>  |
| <b>ii) The settlement terms.....</b>  | <b>21</b>  |
| <b>iii) The amount and nature of discovery, evidence or investigation .....</b>                 | <b>24</b>  |
| <b>iv) Future expense and likely duration of litigation .....</b>                               | <b>26</b>  |
| <b>v) Presence or Lack of Objectors to the Settlement Agreement .....</b>                       | <b>27</b>  |
| <b>vi) Recommendations and experience of Counsel and arm-length negotiations .....</b>          | <b>28</b>  |
| <b>vii) Involvement of the Representative Plaintiff.....</b>                                    | <b>29</b>  |
| <b>b) The Maximum Plaintiffs’ Counsel Fees Amount Is Fair And Reasonable....</b>                | <b>29</b>  |
| <b>VI. ORDER REQUESTED .....</b>  | <b>33</b>  |
| <b>SCHEDULE “A” – LIST OF AUTHORITIES.....</b>  | <b>i</b>   |
| <b>SCHEDULE “B” – RELEVANT STATUTES AND REGULATIONS .....</b>                                   | <b>iii</b> |

## **I. OVERVIEW**

1. This motion for settlement approval is the result of nearly two years of mediations facilitated by the Honourable Justice Thomas Cromwell.
2. The action arises out of an alleged defect in automobile ignition switches the Defendants designed and manufactured from 1997 to 2014. This defect caused the ignition switches to move from the “on” to the “accessory” or “off” position, potentially while the vehicle was in motion, resulting in a loss of power steering, power braking, and potentially air bags (collectively referred to herein as the “Defects”). The Plaintiffs allege the Defendants knew of these Defects as early as 2002, but did not begin recalling them until 2014. The Defendants deny all allegations
3. This action was commenced on April 11, 2014, and was thereafter consolidated with various other actions. Since then, it has been advanced alongside two parallel actions in Quebec.
4. In fall of 2020, shortly after the Plaintiffs served their certification motion record, the Parties entered formal mediation regarding the economic loss claims, assisted by Justice Cromwell. After exchanging voluminous materials and attending numerous mediation sessions and ongoing informal discussions, the Parties executed a Term Sheet in March 2022. The Parties then resumed mediation with Justice Cromwell to separately resolve the amount the Defendants would pay on account of Plaintiffs’ counsel fees and disbursements.
5. The Settlement Agreement provides a \$12,000,000 Settlement Fund Amount to be distributed to Eligible Claimants, less Administrative Expenses and taxes on interest earned. The Settlement Fund Amount will be distributed *pro rata* among Eligible

Claimants, depending on the recalls to which their vehicles were subject. 19.76% of the Settlement Fund Amount will be attributed to settlement of the Quebec Actions, and the remainder will be attributed to the settlement of the Ontario Action. The Class Proceedings Fund, which provided funding to the Ontario Action Plaintiffs, will apply a 10% levy to the net amounts awarded to eligible Ontario/National Settlement Class members only. The Settlement is comparable to that achieved in the parallel action in the United States. Taking into account the result achieved as well as the risks of continuing litigation, the settlement is fair, reasonable, and in the best interests of the class.

6. The Settlement Agreement also provides that the Defendants will pay a separate \$4,397,500 to compensate any and all plaintiffs' counsel in the Actions and Related Actions for fees and disbursements, to be allocated by Co-Lead Counsel. These requested fees reflect the time, efforts, and risk incurred by counsel over the past decade, and will be divided among at least five law firms. They are reasonable, "presumptively valid", and supported by the Representative Plaintiff and should be approved.

7. The Plaintiff requests that the Settlement Agreement, Approval Notice Program, and requested fees and disbursements be approved.

#### **I. DEFINED TERMS**

8. All capitalized terms in this factum have the meanings ascribed to them in Amended Settlement Agreement, except to the extent they are otherwise defined herein.

## II. FACTS

### a) Background

9. This motion for settlement approval is brought within the following three proceedings (collectively referred to as the “Actions”):<sup>1</sup>

- a) the action in the Ontario Superior Court of Justice bearing Court File No. CV-14-502023-CP titled *Oberski et al. v. General Motors LLC et al.* (the “Ontario Action”);
- b) the action in the Superior Court of Québec bearing Court File No. 500-06-000687-141 titled *Michael Gagnon v. General Motors of Canada et al.*; and
- c) the action in the Superior Court of Québec bearing Court File No. 500-000729-158 titled *Michael Gagnon v. General Motors of Canada et al.*

(the actions in the Superior Court of Québec are collectively referred to as the “Quebec Actions”).

10. The Ontario Action was commenced on April 11, 2014, in Toronto. Around the same time, three other proposed class actions were commenced in Ontario relating to the same Recalls and Defects.<sup>2</sup> Following a year of carriage discussions, the actions were consolidated into the Ontario Action by order of Justice Perell dated October 11, 2016.<sup>3</sup> Justice Perell’s order also appointed RG and KSM as Co-Lead Counsel, and LMS Lawyers LLP, Sutts Strosberg LLP, McKenzie Lake Lawyers LLP and Merchant Law Group LLP were named as Class Counsel in the Ontario Action.<sup>4</sup>

---

<sup>1</sup> Affidavit of Vincent Genova, sworn July 24, 2024 [Genova Affidavit] at para. 45.

<sup>2</sup> Genova Affidavit at para. 46; *Green et al. v. General Motors of Canada Ltd. and General Motors Company* (CV-14-20608-CP), commenced March 31, 2024, *Scobie v. General Motors of Canada Limited and General Motors Company* (CV-14-21250-CP), commenced September 10, 2014, and *Hansen et al. v. General Motors of Canada Ltd. and General Motors Company* (CV-14-21552-CP), commenced November 24, 2014. See

<sup>3</sup> Genova Affidavit at para. 47.

<sup>4</sup> Genova Affidavit at para. 44.

11. A number of parallel actions were commenced across the country (the “Related Actions”), all of which are subject to this settlement approval motion.<sup>5</sup> These include parallel actions commenced in Windsor, which were consolidated in the Ontario Action in 2017, and the two Quebec Actions, which were judicially suspended in 2016 pending the outcome of the Ontario and American proceedings.<sup>6</sup>

**b) Subject of the Action**

12. Beginning in or about February 2014, the Defendants began recalling Subject Vehicles affected by the Defects.<sup>7</sup> Eight recalls were made on Subject Vehicles between February 10, 2014 and July 3, 2014.<sup>8</sup>

13. The Plaintiffs allege that the Subject Vehicles contained improperly designed and manufactured ignition switches and electronic modules, which were prone to move from the “run” position to the “accessory” or “off” position while the Subject Vehicles were in motion and use. This resulted in a loss of the Subject Vehicle’s electrical power, as well as the turning off of the engine and the disabling of the airbags, power steering and the power brakes. Furthermore, when the ignition moved to the “off” position, the Subject Vehicles’ sensing and diagnostic modules would shut off critical vehicle systems, including airbags, even if the Subject Vehicle was still moving at high speed.<sup>9</sup>

14. The Plaintiffs allege that these Defects rendered the Subject Vehicles inherently dangerous, and that these dangerous design flaws caused a multitude of very serious and

---

<sup>5</sup> Genova Affidavit at paras. 49-50.

<sup>6</sup> Genova Affidavit at paras. 51-52.

<sup>7</sup> Genova Affidavit at para. 20

<sup>8</sup> Genova Affidavit at para. 20, Exhibits H-O.

<sup>9</sup> Genova Affidavit at para. 36.

life-threatening injuries, and in some cases death.<sup>10</sup> The Plaintiffs also allege that the Defendants knew of these Defects as early as 2002, but did not inform regulatory authorities, the Class Members or the general public, or issue a recall, until February 2014.<sup>11</sup>

15. The Plaintiffs initially brought the action on behalf of three proposed classes: those who had sustained injuries or death while operating or being transported in a Subject Vehicle (the “Injury Class”); family members with standing to advance derivative claims under the applicable provincial legislation (the “Family Class”); and those who had suffered economic loss caused by the Defects (the “Owner/Lessee Class”).<sup>12</sup>

**c) Parallel U.S. Litigation and Settlement**

16. Parallel pure economic loss claims were filed in the United States in 2014, and were litigated in a multi-district litigation matter in the United States District Court for the Southern District of New York (*In re: General Motors LLC Ignition Switch*, No. 14-MDL-2543 (JMD)).<sup>13</sup> These economic loss claims arose out of the same Defects in the Canadian actions, along with an additional defect regarding side airbags not part of the Canadian actions.<sup>14</sup> The U.S. action involved over 14.1 million vehicles, and was resolved via a nationwide settlement of USD \$121,000,000, or approximately USD \$8.53 per Subject Vehicle in that action.<sup>15</sup>

---

<sup>10</sup> Genova Affidavit at para. 37.

<sup>11</sup> Genova Affidavit at para. 38.

<sup>12</sup> Genova Affidavit at paras. 63-64; see also Exhibit “AA”, “BB”. “CC”.

<sup>13</sup> Genova Affidavit at para. 26.

<sup>14</sup> Genova Affidavit at para. 26.

<sup>15</sup> Genova Affidavit at paras. 27–29.



**d) Procedural History**

17. Following resolution of carriage, the Plaintiffs served the Defendants a Request to Admit and an Amended Request to Admit on November 8, 2017, and January 22, 2018, respectively.<sup>16</sup> On February 12, 2018, the Defendants responded to both Requests to Admit and admitted:<sup>17</sup>

- a) many of the Subject Vehicles had low-torque ignition switches that could move out of the “run” position, and that if the movement occurred, the driver would lose power steering and power braking; and
- b) if a collision occurs while the switch is in the “off” position, the vehicle’s safety airbags may fail to deploy.

18. On January 18, 2018, Co-Lead Counsel sought and subsequently obtained funding for the Ontario Action from the Class Proceedings Fund. The Fund has a first charge on the Net Settlement Fund and is entitled to recover the costs of any disbursements it has paid and a 10% levy to the net amounts awarded to eligible Ontario/National Settlement Class members.<sup>18</sup>

19. On June 29, 2020, the Plaintiffs in the Ontario Action served their certification record in anticipation of a contested certification motion. The four-volume motion record included a Second Fresh As Amended Statement of Claim, two expert reports (one regarding liability and one regarding damages), affidavits from the three proposed representative plaintiffs, and a lengthy solicitor’s affidavit, attaching various documents

---

<sup>16</sup> Genova Affidavit at paras. 53-55, Exhibit “W”- “X”.

<sup>17</sup> Genova Affidavit at para. 55, Exhibit “Y”.

<sup>18</sup> Genova Affidavit at para. 56.

Co-Lead Counsel had obtained from, among other sources, the U.S. regulatory investigations and the U.S. litigation.<sup>19</sup>

**e) The Economic Loss Settlement**

20. Concurrently with steps to advance the litigation, Co-Lead Counsel and Defendants' counsel periodically canvassed possibilities for resolving the various actions.<sup>20</sup> Informal steps began shortly after the Plaintiffs delivered their certification motion record.<sup>21</sup> Following initial discussions in around October 2020, the parties engaged former Supreme Court of Canada Justice Thomas Cromwell for the purpose of mediating settlement of the economic loss claims.<sup>22</sup> From December 2020 until March 2021, the parties engaged in numerous pre-mediation calls and caucuses, and exchanged mediation materials.<sup>23</sup>

21. Following the first formal mediation session on March 26, 2021, the Parties agreed to pause mediation for the economic loss claims and to instead focus on mediating claims for personal injury and fatalities.<sup>24</sup> The parties engaged U.S. mediator Daniel J. Balhoff, who had previously served as mediator and Court-appointed Special Master to resolve the American personal injury claims.<sup>25</sup> Mediation sessions were held on November 10, 2021, and on May 31, 2023, and the Parties ultimately settled those personal injury claims

---

<sup>19</sup> Genova Affidavit at para. 63.

<sup>20</sup> Genova Affidavit at para. 65.

<sup>21</sup> Genova Affidavit at para. 65.

<sup>22</sup> Genova Affidavit at para. 66.

<sup>23</sup> Genova Affidavit at para. 67.

<sup>24</sup> Genova Affidavit at para. 68.

<sup>25</sup> Genova Affidavit at para. 69.

without prejudicing the rights of other class members to pursue individual litigation over their personal injuries.<sup>26</sup>

22. Counsel resumed mediation of the economic loss claims with Justice Cromwell on December 7, 2021. Multiple mediation sessions culminated in a successful session in mid-March 2022, where the Parties agreed to the final proposed settlement conditions and term sheet. These terms were ultimately memorialized in the Settlement Agreement, which provides for a Settlement Fund Amount of CAD \$12,000,000.00,<sup>27</sup> roughly CAD \$9.29 per Subject Vehicle.<sup>28</sup>

23. After agreement on the quantum of the Settlement Fund Amount for payment of individual Claims and the execution of the term sheet, the Parties began negotiations to resolve the quantum the Defendants would pay for plaintiffs' counsels' fees and disbursements. This involved further mediation before Justice Cromwell, and informal negotiations between the parties. The parties ultimately agreed, subject to approval of the courts in Quebec and Ontario, on a Plaintiffs' Counsel Fee Amount of \$4,397,000.00, inclusive of fees, expenses, costs, disbursements, and associated taxes, all of which is to be paid by GM separately from and in addition to the \$12 million Settlement Fund Amount to compensate any and all plaintiffs' counsel across the country.<sup>29</sup>

---

<sup>26</sup> Genova Affidavit at para. 69.

<sup>27</sup> Genova Affidavit at para. 70.

<sup>28</sup> Genova Affidavit at para. 30.

<sup>29</sup> Genova Affidavit at paras. 71-72.

**f) Certification and Authorization for Settlement Purposes**

24. By Order dated January 16, 2024, this Court certified the Ontario Action for settlement purposes with respect to the Plaintiffs' economic loss allegations. This Order also discontinued all class claims advanced on behalf of the Injury and Family Classes arising from a motor vehicle accident involving a Subject Vehicle. These claims were settled separately on behalf of those class members with viable personal injury and/or property damage claims.<sup>30</sup>

25. In May 2024, the Quebec Actions were authorized for settlement purposes, with the Notice approved, and an Opt-Out/Objection Deadline set for July 19, 2024 (the "Québec Actions Authorization Notice Order").<sup>31</sup> The Ontario Certification Order was then amended to align with the Québec Actions Authorization Notice Order (the "Ontario Action Certification Notice Order", and with the Quebec Actions Notice Order, the "Certification/Authorization Notice Orders").<sup>32</sup>

26. The Ontario Action Certification Notice certified the following National Settlement Class:<sup>33</sup>

All Persons resident in Canada other than Excluded Persons and other than Persons whose Subject Vehicles are identified based on reasonably available information from GM as having been first retail sold in Québec who, at any time on or before the Recall Announcement Date of the Recall(s) applicable to their Subject Vehicle(s), owned, purchased, and/or leased a Subject Vehicle in any of the provinces/territories in Canada.

---

<sup>30</sup> Genova Affidavit at para. 74.

<sup>31</sup> Genova Affidavit at paras. 75-77.

<sup>32</sup> Genova Affidavit at para. 78.

<sup>33</sup> Genova Affidavit at para. 79.

27. The Québec Actions Authorization Notice Order authorized the following Québec Settlement Class:<sup>34</sup>

All Persons resident in Canada other than Excluded Persons who, at any time on or before the Recall Announcement Date of the Recall(s) applicable to their Subject Vehicle(s), owned, purchased, and/or leased a Subject Vehicle in any of the provinces/territories in Canada and whose Subject Vehicles are identified based on reasonably available information from GM **as having been first retail sold in Quebec.** [Emphasis added].

28. The Certification/Authorization Notice Orders certified/authorized the following four Subclasses:<sup>35</sup>

Settlement Class Members who own(ed), purchased, and/or lease(d) a Subject Vehicle covered by the **Delta Ignition Switch Recall** (the “Delta Ignition Switch Subclass”).

Settlement Class Members who own(ed), purchased, and/or lease(d) a Subject Vehicle covered by the **Key Rotation Recall** (the “Key Rotation Subclass”).

Settlement Class Members who own(ed), purchased, and/or lease(d) a Subject Vehicle covered by the **Camaro Knee-Key Recall** (the “Camaro Knee-Key Subclass”); and

Settlement Class Members who own(ed), purchased, and/or lease(d) a Subject Vehicle covered by the **Electric Power Steering Recall** (the “Electric Power Steering Subclass”).

29. The Ontario Action Certification Notice Orders certified the following Common Issue:<sup>36</sup>

Did any of the Defendants owe a duty of care to National Settlement Class members and if so, what was the standard of care?

---

<sup>34</sup> Genova Affidavit at para. 81.

<sup>35</sup> Genova Affidavit at paras. 80, 82.

<sup>36</sup> Genova Affidavit at para. 83.

30. The Québec Actions Authorization Notice Order authorized the following Common Issue:<sup>37</sup>

Are the defendants liable for a defect in the Subject Vehicles to the Québec Settlement Class Members?

31. The Certification/Authorization Notice Program commenced on May 20, 2024 and provided direct and general notice to Settlement Class Members through emails, press release and newspaper publications.<sup>38</sup> In total, direct and media notice reached over 80% of the Class.<sup>39</sup> As of the date of this factum, there have been no Objection requests and only six Opt-Out requests.<sup>40</sup>

**g) Settlement Agreement**

**i) Criteria for Eligibility and the Claims Program**

32. To receive compensations under the Settlement Agreement, Settlement Class Members must, electronically or through paper mail, submit a Claim Form:<sup>41</sup>

- a) Confirming they are not claiming on behalf of Excluded Persons;
- b) Providing the personal or business name under which the Subject Vehicle was owned or leased, along with their contact information and address;
- c) Providing the VIN and make, model and year of the Subject Vehicle for which they are claiming compensation (only one claim is allowed per Subject Vehicle);
- d) Confirming whether they are current or former owners or lessees of the Subject Vehicles, including the dates upon which the Subject Vehicle was leased or purchased and when the lease was terminated or the vehicle was sold (if applicable);

---

<sup>37</sup> Genova Affidavit at para. 84.

<sup>38</sup> JND Affidavit at para. 12.

<sup>39</sup> JND Affidavit at para. 20.

<sup>40</sup> There was one additional Opt-Out request by an individual that did not own or lease, at any point, a Subject Vehicle covered by the Settlement Agreement or this proceeding. See JND Affidavit at paras. 21–22.

<sup>41</sup> Genova Affidavit, Exhibit “A” – Settlement Agreement, Schedule “E”.

- e) Confirming either
  - i) that the Subject Vehicle was repaired pursuant to a Recall, or the Subject Vehicle will be repaired pursuant to a Recall before the Final Recall Repair Date; or
  - ii) they no longer have possession of the Subject Vehicle

**h) Formula for the Calculation of Settlement Benefits**

33. Based on GM's best available sales and distribution data for all Subject Vehicles destined for sale in Canada, 80.24% of the Net Settlement Amount will be attributed to the settlement of the Ontario Action and 19.76% of the Net Settlement Amount will be attributed to the settlement of the Quebec Actions.<sup>42</sup> This allocation between the Ontario Action, which extends to all Class Members in all jurisdictions except Quebec, and the Quebec Actions is based on the GM's best data on the sales and distribution destinations of the Subject Vehicles.<sup>43</sup>

34. As there are four Subclasses, four Defects, and various Recalls, the benefits available under the Settlement vary based on the applicable Recalls and Defects for the relevant Subject Vehicle.<sup>44</sup> The allocations of the Net Settlement Amount are based on the relative strength of the liability position of each Subclass.<sup>45</sup>

35. The Delta Ignition Switch Class Members will receive twice (2x) the amount paid to each Eligible Claim as compared to the members of the Camaro Knee-Key and Electric Power Steering Subclasses. The Key Rotation Class Members shall receive one-and-a-half

---

<sup>42</sup> Genova Affidavit at para. 85.

<sup>43</sup> Genova Affidavit at para. 85.

<sup>44</sup> Genova Affidavit at para. 86.

<sup>45</sup> Genova Affidavit at para. 86.

times (1.5x) the amount paid to each Eligible Claim by members of the Camaro Knee-Key and the Electric Power Steering Subclasses.<sup>46</sup>

36. The Settlement Agreement sets out that the settlement amounts for each Subclass and Class Member shall be calculated in accordance with the following mathematical models:<sup>47</sup>

- a) Base Payment Amount: the Net Settlement Amount is divided by the number of Eligible Claims, with the Eligible Claims that fall *both* in the Delta Ignition Switch Subclass and the Electric Power Steering Subclass being counted twice;
- b) Adjusted Base Payment Amount: the Base Payment Amount is multiplied by:
  - i) a factor of two (2) for the Eligible Claims in the Delta Ignition Switch sub-Class;
  - ii) a factor of one-and-a-half (1.5) for the Eligible Claims in the Key Rotation sub-Class;
  - iii) a factor of one (1) for the Eligible Claims in the Camaro Knee-Key and Electric Power Steering sub-classes;
- c) Total Value of the Eligible Claims for the Subclasses: the Adjusted Base Payment Amount is multiplied by the number of Eligible Claims for that sub-Class;
- d) The Total Value of the Eligible Claims for each Subclass is totaled so that a percentage can be assigned to the Total Value of the Eligible Claims for each Subclass;
- e) Prorated Value of Eligible Claims for each Subclass: Each Subclass's percentage is applied to the Net Settlement Amount; and
- f) Final Base Payment Amount: the Prorated Value for each Subclass is divided by the number of Eligible Claims for that Subclass.

---

<sup>46</sup> Genova Affidavit at para. 87.

<sup>47</sup> Genova Affidavit at para. 88.



**i) Administrative Expenses**

37. The Settlement Fund is separate and apart from the fund for Plaintiffs' Counsel Fees. The only charges to the Settlement Fund are the Administrative Expense payable to JND and taxes on interest earned. JND has estimated the range of its fees and expenses, based on take up rates between 5-15% and a class size of approximately 1.3 million, to be \$1,487,087 and \$2,066,209. The payment of Administrative Expenses will be the only payment JND receives in relation to the administration of the Notice Program and the Claims Program.<sup>48</sup>

**ii) Net Settlement Benefits by Subclass and take-up rate**

38. Based on the expected Administrative Expenses for a 5%, 10%, or 15% take-up rate and the above calculations for the Settlement Class Member payments, the expected payment amount that will be provided to Settlement Class Members in each Subclass is set out in the table below:<sup>49</sup>

| <b>Subclass</b>         | <b>Estimated Final Base Payment Amount (5% take-up)</b> | <b>Estimated Final Base Payment Amount (10% take-up)</b> | <b>Estimated Final Base Payment Amount (15% take-up)</b> |
|-------------------------|---|--|--|
| Delta Ignition Switch   | \$195.48  | \$95.12  | \$61.60  |
| Key Rotation            | \$146.61  | \$71.34  | \$46.20  |
| Camaro Knee-Key         | \$97.74   | \$47.56  | \$30.80  |
| Electric Power Steering | \$97.74   | \$47.56  | \$30.80  |

39. For the National Settlement Class Members, the Class Proceedings Fund levy will be deducted from each of the above Final Base Payment Amounts, pursuant to section 10(3)(b) of O. Reg. 771.92.<sup>50</sup>

<sup>48</sup> JND Affidavit at para. 27.

<sup>49</sup> JND Affidavit at paras. 36-39.

<sup>50</sup> JND Affidavit at para. 39.

### III. Plaintiffs' Counsel Fees, Disbursements, Expenses, Costs and Applicable Taxes

40. The requested \$4,397,500.00 for the Plaintiffs' Counsel Fee Amount represents approximately a 20.5% contingency fee (once disbursements are deducted).

41. In relation to Co-Lead Counsel's fees and disbursements, RG has incurred fees of approximately **\$1,097,077.26** (inclusive of HST) and disbursements of approximately **\$245,080.96** (inclusive of HST) totalling **\$1,342,158.22**. KSM has incurred fees (inclusive of HST) of approximately **\$860,057.13** and disbursements (inclusive of HST) of approximately **\$41,747.21**, totalling **\$901,804.34**.<sup>51</sup>

42. As of April 2022, Sutts Strosberg LLP had incurred fees of approximately **\$621,720** and disbursements of approximately **\$357,903**, totalling **\$979,623** (inclusive of HST). McKenzie Lake Lawyers LLP incurred fees of approximately **\$167,437** and disbursements of **\$21,312**, totalling **\$188,749**.<sup>52</sup>

43. For ease reference, below is a table setting out the total amount of fees and disbursements incurred by Co-Lead Counsel as well as Sutts Strosberg LLP and McKenzie Lake Lawyers LLP:<sup>53</sup>

|                     | <b>Fees</b>                  | <b>Disbursements</b>         | <b>Total</b>          |
|---------------------|------------------------------|------------------------------|-----------------------|
| RG                  | \$1,097,077.26               | \$245,080.96                 | <b>\$1,342,158.22</b> |
| KSM                 | \$860,057.13                 | \$41,747.21                  | <b>\$901,804.34</b>   |
| Sutts Strosberg LLP | \$621,720 (as of April 2022) | \$357,903 (as of April 2022) | <b>\$979,623</b>      |

<sup>51</sup> Genova Affidavit at para. 135.

<sup>52</sup> Genova Affidavit at para. 136.

<sup>53</sup> Genova Affidavit at paras. 137-138.

|                              |                                 |                                |                       |
|------------------------------|---------------------------------|--------------------------------|-----------------------|
| McKenzie Lake<br>Lawyers LLP | \$167,437 (as of April<br>2022) | \$21,312 (as of April<br>2022) | <b>\$188,749</b>      |
| <b>Total:</b>                | <b>\$2,746,291.39</b>           | <b>\$666,043.17</b>            | <b>\$3,412,334.56</b> |

44. When executing the term sheet, the Parties anticipated that Co-Lead Counsel would undertake significant further work to complete the formal Settlement Agreement and to bring this action to the settlement approval stage. Co-Lead Counsel has, in fact, incurred fees for this time, and will continue to incur fees throughout the claims process under the Settlement Agreement. In this context, the requested Plaintiffs' Counsel Fee Amount represents a premium of approximately \$985,165.44 on the fees and disbursements, plus taxes, actually incurred by Co-Lead and Actions Counsel.<sup>54</sup>

45. However, any premium will dissipate once the Plaintiffs' Counsel Fee Amount is shared amongst all plaintiffs' counsel in the Action and Related Actions, as is required by the Settlement Agreement.<sup>55</sup>

#### IV. ISSUES

46. There are two issues before the Court:

- a) Whether the proposed Settlement Agreement is fair, reasonable and in the best interests of class members, and should be approved by this Court; and
- b) Whether the requested Plaintiffs' Counsel Fee Amount of \$4,397,500, inclusive of fees, disbursements, and applicable taxes, should be approved by this Court.

#### V. LAW AND ARGUMENT

- a) **The Settlement Is Fair, Reasonable And In The Best Interests Of Class**

---

<sup>54</sup> Genova Affidavit at para. 139

<sup>55</sup> Genova Affidavit at para. 139.

## Members

47. This proceeding was commenced under the *Class Proceedings Act, 1992* as it was commenced before the October 1, 2020 amendments (the “Old CPA”) that added s. 27.1, which enumerates the various considerations applicable to court approval of settlements. Pursuant to the transition provision of the amended CPA, the Old CPA continues to apply to this proceeding.

48. Section 29(2) of the CPA provides that a proposed settlement of class proceedings is not binding unless approved by the court.<sup>56</sup>

49. Generally, courts favour settling of cases: “... there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.”<sup>57</sup>

50. A proposed settlement “must fall within a zone of reasonableness”, which “is an objective standard” that varies “depending on the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.”<sup>58</sup> The settlement need not be perfect, nor must it treat all class members equally, so long as it is fair and reasonable.<sup>59</sup>

---

<sup>56</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6, [CPA] s. 29(2).

<sup>57</sup> *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 14 (Gen. Div.), citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230-31 (H. Ct. J.).

<sup>58</sup> *Des-Rosiers v. Takata Corporation*, 2020 ONSC 8043 [*Des-Rosiers*] at para. 26.

<sup>59</sup> *Rizzi v. Handa*, 2021 ONSC 1004 [*Rizzi*] at para. 19.

51. In determining whether a settlement is “reasonable”, the court takes into account what might have been expected had the case proceeded to trial,<sup>60</sup> without making findings of fact on the merits of the litigation.<sup>61</sup> To that end, the court considering whether a proposed settlement is reasonable must consider all relevant circumstances, including:

- a. The likelihood of recovery or success;
- b. The amount and nature of the discovery, evidence or investigation;
- c. The settlement terms;
- d. The recommendation and experience of counsel;
- e. The futures expenses and likely litigation risk;
- f. The recommendation of neutral parties;
- g. The number of objectors and the nature of the objections;
- h. Whether there was arms-length bargaining;
- i. The involvement of the representative plaintiff; and
- j. Positions taken by the parties during the negotiation.<sup>62</sup>

52. The factors “are, and should be, a guide in the process and no more.”<sup>63</sup>

**i) The likelihood of recovery or success and litigation risks**

53. In assessing plaintiffs’ likelihood of success, the court must compare and contrast the settlement with what would likely be achieved at trial without making any actual

---

<sup>60</sup> [Rizzi](#) at para. 19.

<sup>61</sup> [Vell v. Mattel Canada Inc.](#), 2016 ONSC 5789 [[Vell](#)] at para. 27.

<sup>62</sup> [Rizzi](#) at para. 17; [Lavie v. MyTravel Canada Holidays Inc.](#), 2011 ONSC 3149 at para. 19; [Maggisano v. Skyservice Airlines Inc.](#), 2010 ONSC 7169.

<sup>63</sup> [Charette v. Trinity Capital Corporation](#), 2019 ONSC 3153 at para. 60.

findings on the merits of the claims and defences.<sup>64</sup> This is a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits.<sup>65</sup>

54. The Plaintiffs in this case faced significant litigation risks.

55. *First*, developments in the law of recovery for pure economic loss following the Plaintiffs' delivery of their certification material were not favourable to Plaintiffs.

56. In November 2020, the Supreme Court of Canada released its decision in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, arising out of a defendant's motion for summary judgment in a class action brought on behalf of food service franchisees after the defendant recalled meat products processed in one of its factories in which a listeria outbreak had occurred. The Supreme Court of Canada allowed the defendant's motion, finding that the claims were doomed to fail because they were for "pure economic loss":

“While the RTE [*i.e.*, “ready to eat”] meats may have posed a real and substantial danger to consumers when they were manufactured, ***any such danger evaporated when they were recalled and destroyed.*** [...] We therefore agree that, once that was accomplished in this case by way of the recall, the facts would not support a finding that the RTE meats posed a real and substantial danger thereafter to anyone — not to consumers, and certainly not to [class members], who can therefore show no injury to a relevant right protected under tort law. [emphasis added]<sup>66</sup>

57. Courts have since found that the *Maple Leaf Foods* decision “placed limits on the compensation available in product liability cases and have increased the litigation risk associated with products liability class actions.”<sup>67</sup> In fact, in an earlier decision approving

---

<sup>64</sup> [1688782 Ontario Inc. v. Maple Leaf Foods Inc.](#), 2020 SCC 35 [[Maple Leaf Foods Inc.](#)] at para. 58.

<sup>65</sup> [Des-Rosiers](#) at para. 29.

<sup>66</sup> [Maple Leaf Foods Inc.](#) at para. 58.

<sup>67</sup> [Baggio v. General Motors of Canada Ltd.](#), 2023 ONSC 3019 at para. 9.

a settlement in *Hamilton v. Toyota Motor Sales, USA, Inc.*, a product liability class action where the defective gas pedals were subject to voluntary recalls, Justice Perell expressly acknowledged that the “very high litigation risks” meant that the “immediate, genuine, and substantive benefits” under the settlement were in the best interests of the class members.<sup>68</sup>

58. Similarly, the Plaintiffs in this action faced a real likelihood that, at trial, this Court would accept the Defendants’ position that Settlement Class Members’ claims were entirely remedied by the Recalls and no longer compensable in tort. *Maple Leaf Foods* significantly altered the Plaintiffs’ litigation risk. Settlement Class Members may have been without any recourse for their claims at all had this action proceeded by litigation. When compared to these high litigation risks, the immediate and effective benefits under the Settlement Agreement are fair, reasonable and in the best interest of the class.

59. **Second**, the jurisprudence regarding subsidiary corporate liability for parent corporations is also unfavourable to the Plaintiffs’ theory of liability. In *Gregorio v. Intrans-Corp.*, the Court of Appeal for Ontario held that a subsidiary corporation could not be held liable for its parent corporation manufacturing defects unless the subsidiary is “nothing more than a conduit used by the parent to avoid liability” for “conduct akin to fraud.”<sup>69</sup>

60. In this case, General Motors Corporation (“Old GM”) designed, manufactured, and assembled approximately 88% of the Subject Vehicles. Although GM Canada was an Old GM subsidiary during the material time, the Plaintiffs would have faced a high hurdle in

---

<sup>68</sup> *Hamilton v. Toyota Motor Sales, USA, Inc.*, 2014 ONSC 785 [*Toyota*] at para. 49.

<sup>69</sup> *Gregorio v. Intrans-Corp.*, 1994 CanLII 2241 (ON CA) at pp. 14-15; See also *Lilleyman v. Bumblebee Foods LLC*, 2023 ONSC 4408 at para. 107.

showing that GM Canada was merely a shell for Old GM to avoid liability such that it should be liable for Old GM manufacturing defects.

61. **Third**, the Plaintiffs faced additional litigation risks in holding General Motors LLC (“New GM”) liable as a successor corporation to Old GM. While Canadian law recognizes that a corporation acquiring assets may be responsible for the liabilities of the selling corporation, the circumstances in which such liability will be imposed are “limited” and “uncertain.”<sup>70</sup> As Justice Koehnen held in *Talbot*, the law regarding the “certain circumstances” required to impose successor liability in Canada is unsettled.<sup>71</sup>

62. The Plaintiffs’ claim against New GM for the vehicles Old GM manufactured is similar to such a successor liability claim, as New GM purchased Old GM’s assets. While the Plaintiffs’ position throughout the proceedings has been that successor liability should be appropriately imposed on New GM, Co-Lead Counsel took into account that the uncertainty and unsettled nature of the law necessarily increased the litigation risks.

63. As a result, the state of Canadian law placed significant litigation risks before the Plaintiffs. Given the considerable uncertainty they would have succeeded in proceeding to trial, the benefits under the Settlement Agreement are fair, reasonable, and in the best interests of the Class Members.

#### **ii) The settlement terms**

64. The proposed terms of the Settlement Agreement are fair, reasonable and in the best interests of Class Members. As noted, the Settlement Agreement provides for a

---

<sup>70</sup> *Talbot v. Nourse et al*, 2018 ONSC 1061 [*Talbot*] at paras. [137-141](#).

<sup>71</sup> *Talbot* at para. [141](#).



Settlement Fund Amount of \$12,000,000 from which Administrative Expenses, taxes on interest earned on the escrow account holding the Settlement Fund Amount, and distributions to Eligible Claimants will be drawn. The Class Proceedings Fund's levy will also be calculated as 10% of the net amounts awarded to eligible Ontario/ National Settlement Class members.<sup>72</sup>

65. This Settlement Fund Amount is separate and distinct from the Plaintiffs' Counsel Fee Amount: no counsel fees will be drawn from the Settlement Fund Amount.<sup>73</sup>

66. The compensation Eligible Claimants will receive depends both on the Recalls to which their vehicles were subject and the total number of Eligible Claimants. As a result, the take-up rate will determine the compensation available to each Eligible Claimant. The projected compensation amounts for each subclass given take-up rates of 5%, 10%, and 15% are described in the following chart:<sup>74</sup>

| <b>Subclass</b>         | <b>Estimated Final Base Payment Amount (5% take-up)</b> | <b>Estimated Final Base Payment Amount (10% take-up)</b> | <b>Estimated Final Base Payment Amount (15% take-up)</b> |
|-------------------------|---|--|--|
| Delta Ignition Switch   | \$195.48  | \$95.12  | \$61.60  |
| Key Rotation            | \$146.61  | \$71.34  | \$46.20  |
| Camaro Knee-Key         | \$97.74   | \$47.56  | \$30.80  |
| Electric Power Steering | \$97.74   | \$47.56  | \$30.80  |

---

<sup>72</sup> JND Affidavit at para. 27-39.

<sup>73</sup> JND Affidavit at para. 122.

<sup>74</sup> JND Affidavit at para. 38.

67. The Class Proceedings Fund’s 10% levy will be applied to each such payment made to a National Settlement Class Member, pursuant to section 10(3)(b) of O. Reg. 771/92.<sup>75</sup>

68. These amounts generally accord with a range of damages identified in the Expert Report of Mr. Edward Stockton, adduced as part of the Plaintiffs’ 2020 Certification Motion Record.<sup>76</sup>

69. The Parties anticipate a take-up rate of approximately 10%. This take-up rate is comparable to that in the U.S. Settlement, which was approximately 10%.<sup>77</sup> This rate appears reasonable, given that the majority of Subject Vehicles were manufactured before 2010, and many Class Members may have replaced their Subject Vehicles by now. Notwithstanding the extensive Certification and Approval Notice Programs, the passage of time and Class Members’ replacement of their subject vehicles may have decreased general interest in submitting Claims.

70. The Final Base Payment Amounts under a 10% take-up rate listed above are comparable to those ultimately distributed in the U.S. Settlement, described in the following table:<sup>78</sup>

| <b>U.S. Subclass</b>    | <b>Final Payout Per Eligible Claim</b> |
|-------------------------|--|
| Delta Ignition Switch   | USD \$97.43                            |
| Key Rotation            | USD \$73.07                            |
| Camaro Knee-Key         | USD \$48.72                            |
| Electric Power Steering | USD \$48.72                            |

---

<sup>75</sup> JND Affidavit at para. 39.

<sup>76</sup> Genova Affidavit at para. 39(e)(ii), Exhibit “U”.

<sup>77</sup> Genova Affidavit at para. 92.

<sup>78</sup> Genova Affidavit at para. 33. The U.S. Settlement also included a “Side Airbag Subclass” regarding a recall and alleged defect not covered in this action. The payout per claim to those subclass members was USD \$48.72.

71. Additionally, it is fair, reasonable and in the best interests of the Settlement Class Members that the Settlement Agreement discontinues the class proceeding claims related to personal injuries but does not provide the Defendants any release from individual personal injury claims (outside of the personal injury claims of certain Class Members which were settled). In class actions relating to voluntary recalls that are alleged to be delayed or otherwise improper, courts have approved proposed settlements that provide compensation for economic loss claims only and do not release the Defendants of any liability to the personal injury claims of Class Members.<sup>79</sup>

**iii) The amount and nature of discovery, evidence or investigation**

72. Plaintiffs' Counsel have taken many steps over the duration of this proceeding to investigate the allegations and procure evidence, including:

- c) Signing a Cooperation Agreement with Delphi Automotive that allowed the Plaintiffs to obtain information regarding the testing, research, manufacture of, and subsequent modifications to the ignition switches at issue, as well as meeting with certain fact witnesses at the Delphi Automotive facility in Troy, Michigan;<sup>80</sup>
- d) Retrieving and reviewing all relevant documents arising from the U.S. bellwether litigation against New GM in relation to the Defects and Recalls;<sup>81</sup>
- e) Retaining and delivering expert reports from Dr. Stevick, who opined that all Subject Vehicles contained the Defects, and from Mr. Stockton who opined that the Recall did not fully compensate Class Members for their losses as the cost in repair damages are \$80 per Subject Vehicle and consequential damages (are \$30 per Subject Vehicle).<sup>82</sup>
- f) Reviewing, analyzing and obtaining expert advice (formally and informally) on the eight Recalls that are at issue in this proceeding;<sup>83</sup>

---

<sup>79</sup> *Vell* at para. 15; *Des-Rosiers* at para. 13.

<sup>80</sup> Genova Affidavit at paras. 11, 57-60.

<sup>81</sup> Genova Affidavit at paras. 26-35, 39(a)-(d), 57.

<sup>82</sup> Genova Affidavit at para. 39(e)(i).

<sup>83</sup> Genova Affidavit at para. 18.

- g) Staying apprised of and reviewing documents from the U.S. Bankruptcy proceedings relating to Old G.M.;<sup>84</sup>
- h) Retrieving and reviewing the press releases and testimony before U.S. Congress of the GM executives and officers discussing the Defects and Recalls;<sup>85</sup>
- i) Retrieving and reviewing the “Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls” of U.S Attorney Anton R. Valukas, dated May 29, 2014;<sup>86</sup> and
- j) Retrieving and reviewing the Deferred Prosecution Agreement between the US and GM.<sup>87</sup>

73. The Plaintiffs also delivered Requests to Admit that resulted in the Defendants admitting that many of the Subject Vehicles had low-torque ignition switches that could move out of the “run” position, and that if the movement occurred, the driver loses the assistance of power steering and power brakes. The Defendants also admitted that if a collision occurs while the switch is in the “off” position, the vehicle’s safety airbags may fail to deploy.<sup>88</sup>

74. Further, on June 29, 2020, the Plaintiffs in this action delivered their certification record which was four volumes and contained a Second Fresh As Amended Statement of Claim, two expert reports, affidavits from the three proposed representative plaintiffs Amanda Oberski, Edward Oberski and Stacey Green, and a lengthy solicitor’s affidavit.<sup>89</sup>

75. As a result of this work, Plaintiffs’ counsel has been able to appropriately and effectively evaluate the risk of the litigation, put forward an evidentiary record that aided

---

<sup>84</sup> Genova Affidavit at paras. 21-24.

<sup>85</sup> Genova Affidavit at para. 39(a)-(d).

<sup>86</sup> Genova Affidavit at para. 39(c).

<sup>87</sup> Genova Affidavit at paras. 25, 39(d)

<sup>88</sup> Genova Affidavit at paras. 53-55.

<sup>89</sup> Genova Affidavit at para. 61.

them throughout the mediation process, and develop an in-depth understanding of the various liability and damage scenarios of this proceeding. This in turn allowed Co-Lead Counsel to confidently negotiate with the Defendants and obtain a fair and reasonable Settlement that is in the best interests of the Class Members.

**iv) Future expense and likely duration of litigation**

76. Courts have expressly recognized that the expedited recovery provided by a settlement is an important factor in considering settlement approval.<sup>90</sup>

77. If this class action is not settled, Class Members would have to wait much longer before they could make individual claims. The Plaintiffs would still have to move to certify/authorize this action, which the Defendants indicated they would oppose.<sup>91</sup> As discussed above at paragraphs 53-63, the Plaintiffs faced a real risk that such a motion would be dismissed.

78. Even were the Plaintiffs to succeed on such a motion, the Parties would have to move to complete discoveries before proceeding to a common issues trial. The volume of evidence the Plaintiffs have already produced in this proceeding suggests that this would be lengthy and expensive. Should the Plaintiffs succeed at a common issues trial, the Defendants could still exercise their appeal rights, further drawing out the process and delaying individual recovery. Individual Class Members would then only be able to make individual claims following this process, where they might face additional hurdles and expenses in attempting to prove their individual damages.<sup>92</sup>

---

<sup>90</sup> *Silver v. Imax*, 2016 ONSC 403 [*Silver*] at para. 31.

<sup>91</sup> Genova Affidavit at paras. 11, 53, 63-64.

<sup>92</sup> Genova affidavit at paras. 41-42.

79. The additional delays of litigation could also lead to a lower “take-up” rate. The further passage of time and the additional complexity and expense of bringing an individual claim could deter Class Members from advancing individual claims at all. In contrast, this Settlement Agreement provides a straightforward claims process where Class Members do not need to prove their individual damages. In these circumstances, “[a]ny additional value that might result from a trial is not only highly speculative but likely outweighed by the delay and attendant costs thereof.”<sup>93</sup>

**v) Presence or Lack of Objectors to the Settlement Agreement**

80. There have been no objections to the Settlement Agreement, and only six Opt-Outs from National Settlement Class Members and only one Opt-Out from Québec Settlement Class Members.<sup>94</sup>

81. The absence of opposition to a settlement may serve as a proxy for reasonableness.<sup>95</sup> This is especially so here, where there has been extensive direct notice to Class Members. The Certification and Settlement Approval Hearing Notice Program provided direct email notice to Class Members, as well as general notice through press releases, print publications in national newspapers, and internet and social media advertisements.<sup>96</sup> JND has also set up a dedicated toll-free telephone number for Settlement Class Members, and has received approximately 375 calls to date.<sup>97</sup>

---

<sup>93</sup> *Silver* at para. 31.

<sup>94</sup> JND Affidavit at paras. 21–23.

<sup>95</sup> *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647 [*ProQuest*] at para. 29.

<sup>96</sup> JND Affidavit at paras. 12–20.

<sup>97</sup> JND Affidavit at para. 19.

82. Given this robust Notice Program, the absence of any objectors and the low number of Opt-Outs indicate that the Settlement Agreement is fair, reasonable, and in the best interests of class members.

**vi) Recommendations and experience of Counsel and arm-length negotiations**

83. The Settlement Agreement was recommended by experienced counsel and entered into after extensive and considered negotiations between sophisticated parties.

84. There is a strong initial presumption of fairness when a proposed class settlement, negotiated at arm's length by experienced class counsel, is presented to the court for approval.<sup>98</sup> As recognized by Strathy J. (as he then was), "...the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."<sup>99</sup>

85. This Settlement Agreement is the product of nearly two years of informal negotiations and formal mediations by experienced class actions counsel.<sup>100</sup> The negotiations were facilitated by The Honourable Justice Thomas Cromwell. The Parties retained experts to assist with the mediation process. Given the time, resources, and expertise involved in the settlement negotiation process, there is no reason for this Court to depart from the presumption that the Settlement Agreement is reasonable.

---

<sup>98</sup> [Haikola v. The Personal Insurance Company](#), 2019 ONSC 5982 at para. 75.

<sup>99</sup> [Ainslie v. Afexa Life Sciences Inc.](#), 2010 ONSC 4294 at para. 31 (Sup. Ct. J.); See also [Serhan v. Johnson & Johnson](#), 2011 ONSC 128 at paras. 55–56 and [ProQuest](#) at para. 32.

<sup>100</sup> Genova Affidavit at paras. 65-73.

**vii) Involvement of the Representative Plaintiff**

86. A representative plaintiff’s belief that a settlement is in the best interest of the class is relevant to settlement approval.<sup>101</sup>

87. That is especially so in this case, where the National Settlement Class Representative Stacey Green has been involved in this litigation from its commencement. Ms. Green has sought to advance an economic loss claim since March 2014, when she first retained counsel to launch her claim.

88. Since then, Ms. Green has remained apprised of this action’s progress.<sup>102</sup> She has also reviewed the Settlement Agreement with Co-Lead Counsel and believes the Settlement is in the best interests of the class.<sup>103</sup> Given the complete absence of any objectors, Ms. Green’s belief in the Settlement Agreement’s fairness militates in favour of approving the Settlement Agreement.

**b) The Maximum Plaintiffs’ Counsel Fees Amount Is Fair And Reasonable**

89. Section 32(2) of the Old *CPA* requires court approval of class counsel fees and disbursements.<sup>104</sup> To be fair and reasonable, the fee must provide “access to justice for class members, and at the same time provide an economic incentive to lawyers to take on a class action and to strive for a successful result for the class.”<sup>105</sup>

---

<sup>101</sup> See, e.g., [Rizzi](#) at para. 21.

<sup>102</sup> Green Affidavit at para. 19.

<sup>103</sup> Green Affidavit at para. 20.

<sup>104</sup> *CPA*, s. 32(2).

<sup>105</sup> [Rizzi](#) at para. 24.



90. While courts have traditionally assessed the reasonableness of fees in light of the risks undertaken compared to the success achieved,<sup>106</sup> this Court has since eschewed that approach in favour of presuming contingency fee retainer agreements are valid, provided they are “fully understood and accepted by the representative plaintiffs.”<sup>107</sup>

91. Here, plaintiffs’ counsel requests approval of \$4,397,500, inclusive of all fees, disbursements, and applicable taxes (defined in the Settlement Agreement as the “Plaintiffs’ Counsel Fee Amount”).

92. The Plaintiffs’ Counsel Fee Amount is not calculated from the \$12,000,000 Settlement Fund Amount. It was negotiated after the term sheet was signed, at mediation facilitated by Justice Cromwell. It is an entirely separate fund payable from the Defendants directly to Co-Lead Counsel, to be allocated among plaintiffs’ counsel thereafter. The Plaintiffs’ Counsel Fee Amount will have no bearing on the amount available to compensate Eligible Claimants. Accordingly, no concerns arise as to the ability of the Class to pay the amount.

93. While the Plaintiffs’ Counsel Fee Amount is not a contingency fee insofar as it is not payable from the compensation to class members, it represents approximately 20.5% of the total recovery to be paid by the Defendants (once disbursements are deducted). Further, as demonstrated by the table on the following page, the Plaintiffs’ Counsel Fee Amount represents a modest 1.22 multiplier of the time expended and disbursements

---

<sup>106</sup> See, e.g., [Rizzi](#) at para. 24.

<sup>107</sup> [Cannon v. Funds for Canada Foundation](#), 2013 ONSC 7686 at para. 8 (Sup. Ct. J.).

incurred (without accounting for all the Plaintiffs’ counsel firms that will be entitled to a portion of the fees award).

|                           | <b>Fees</b>                  | <b>Disbursements</b>         | <b>Total</b>          |
|---------------------------|------------------------------|------------------------------|-----------------------|
| RG                        | \$1,097,077.26               | \$245,080.96                 | <b>\$1,342,158.22</b> |
| KSM                       | \$860,057.13                 | \$41,747.21                  | <b>\$901,804.34</b>   |
| Sutts Strosberg LLP       | \$621,720 (as of April 2022) | \$357,903 (as of April 2022) | <b>\$979,623</b>      |
| McKenzie Lake Lawyers LLP | \$167,437 (as of April 2022) | \$21,312 (as of April 2022)  | <b>\$188,749</b>      |
| <b>Total:</b>             | <b>\$2,746,291.39</b>        | <b>\$666,043.17</b>          | <b>\$3,412,334.56</b> |

94. This is less than the 30% contingency fee provided for in the Representative Plaintiff’s retainer agreement, and less than the one-third contingency fees this Court has found are “standard”<sup>108</sup> and “presumptively valid”<sup>109</sup> for settlements of this size. Indeed, this Court has approved similar fee and disbursement amounts in other automotive product liability class actions.<sup>110</sup>

95. Further, the following factors, as described in more detail above, support the approval of \$4,397,500 in Plaintiffs’ Counsel Fees:

- a) In addition to the litigation risks of this matter, it must be noted that none of the analogous US litigation, on the merits, against GM resulted in a finding of liability.<sup>111</sup> There was serious risk throughout this litigation that this action may not be certified because a) the costs of repair and consequential damages claims would be found to be “pure economic loss claims” and b) the personal injury claims would be found to be littered with individual issues that made individual actions preferable to a class proceeding. At trial, there was also the added complexity of piercing the corporate veil to establish liability against GM Canada for the conduct of its former parent company (Old GM), as well as the

<sup>108</sup> *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 13.

<sup>109</sup> See, e.g., *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at para. 11 (Sup. Ct. J.).

<sup>110</sup> *Toyota* at para. 59.

<sup>111</sup> Genova Affidavit at para. 42(d).

uncertainty of imposing successor liability on New GM for the conduct of Old GM;<sup>112</sup>

- b) Despite the legal and factual complexities of this matter that are unique to Canada, Co-Lead Counsel still obtained a settlement that is *pro rata* comparable to the results of the US settlement;<sup>113</sup>
- c) Co-Lead Counsel spent an enormous amount of time and effort preparing material for certification, attending meetings and conferences in Canada and the US, working with experts, preparing for and attending mediation in Canada and the US, drafting and reviewing the settlement agreement and the materials for settlement approval;<sup>114</sup>
- d) Plaintiffs' Counsel across the country have coordinated and cooperated to prosecute this action;<sup>115</sup>
- e) Co-Lead Counsel has communicated and cooperated with the US counsel in the bellwether litigation, and has stayed apprised of the status and progress of the US settlement;<sup>116</sup>
- f) Co-Lead Counsel obtained funding from the Fund which ensured that the Representative Plaintiffs were indemnified, as well as ensuring the availability of additional funds to cover disbursements necessary to effectively prosecute this litigation;<sup>117</sup>
- g) The negotiations that culminated in the Settlement Agreement took two years, and included negotiations in Chicago in relation to the personal injury claims of certain Class Members;<sup>118</sup>
- h) Plaintiffs' Counsel will continue to spend additional time and incur further expenses throughout the Claims Program to ensure the Class Members receive the necessary assistance to successfully file claims;<sup>119</sup>
- i) Plaintiffs' Counsel will continue to monitor the implementation of the Settlement Agreement, as well as the Approval Notice Program;<sup>120</sup>

---

<sup>112</sup> Genova Affidavit at paras. 94-102

<sup>113</sup> Genova Affidavit at paras. 26-35

<sup>114</sup> Genova Affidavit at paras. 45-78.

<sup>115</sup> Genova Affidavit at paras. 45-47,

<sup>116</sup> Genova Affidavit at paras. 57-62

<sup>117</sup> Genova Affidavit at para. 56.

<sup>118</sup> Genova Affidavit at paras. 65-73.

<sup>119</sup> Genova Affidavit at paras. 138-139

<sup>120</sup> Genova Affidavit at paras. 138-139

- j) Plaintiffs' Counsel will continue to address any questions or issues raised by the Settlement Administrator during the administration of the Claims Program;<sup>121</sup>
- k) Co-Lead Counsel have decades of experience in class proceedings litigation, yet are taking a contingency fee that is below the expected standard rate in class proceedings; and
- l) The Representative Plaintiffs' knowingly, and on a full informed basis, executed contingency fee retainers, and Ms. Green has filed an affidavit in support of Plaintiff Counsel's request for \$4,397,500 in fees.<sup>122</sup>

96. The Plaintiffs' Counsel Fee Amount represents approximately a 1.22 multiplier of the actual time and disbursements incurred, and will not go to any one law firm. It will be distributed among at least five: the law firm consortium advancing this proceeding as well as any and all plaintiffs' counsel.<sup>123</sup> Given this distribution, as well as counsel's actual fees and disbursements incurred over the ten years of advancing this action, this amount is fair and reasonable, and should be approved by the Court.

## VI. ORDER REQUESTED

97. The Plaintiffs request an Order approving the Settlement Agreement and awarding Plaintiffs' Counsel the maximum amount of fees under the Settlement Agreement.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July 2024**




---

*Counsel for the Plaintiffs*

---

<sup>121</sup> Genova Affidavit at paras. 138-139

<sup>122</sup> Green Affidavit at paras. 28-32.

<sup>123</sup> Amended Settlement Agreement, executed July 24, 2024, s. 2.49.

## SCHEDULE “A” – LIST OF AUTHORITIES

1. [\*1688782 Ontario Inc. v. Maple Leaf Foods Inc.\*](#), 2020 SCC 35
2. [\*Abdulahim v. Air France\*](#), 2011 ONSC 512
3. [\*Ainslie v. Afexa Life Sciences Inc.\*](#), 2010 ONSC 4294
4. [\*Baggio v. General Motors of Canada Ltd.\*](#), 2023 ONSC 3019
5. [\*Cannon v. Funds for Canada Foundation\*](#), 2013 ONSC 7686
6. [\*Charette v. Trinity Capital Corporation\*](#), 2019 ONSC 3153
7. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598
8. [\*Des-Rosier v. Takata Corporation\*](#), 2020 ONSC 8043
9. [\*Gregorio v. Intrans-Corp.\*](#), 1994 CanLII 2241 (ON CA)
10. [\*Haikola v. The Personal Insurance Company\*](#), 2019 ONSC 5982
11. [\*Hamilton v. Toyota Motor Sales, USA, Inc.\*](#), 2014 ONSC 785
12. [\*Lavier v. MyTravel Canada Holidays Inc.\*](#), 2011 ONSC 3149
13. [\*Lilleyman v. Bumblebee Foods LLC\*](#), 2023 ONSC 4408
14. [\*Maggisano v. Skyservice Airlines Inc.\*](#), 2010 ONSC 7169
15. [\*Rizzi v. Handa\*](#), 2021 ONSC 1004
16. [\*Robertson v. ProQuest Information and Learning Company\*](#), 2011 ONSC 1647
17. [\*Serhan v. Johnson & Johnson\*](#), 2011 ONSC 128
18. [\*Silver v. Imax\*](#), 2016 ONSC 403

19. [\*Sparling v. Southam Inc.\*](#) (1988), 66 O.R. (2d) 225

20. [\*Talbot v. Nourse et al.\*](#), 2018 ONSC 1061

21. [\*Vell v. Mattel Canada Inc.\*](#), 2016 ONSC 5789

## SCHEDULE “B” – RELEVANT STATUTES AND REGULATIONS

[Class Proceedings Act](#), 1992, S.O. 1992, c. 6

### **Discontinuance, abandonment and settlement**

**29** (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

### **Settlement without court approval not binding**

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

### **Effect of settlement**

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

### **Notice: dismissal, discontinuance, abandonment or settlement**

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4)

### **Fees and disbursements**

**32** (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

**Court to approve agreements**

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).



OBERSKI, et al.  
Plaintiffs

-and-

GENERAL MOTORS LLC, et al.  
Defendants  
Court File No.: CV-14-502023-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM  
(Settlement Approval and Plaintiffs' Counsel Fees)**

**ROCHON GENOVA LLP**  
900-121 Richmond Street West  
Toronto, ON M5H 2K1

Joel P. Rochon (LSO #: 28222Q)  
Pritpal Mann (LSO #:87637E)  
Tel: 416.363.1867 / Fax: 416.363.0263

*Co-Lead Counsel for the Plaintiffs*

**MCKENZIE LAKE LAWYERS LLP**  
140 Fullarton Street, Suite 1800  
London ON N6A 5P2

Michael Peerless (LSO #34127P)  
Sabrina Lombardi (LSO #52116R)  
Tel: 519.672.5666 / Fax: 519.672.2674

**MERCHANT LAW GROUP LLP**  
240 Richmond Street West  
Toronto, ON M5V 1V6

Evatt F.A. Merchant (LSO #51811C)  
Tel: 416.828.7777 / Fax: 647.478.1967

*Lawyers for the Plaintiffs*

**KIM SPENCER MCPHEE  
BARRISTERS P.C.**  
1200 Bay Street, Suite 1203  
Toronto, ON M5R 2A5

Won J. Kim (LSO #: 32918H)  
Megan B. McPhee (LSO #:48351G)  
Tel: 416.596.1414 / Fax: 416.598.0601

**STROSBERG SASSO SUTTS LLP**  
1561 - Ouellette Avenue  
Windsor ON N8X 1K5

Harvey T. Strosberg, Q.C.(LSO #:126400)  
William V. Sasso (LSO #:12134I)  
S. Alex Constantin (LSO # :63097W)  
Tel: 519.258.9527 / Fax: 519.561.6203