



Court File No.

1186/19

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KEITH McBAIN

Plaintiff

and

HYUNDAI AUTO CANADA CORP,
HYUNDAI MOTOR COMPANY, LTD, HYUNDAI MOTOR AMERICA, INC,
and HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's 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.

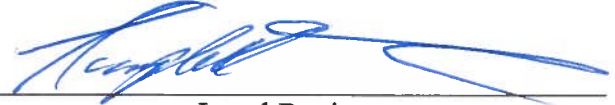
Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

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 June 10, 2019

Issued by



Local Registrar

Address of court office: London Courthouse
80 Dundas Street
London, ON N6A 6A3

TO: HYUNDAI AUTO CANADA CORP
75 Frontenac Drive
Markham, ON L3R 6H2

TO: HYUNDAI MOTOR COMPANY, LTD
12, Heolleung-ro, Seocho-gu
Seoul 06797
South Korea

TO: HYUNDAI MOTOR AMERICA, INC
10550 Talbert Avenue
Fountain Valley, CA 92708
USA

TO: HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC
700 Hyundai Boulevard
Montgomery, AL 36015
USA

CLAIM

DEFINED TERMS

1. The following definitions apply for the purpose of this Statement of Claim:

- (a) **“Affected Vehicles”** means all vehicles designed, developed, manufactured, marketed, distributed, leased, and/or sold by the Defendants and equipped with the **Engines**. These vehicles include, but are not limited to, the following:

| Model | Model Year(s) Affected |
|------------------------|------------------------|
| Hyundai Accent | 2010-2019 |
| Hyundai Elantra | 2014-2016 |
| Hyundai Kona | 2018-2019 |
| Hyundai Santa Fe | 2013-2019 |
| Hyundai Santa Fe Sport | 2013-2019 |
| Hyundai Santa Fe XL | 2013-2019 |
| Hyundai Sonata | 2011-2019 |
| Hyundai Tucson | 2011-2019 |
| Hyundai Veloster | 2011-2018 |

- (b) **“Class”** and/or **“Class Members”** means all persons, corporations or other entities resident in Canada who are current or former owners and/or lessees of an **Affected Vehicle**;
- (c) **“Engines”** means the Theta/Theta II 2.0-litre and 2.4-litre, Nu 1.8-litre and 2.0-litre, Gamma 1.6-litre, and Lambda II 3-litre, 3.3-litre, and turbocharged 3.3-litre **GDI** engines designed, developed and manufactured by the Defendants;
- (d) **“GDI”** means gasoline direct injection;
- (e) **“Hyundai”** means Hyundai Motor Company, Ltd;

- (f) “**Hyundai Alabama**” means Hyundai Motor Manufacturing Alabama, LLC;
- (g) “**Hyundai Canada**” means Hyundai Auto Canada Corp;
- (h) “**Hyundai USA**” means Hyundai Motor America, Inc; and,
- (i) “**Mr McBain**” means Keith McBain.

RELIEF CLAIMED

2. The Plaintiff, Mr McBain, on his own behalf and on behalf of all Class Members, seeks:
- (a) an order certifying this action as a class proceeding and appointing him as the representative plaintiff of the Class pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6;
 - (b) a declaration that the Defendants, or any of them, were negligent in the design, research, development, testing, manufacturing, marketing, advertisement, promotion, distribution, warning, sale, leasing, warranting, servicing, and/or repair of the Affected Vehicles;
 - (c) a declaration that the Defendants, or any of them, are vicariously liable for the acts and omissions of their officers, directors, agents, employees, and representatives;
 - (d) a declaration that the Defendants, or any of them, breached the express warranties for the Affected Vehicles;
 - (e) a declaration that the Defendants, or any of them, breached the implied warranties for the Affected Vehicles contrary to Part II of the *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, the parallel provisions of the consumer protection legislation in other Canadian provinces as described in Appendix 1 hereto, the *Sale of Goods Act*, RSO 1990, c S 1, and the parallel provisions of the sale of goods legislation in other Canadian provinces as described in Appendix 2 hereto;
 - (f) a declaration that the Defendants, or any of them, breached the *Motor Vehicle Safety Act*, SC 1993, c 16, by failing to provide notice of latent engine defects to Mr McBain and the Class Members;
 - (g) a declaration that the Defendants, or any of them, were unjustly enriched at the expense of Mr McBain and the Class Members;
 - (h) general damages and special damages in the amount of \$100,000,000;

- (i) punitive damages in the amount of \$25,000,000;
- (j) disgorgement of the Defendants' profits and other equitable relief;
- (k) a reference to decide any issues not decided at the trial of the common issues;
- (l) costs of administration and notice, plus applicable taxes, pursuant to s 26(9) of the *Class Proceedings Act, 1992*;
- (m) costs of this action pursuant to the *Class Proceedings Act, 1992*, the *Courts of Justice Act*, and the *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (n) prejudgment interest compounded and post-judgment interest in accordance with ss 128 and 129 of the *Courts of Justice Act*, RSO 1990, c C43, as amended; and
- (o) such further and other relief as to this Honourable Court may seem just.

THE PARTIES

The Plaintiff and the Class

3. Mr McBain is an individual residing in North Vancouver, British Columbia. He currently leases a 2016 Hyundai Santa Fe Sport equipped with a Theta II 2.4-litre GDI Engine. On or around November 30, 2017, while driving on a highway at a speed of approximately 100 km/h, his Affected Vehicle experienced catastrophic engine failure.
4. Mr McBain seeks to represent the following Class of which he is a member:
 - All persons, corporations or other entities resident in Canada who are current or former owners and/or lessees of an Affected Vehicle.

The Defendants

5. The Defendant Hyundai Canada is a corporation incorporated pursuant to the laws of Canada with its registered office located in Markham, Ontario. Hyundai Canada is and was at all material times a wholly-owned subsidiary of Hyundai and Hyundai USA.

6. Hyundai Canada imports into Canada for sale or lease newly manufactured Hyundai vehicles, including the Affected Vehicles, and is responsible for ensuring that those vehicles' designs are compliant with the regulations for import into Canada.
7. Hyundai Canada sells, leases, services and repairs the Affected Vehicles in Canada through its network of dealers who are its agents. Money received by a dealer from the purchase or lease of a Hyundai vehicle flows from the dealer to the Defendants.
8. Hyundai Canada administers the warranties for all Affected Vehicles sold in Canada, representing that they are, *inter alia*, free of defects in material and workmanship.
9. The Defendant Hyundai is a corporation organized and existing under the laws of South Korea. Hyundai controls and directs Hyundai Canada with respect to virtually all aspects of the Affected Vehicles.
10. The Defendant Hyundai USA is a corporation organized and existing under the laws of California. Hyundai USA is and was at all material times a wholly-owned subsidiary of Hyundai and controls and directs Hyundai Canada with respect to virtually all aspects of the Affected Vehicles.
11. The Defendant Hyundai Alabama is a corporation organized and existing under the laws of Delaware. Hyundai Alabama is and was at all material times a wholly-owned subsidiary of Hyundai and Hyundai USA.
12. The Defendants operated and continue to operate as an integrated unit and are collectively responsible for the design, research, development, testing, manufacture, production, supply, distribution, marketing, leasing and sale of thousands of the Affected Vehicles to

residents of Canada. They prepared and participated in the development of the owner's manuals, warranty booklets, and maintenance recommendations and/or schedules for the Affected Vehicles and continue to provide service and maintenance for the Affected Vehicles through their extensive network of authorized dealers and service providers.

THE FACTS

The Engines

13. Hyundai Alabama manufactures the Engines at its factory in Montgomery, Alabama.
14. The Engines contain a GDI fuel delivery system. The Defendants advertise that this shorter and more direct path of fuel delivery allows for greater control of the fuel mixture at the optimum moment, improving efficiency and delivering best-in-class fuel economy, best-in-class four-cylinder horsepower and best-in-class torque.
15. In these Engines, the fuel is injected into a camshaft-driven, high-pressure pump that operates at pressures up to 2,175 psi. The Engines use a higher than normal 11.3:1 compression ratio for increased power as well as "dished" pistons for increased combustion efficiency in the cylinder.
16. The Engines use four reciprocating pistons to convert pressure into a rotating motion. Gasoline is mixed with air in the combustion chambers of the engine. A four-stroke sequence (the "Combustion Cycle") is used to generate the rotating motion as follows:
 - (a) the intake stroke begins with the inlet valve opening and a vaporized fuel mixture being pulled into the combustion chamber;

- (b) the compression stroke begins with the inlet valve closing and the piston beginning its movement upward, compressing the vaporized fuel mixture in the combustion chamber;
 - (c) the power stroke begins when the spark plug ignites the vaporized fuel mixture, expanding the gases and generating power that is then transmitted to the crankshaft;
 - (d) the exhaust stroke begins with the exhaust valve opening and the piston moving back up, forcing the exhaust gases out of the cylinder; and,
 - (e) the exhaust valve then closes, the inlet valve opens, and the Combustion Cycle repeats itself.
17. The “dished” pistons in the Engines are connected to the crankshaft via the connecting rod. As the connecting rod moves up and down during the Combustion Cycle, the crankshaft rotates, providing power to the Affected Vehicles’ drive wheels. During this cycle, the crankshaft rotates several thousand times per minute within each connecting rod. A bearing placed between the connecting rod and crankshaft surfaces allows the crankshaft to rotate within the connecting rods during the Combustion Cycle, reduces friction and prolongs longevity.
18. Engine oil is crucial to the performance of the Engines in the Affected Vehicles. When the Affected Vehicles are in operation, engine oil:
- (a) is used to lubricate the pistons, cylinder walls, connecting rod bearings, and other rotating and moving parts as the pistons move up and down through the four-stroke sequence;

(b) is essential to reducing wear on the rotating and moving parts of the engine; improving sealing; and, cooling the engine by carrying away heat from its rotating and moving parts; and,

(c) cleans and transports contaminants away from the engine to the engine oil filter.

19. An oil pump pumps and pressurizes oil throughout the Engine. The oil pump draws oil from the oil pan, located underneath the piston and crankshaft, and forces the oil through the oil filter and then through passages in the Engine to properly lubricate and reduce friction in the rotating and moving engine parts. The oil returns to the oil pan through small drainage holes located throughout the Engine before being recirculated by the oil pump.

20. In the Engines, the connecting rod bearings must be lubricated with engine oil to allow the crankshaft to rotate within the connecting rods.

Life-Threatening and Dangerous Latent Defects in the Engines

21. This action concerns life-threatening and dangerous latent defects in the Engines. These latent defects, which typically manifest themselves during the limited warranty period or shortly after its expiration, result in:

(a) the restriction of oil flow through the connecting rod bearings as well as to other vital areas of the engine, causing the Affected Vehicles to experience vehicle stalling during operation, catastrophic engine failure, and/or non-collision engine fires; and/or,

(b) fuel leaks in the engine, causing the engine to spontaneously burst into flames.

22. The latent defects in the Engines pose a significant risk of personal injury and/or property damage to Mr McBain and the other Class Members, occupants of the Affected Vehicles, and other members of the Canadian public because:
- (a) the failure to have sufficient engine lubrication can cause vehicle stalling and catastrophic engine failure while the Affected Vehicles are in operation at any time and under any driving conditions and/or speed; and,
 - (b) leaking fuel in the presence of an ignition source increases the risk of a fire.
23. Numerous current and former owners and lessees of the Affected Vehicles, including Keith McBain, have experienced engine damage, catastrophic engine failure, and/or non-collision engine fires while operating the Affected Vehicles, placing them and those around them in immediate danger.
24. Some current and former owners and lessees of the Affected Vehicles have experienced non-collision engine fires while the Affected Vehicles were not in operation, also placing them and those around them in immediate danger.

Latent Defect # 1: Metal Debris Circulating in the Engines of the Affected Vehicles

25. The first latent defect plaguing the Engines of the Affected Vehicles is metal debris circulating throughout the Engines via the engine oil. The metal debris in the engine oil results from, *inter alia*, (i) the failure to properly clean the engine crankshaft to remove metal debris during manufacturing; (ii) residual metal debris from factory machining operations; and/or, (iii) irregularities in the engines' components causing premature wear and fracturing of those or other components, including the crankshaft and bearings.

26. The metal debris in the engine oil causes damage to the Engines' components in two ways: (i) through contact with the engine components; and, (ii) by blocking the flow of oil to rotating and moving engine components, causing premature wear due to the lack of oil lubrication.
27. As the metal debris circulates throughout the Engines via the engine oil, the connecting rod bearings in the Engines suffer damage and over time begin to fracture. Once the connecting rod bearings fracture, larger amounts of metal debris begin to accumulate in the engine oil. As a result, the engine oil becomes so contaminated with metal debris that the oil filter can no longer remove the debris and maintain the necessary oil pressure within the Engine. The oil pump recirculates the contaminated engine oil throughout the Engine, causing damage to the various engine components and eventually resulting in sudden and unexpected vehicle stalling, catastrophic engine failure, and/or non-collision engine fires.
28. Additionally, as the connecting rod bearings continue to fracture, the acceptable tolerances between the bearings, the connecting rod, and the crankshaft rapidly deteriorate, eventually causing the Engines to produce a "knocking" sound that increases in frequency as the engine speed rises. In some cases, the defective connecting rod bearings may eventually cause the piston to break through the engine block as a result of the deterioration. In other cases, connecting rods can fracture and create holes in the Engines, allowing fluids to leak in the Engines and ignite fires.
29. After the connecting rod bearings fail and more metal debris is circulated throughout the Engine via the engine oil, damage is caused to other key engine components, such as the

main cap, which fastens the crankshaft to the Engine. This leads to vehicles stalling, catastrophic engine failure, and non-collision engine fires.

30. As stated above, as a result of the metal debris in the oil of the Engines, the Affected Vehicles suffer from restricted and inadequate engine oil lubrication. As explained above, it is essential that the Engines have oil distributed throughout the engine lubrication channels. When operating properly, the engine oil is distributed throughout the Engine by the oil pump and then flows back to the oil pan where it is recirculated throughout the Engine.
31. In the Affected Vehicles, the engine lubrication channels become clogged and restricted as a result of the metal debris in the engine oil – even under normal use and with proper maintenance. When the engine lubrication channels clog, the oil pump is unable to be circulate oil throughout the Engine and unable to adequately return the oil to the oil pan, causing oil starvation. This insufficient lubrication causes premature wear of the engine components, engine damage, vehicle stalling while in operation, catastrophic engine failure, and/or non-collision engine fires.
32. In many circumstances, the Affected Vehicles' check engine light may not turn on to alert drivers to the engine damage being caused by the metal debris and/or to warn drivers of impending vehicle stalling, catastrophic engine failure, and/or non-collision engine fires.

Latent Defect # 2: Improperly Installed High Pressure Fuel Pipe

33. As a result of the foregoing, Hyundai Canada recalled over 110,000 Affected Vehicles in Canada, specifically 33,786 model year 2011-2012 Hyundai Sonata vehicles in September 2015 and 76,683 model year 2013-2014 Hyundai Santa Fe Sport and model year 2013-

2014 Hyundai Sonata vehicles in April 2017. Under these recall campaigns (Transport Canada Recall # 2015428 and 2017468), dealers – agents of Hyundai Canada – would inspect, and if necessary, replace the Engine.

34. Unfortunately, the repairs completed under these recall campaigns created another latent defect in some of the Engines.
35. The recall instructions, developed and implemented by Hyundai Canada and/or its agents, failed to ensure that the high pressure fuel pipe would be properly installed on the fuel pump outlet in many of the Affected Vehicles. As a result, fuel leaks can occur where the high pressure fuel pipe was improperly installed – damaged, misaligned, or improperly torqued – during the recalls. These fuel leaks can cause non-collision engine fires.

The Defendants' Knowledge of the Defects

36. The Defendants have long been aware of the latent defects in the Engines but have intentionally, negligently and/or recklessly concealed the latent defects from Mr McBain and other Class Members; failed to warn Mr McBain and the other Class Members of the serious personal safety risks from the latent defects; and, failed to adequately notify the appropriate authorities of the safety risk.
37. At all material times, the Defendants had notice and knowledge of the latent defects plaguing the Engines through, *inter alia*, (i) numerous complaints they received from consumers, including Mr McBain and the Class Members; (ii) information received from dealers, including dealership repair records; (iii) Transport Canada and US National Highway Traffic Safety Administration complaints and records; (iv) warranty and post-

warranty claims; (v) the high number of replacement parts ordered from the Defendants; and, (vi) their own internal records, including pre-sale durability testing.

38. The Defendants' customer relations departments routinely monitor the Internet for customer complaints and regularly receive and respond to customer calls concerning, *inter alia*, product defects. Through these activities, the Defendants were made aware of the latent defects in the Engines and their potential danger.
39. The Defendants also became aware of the latent defects in the Engines from the substantial volume of reports of engine problems relating to the connecting rod bearings, lubrication channels, and fuel leakage.
40. For example, Hyundai Canada's customer relations department works closely with Hyundai-authorized service technicians to identify potentially widespread vehicle problems and assist in the diagnosis of vehicle issues. Hyundai Canada has received numerous reports of engine problems in the Engines relating to the connecting rod bearings, lubrication channels, and fuel leakage.
41. The Defendants also collect and analyze field data, including, but not limited to, repair requests made at dealerships and service centres, technical reports prepared by engineers who have reviewed vehicles for which warranty coverage is requested, parts sales reports, and warranty claims data.
42. The Defendants' warranty departments similarly review and analyze warranty claims data submitted by their dealerships, agents and authorized service technicians to identify defect trends in their vehicles.

43. The Defendants knew or ought to have known about the latent defects in the Engines because of the high number of replacement parts ordered from the Defendants.
44. In Canada, Hyundai service centres are required to order replacement parts, including engines, piston assemblies, and connecting rod bearings, directly from Hyundai Canada. Other independent vehicle repair shops that service Affected Vehicles also order replacement parts directly from Hyundai Canada. Hyundai Canada routinely monitors part sales reports and is responsible for the shipping of parts requested by dealerships and technicians.
45. Hyundai Canada had detailed, accurate, and real-time data regarding the number and frequency of replacement part orders. The sudden increase in orders for the Engines and engine components used in the Affected Vehicles was known to Hyundai Canada and ought to have alerted it to the scope and severity of the latent defects.
46. The Defendants knew or ought to know about the latent defects in the Engines from Transport Canada and US National Highway Traffic Safety Administration complaints and records. The Defendants routinely monitor these complaints and records to identify potential defects in their vehicles.
47. Although the Defendants became aware of the latent defects in the Engines much earlier, US National Highway Traffic Safety Administration complaints establish that the Defendants knew, or ought to have known, of the latent defects in the Engines at least as early as August 25, 2013, the date upon which the first US National Highway Traffic Safety Administration complaint in relation to the Engines was filed. This was before the majority of the Affected Vehicles were sold.

48. The Defendants are experienced in the design, testing, and manufacturing of passenger vehicles. As an experienced manufacturer, the Defendants conducts testing on incoming batches of components, including the Engines, to verify that the components are free from defects and comply with the Defendants' specifications.
49. In fact, the Defendants represent to its customers and the public that they put their vehicles, their engines and their engine components, through very stringent and tough tests.
50. Accordingly, the Defendants knew or ought to have known that the Engines used in the Affected Vehicles are defective and likely to fail prematurely, costing Mr McBain and the Class Members thousands of dollars in expenses and presenting a serious safety risk to Mr McBain, the Class Members and the public.

The Defendants' Conduct While Knowing About the Latent Defects

51. Despite their knowledge of the latent defects in the Engines:
 - (a) the Defendants continued to market the Affected Vehicles as being safe and of a high quality;
 - (b) Hyundai Canada routinely refused to repair the Affected Vehicles free of charge when the defects manifested – even within the warranty period;
 - (c) Hyundai Canada routinely refused to offer to reimburse its customers who incurred out-of-pocket expenses to repair the defects – even within the warranty period;

- (d) Hyundai Canada and its agents refused to disclose the existence of the defects when Affected Vehicles displaying symptoms consistent with the defects were brought in for service;
- (e) Hyundai Canada and its agents ignored the defects in Affected Vehicles until they caused significant mechanical problems necessitating costly repairs;
- (f) Hyundai Canada has attempted to circumvent its warranty obligations related to the latent defects in the Engines by faulting Class Members for use of aftermarket oil filters or for a lack of maintenance;
- (g) the Defendants did not inform Class Members of the true cause of the engine damage, vehicle stalling, catastrophic engine failure, and non-collision engine fires;
- (h) despite knowing that the defects in the Engines manifest even if the Class Members followed Hyundai's oil change guidelines, Hyundai Canada and its agents attempted to evade its warranty obligations by requiring Class Members to produce the entire maintenance history of the Affected Vehicles, including proof that all oil changes were completed at a Hyundai dealership, before determining whether to make the necessary repairs under warranty;
- (i) the Defendants have refused to take any action to correct the latent defects when they manifest in the Affected Vehicles after the expiration of the warranty period; and,
- (j) Hyundai Canada has failed to recall and/or offer adequate engine repairs and/or replacements for every Affected Vehicle.

52. Although Hyundai Canada has recalled some of the Affected Vehicles due to the latent defects in their Engines, (1) many of the Affected Vehicles have not been recalled; and, (2) the engine repairs and/or replacements completed under these recall campaigns did not offer sufficient solutions to the defects, and in some cases, caused new defects in the Engines of the Affected Vehicles.

Transport Canada Recalls

53. Hyundai Canada has been slow to recall the Affected Vehicles, if at all.
54. Since September 25, 2015, Hyundai Canada has initiated five recalls with respect to the latent defects in the Engines of the Affected Vehicles in Canada.
55. Despite the five recalls, many of the Affected Vehicles have not yet been recalled despite (i) having the same Engines as the recalled Affected Vehicles; and, (ii) Class Members notifying the Defendants about their Engines stalling, failing, or catching fire.
56. On September 25, 2015, Hyundai Canada recalled model year 2011-2012 Hyundai Sonata vehicles because the engine crankshaft might not have been properly cleaned to remove metallic debris during manufacturing.
57. This recall campaign indicated (i) that the metal debris, if not completely removed from the engine oil, could restrict oil flow to the bearings, causing premature bearing wear and an increased risk of vehicle stalling while in operation; and, (ii) that vehicle stalling while in operation could increase the risk of a crash causing property damage and/or injury.
58. Under this recall campaign (Transport Canada Recall # 2015428), dealers inspected the Engines and chose to replace the engine assembly in some vehicles. Additionally, under

the recall campaign, Hyundai Canada increased the warranty for the engine sub-assembly (short block) to 10 years or 200,000 kilometers for both original and subsequent owners of model year 2011-2012 Hyundai Sonata vehicles.

59. On April 6, 2017, Hyundai Canada initiated a recall of model year 2013-2014 Hyundai Santa Fe Sport vehicles and model year 2013-2014 Hyundai Sonata vehicles (Transport Canada Recall # 2017197) due to the possibility that the Engines in those vehicles could contain residual metal debris from factory machining operations.
60. This recall campaign also indicated (i) that the metal debris could restrict oil flow to the bearings, causing premature bearing wear and an increased risk of vehicle stalling while in operation; and, (ii) that vehicle stalling while in operation could increase the risk of a crash causing property damage and/or injury.
61. Under this recall campaign, dealers inspected the Engines and chose to replace the engine sub-assembly in some vehicles. No increased warranty was offered under this recall campaign.
62. On September 27, 2017, Hyundai Canada recalled model year 2017 Hyundai Santa Fe XL vehicles (Transport Canada Recall # 2017468) due to crankshaft pin surface irregularities that could lead to insufficient oil pressure and premature crankshaft or engine bearing wear, causing vehicle stalling while in operation.
63. This recall campaign indicated (i) that the crankshaft pin surface irregularities could cause premature crankshaft and/or bearing wear and an increased risk of vehicle stalling while in

operation; and, (ii) that vehicle stalling while in operation could increase the risk of a crash causing property damage and/or injury.

64. Under this recall campaign, dealers inspected the Engines and chose to replace the engine assembly in some vehicles. No increased warranty was offered under this recall campaign.
65. On January 10, 2019, Hyundai Canada initiated a recall of model year 2013-2018 Hyundai Santa Fe Sport vehicles, model year 2011-2018 Hyundai Sonata vehicles and model year 2014-2015 Hyundai Tucson vehicles (Transport Canada Recall # 2019012) due to the possibility that the high pressure fuel pipe was improperly installed on the fuel pump outlet when repairs were completed under two previous recall campaigns: Transport Canada Recall # 2015428 and 2017197.
66. This recall campaign indicates that the improperly installed high pressure fuel pipe could cause fuel leaks and lead to non-collision engine fires causing injury and/or property damage. Under this recall campaign (Transport Canada Recall # 2019012), dealers are inspecting the Engines and replacing the high pressure fuel pipe in vehicles where fuel leakage is detected. No increased warranty is being offered under this recall campaign.
67. On March 11, 2019, Hyundai Canada announced that it would be conducting a Product Improvement Campaign for model year 2013-2018 Hyundai Santa Fe Sport vehicles, model year 2011-2018 Hyundai Sonata vehicles and model year 2014-2015 Hyundai Tucson vehicles (Transport Canada Recall # 2019130).
68. Under this Product Improvement Campaign, Hyundai Canada is providing a software update to the engine control module to detect potential problems before an Engine fails.

This recall campaign indicates that engine failure would cause a sudden loss of power with an inability to restart and could increase the risk of an accident.

69. Despite initiating the five recall campaigns described above, the Defendants have not developed a sufficient solution, remedy, or fix for the defects. Under these recall campaigns, the defects in the Engines of the Affected Vehicles were left unaddressed; the Engines were replaced with GDI engines containing the same and/or additional defects; or, a software update was provided to detect potential problems caused by the defects before Engine fails. The Defendants still have no solution to correct the defects themselves.

The Plaintiff's Experience

70. In 2016, Mr McBain leased a new 2016 Hyundai Santa Fe Sport from a Hyundai dealership in Richmond, British Columbia. He leased this vehicle for personal, family and/or household uses.
71. Mr McBain's 2016 Hyundai Santa Fe Sport has a Theta II 2.4-litre Engine.
72. On November 30, 2017 at approximately 10:30 pm, while driving on the Trans-Canada Highway at a speed of approximately 100 km/h, Mr McBain experienced catastrophic engine failure in his 2016 Hyundai Santa Fe Sport.
73. This engine failure was sudden and unexpected. The vehicle abruptly lost power without any warning: no warning lights, no strange sounds from the Engine, and no previous problems with the vehicle.
74. Fortunately, Mr McBain was able to glide the vehicle to the side of the road and avoid serious personal injury.

75. Mr McBain was unable to restart his vehicle and had to have it towed to Jim Pattison Hyundai Northshore.
76. On December 1, 2017, Hovsep Dolkhanian, a service manager at Jim Pattison Hyundai Northshore, advised Mr McBain over the phone (i) that his Engine had seized; (ii) that he would need a rental car, as he would be without his vehicle for approximately two months; and, (iii) that there was a recall on older Hyundai Santa Fe Sport vehicles with 2.4-litre GDI engines due to metal debris left in the engines during manufacturing.
77. Later in the afternoon of December 1, 2017, Mr McBain arrived at Jim Pattison Hyundai Northshore to pick up a rental car. Mr Dolkhanian showed him photos of the rod bearing damage in his 2016 Hyundai Santa Fe Sport's Engine as well as photos showing metal debris in the engine. Mr Dolkhanian advised Mr McBain that there were two other Hyundai vehicles with the same catastrophic engine failure sitting in the parking lot at Jim Pattison Hyundai Northshore waiting for replacement engines.
78. On January 5, 2018, Mr McBain picked up his vehicle from Jim Pattison Hyundai Northshore. Its failed engine had been replaced with another Theta II 2.4-litre engine. On this date, there were two different Hyundai vehicles with the same catastrophic engine failure sitting in the parking lot at Jim Pattison Hyundai Northshore, a relatively small dealership.
79. While Mr McBain's rental car and replacement engine were provided free of charge, Hyundai Canada and its agents failed to offer Mr McBain the same 10-year/200,000 km transferable increased warranty that was offered under the September 25, 2015 recall campaign for 2011-2012 Hyundai Sonata vehicles with the same Theta/Theta II 2.4-litre.

80. Mr McBain specifically requested that Hyundai Canada offer him the increased warranty but has not received a response.
81. As a result of the defect in his vehicle's Engine, Mr McBain has suffered, and will continue to suffer damages, including, but not limited to, the diminished value of his vehicle.
82. At all material times, Mr McBain almost always followed Hyundai Canada's maintenance recommendations and/or schedules for his 2016 Hyundai Santa Fe Sport. He only missed one oil change around the 15,000 km mark. His vehicle had been serviced shortly before the catastrophic engine failure event and had only 24,526 km on its odometer at the time of the catastrophic engine failure.
83. Neither the Defendants nor any of their agents, affiliates, predecessors, or subsidiaries informed Mr McBain of the existence of the latent defects prior to his leasing of the vehicle. Had Mr McBain known of the latent defects in the 2016 Hyundai Santa Fe Sport Theta II 2.4-litre Engine at the time of lease, he would not have leased the vehicle or would have paid substantially less to lease the vehicle.

CAUSES OF ACTION

Negligence

84. The Defendants are and were in a relationship of proximity to Mr McBain and the Class Members. It was reasonable foreseeably that if the Affected Vehicles contained the latent defects, harm to Mr McBain and the Class Members would result.
85. At all material times, the Defendants, or any of them, owed a duty of care to Mr McBain and the Class Members to:

- (a) exercise reasonable care in the design, research, development, testing, manufacturing, marketing, advertisement, promotion, distribution, leasing, sale, warranting, servicing, and repair of the Affected Vehicles;
- (b) ensure that the Affected Vehicles were fit for intended and/or reasonably foreseeable use;
- (c) conduct appropriate testing to determine that the Affected Vehicles were fit for intended and/or reasonably foreseeable use;
- (d) take all reasonable steps necessary to manufacture, promote, lease, and/or sell a product that was not unreasonably dangerous to those who use it;
- (e) properly, adequately, and fairly warn of the magnitude and scope of the defects;
- (f) ensure that consumers and the public were kept fully and completely informed of all defects associated with the Affected Vehicles in a timely manner;
- (g) not withhold from consumers and the public material facts concerning the safety, performance, and reliability of the Affected Vehicles;
- (h) monitor, investigate, evaluate, and follow up on reports of defects in the Affected Vehicles; and,
- (i) provide a timely and effective fix to rectify the defects.

86. The reasonable standard of care expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of designing, developing, testing, and manufacturing the Affected Vehicles and having them certified,

imported, marketed and distributed. The Defendants, through their employees, officers, directors and agents, failed to meet the reasonable standard of care in that regard and similarly failed to warn Mr McBain and the Class Members of the latent defects.

87. Mr McBain's and the Class Members' damages were caused by the negligence of the Defendants. Such negligence includes, but is not limited to, the following:

- (a) the Defendants failed to adequately design, research, develop, test, and/or manufacture the Affected Vehicles before marketing, advertising, promoting, warranting, leasing, and selling the Affected Vehicles as suitable and safe for use in an intended and/or reasonably foreseeable manner;
- (b) the Defendants failed to ensure that the Affected Vehicles were free of defects and of merchantable quality;
- (c) the Defendants failed to adequately test the Affected Vehicles and their Engines in a manner that would fully disclose the magnitude and scope of the defects associated with the Affected Vehicles;
- (d) the Defendants failed to provide Mr McBain and the Class Members with proper, adequate, and/or fair warning of the defects;
- (e) the Defendants failed to design and establish an effective and timely procedure for repair of the defects;
- (f) the Defendants failed to adequately monitor, evaluate, and act upon reports of the defects;

- (g) the Defendants failed to provide any or any adequate updates and/or current information to Mr McBain and the Class Members in a timely fashion respecting the defects as such information became available;
- (h) after becoming aware of problems with the Affected Vehicles, the Defendants failed to issue adequate warnings, failed to issue a timely recall, failed to publicize the problems, and failed to otherwise act properly in a timely manner to alert the public to the defects;
- (i) the Defendants represented that the Affected Vehicles were fit for their intended purposes and of merchantable quality when the Defendants knew or ought to have known that these representations were false;
- (j) the Defendants made misrepresentations that were unreasonable given that the defects were known or ought to have been known by the Defendants;
- (k) the Defendants knowingly and intentionally concealed from Mr McBain and the Class Members that the Affected Vehicles suffered from defects (and the costs, risks, and diminished value of the Affected Vehicles as a result of the defects); and,
- (l) the Defendants failed to timely cease the manufacturing, marketing, distribution, leasing, and/or sale of the Affected Vehicles when it knew or ought to have known of the defects.

88. As a result of the Defendants' negligence, Mr McBain and the Class Members suffered and will continue to suffer damages.

Breach of Warranties

89. The Defendants expressly or impliedly warranted to Mr McBain and the Class Members that the Affected Vehicles were reasonably fit for the purpose of safe driving, that the Affected Vehicles were of merchantable quality, that the Affected Vehicles were free from defects and/or that the Affected Vehicles were of acceptable quality. The warranties included the Engines.

90. Hyundai Canada provided the purchasers and lessees of the Affected Vehicles with a written warranty that provides and represents, among other things, that each Affected Vehicle will be free of defects in material and workmanship. In addition, an implied warranty applies to each transaction between the purchasers of the Affected Vehicles and Hyundai Canada to the same effect pursuant to the *Consumer Protection Act, 2002*, the parallel provisions of the consumer protection legislation in other Canadian provinces, the *Sale of Goods Act*, the parallel provisions of the sale of goods legislation in other Canadian provinces, the *Motor Vehicle Safety Act*, and the common law.

91. Despite and contrary to the foregoing warranties and representations, the Defendants sold and leased the Affected Vehicles when they knew or ought to have known of the latent defects and the Defendants concealed or failed to disclose the latent defects to Mr McBain and the Class Members.

92. Hyundai Canada has breached its warranties with the Class Members, and as a result, the Class Members have suffered damages.

Unjust Enrichment

93. The Defendants caused Mr McBain and the Class Members to pay for a product that they would not have otherwise purchased or leased; or, in the alternative, for which they should have paid less than they did.
94. As a result, the Defendants were enriched by the payment or overpayment.
95. Mr McBain and the Class Members suffered a deprivation equal to the Defendants' enrichment.
96. There is no juristic reason for the Defendants' enrichment and the Class Members' corresponding deprivation. The Class Members are entitled to restitution for the Defendants' unjust enrichment.

DAMAGES

97. Mr McBain and the Class Members have suffered loss and damage caused by the wrongful and negligent acts of the Defendants.
98. The Class Members face the loss of the ability to sell, or exercise lease purchase options for, the Affected Vehicles at the Class Members' anticipated fair market value.
99. The Class Members have suffered or will suffer inconvenience and have incurred or will incur special damages arising from any necessary repairs to the Affected Vehicles, including loss of income, loss of use of the Affected Vehicles during any such repair periods, diminished value of the Affected Vehicles, the costs associated with the use of other automobiles or other expenses during such periods.

100. The Defendants' conduct described above was deliberate, arrogant, high-handed, outrageous, reckless, wanton, entirely without care, secretive, callous, willful, disgraceful and in contemptuous disregard of the rights, personal safety and interests of Mr McBain, the Class Members and the public.

101. This conduct renders the Defendants liable to pay punitive damages to Mr McBain and the Class Members.

PLACE OF TRIAL

102. Mr McBain proposes that this action be tried in London, Ontario.

June 10, 2019

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APPENDIX 1

Alberta: *Consumer Protection Act*, RSA 2000, c C-26.3.

British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c 2.

Manitoba: *The Business Practices Act*, CCSM c B120, c 2 and *The Consumer Protection Act*, CCSM c C200.

New Brunswick: *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1.

Newfoundland and Labrador: *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.

Northwest Territories: *Consumer Protection Act*, RSNWT 1988, c C-17.

Nova Scotia: *Consumer Protection Act*, RSNS 1989, c 92.

Nunavut: *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17.

Prince Edward Island: *Consumer Protection Act*, RSPEI 1988, c C-19 and the *Business Practices Act*, RSPEI 1988, c B-7.

Quebec: *Consumer Protection Act*, CQLR c P-40.1.

Saskatchewan: *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.

Yukon: *Consumers Protection Act*, RSY 2002, c 40.

APPENDIX 2

Alberta: *Sale of Goods Act*, RSA 2000, c S-2.

British Columbia: *Sale of Goods Act*, RSBC 1996, c 410.

Manitoba: *The Sale of Goods Act*, CCSM c S10.

New Brunswick: *Sale of Goods Act*, RSNB 2016, c 110.

Newfoundland and Labrador: *Sale of Goods Act*, RSNL 1990, c S-6.

Northwest Territories: *Sale of Goods Act*, RSNWT 1998, c S-2.

Nova Scotia: *Sale of Goods Act*, RSNS 1989, c 408.

Nunavut: *Sale of Goods Act*, RSNWT (Nu) 1998, c S-2.

Prince Edward Island: *Sale of Goods Act*, RSPEI 1988, c S-1.

Quebec: *Civil Code of Quebec*, CQLR c CCQ-1991.

Saskatchewan: *Sale of Goods Act*, RSS 1978, c S-1.

Yukon: *Sale of Goods Act*, RSY 2002, c 198.

KEITH McBAIN
Plaintiff

-and-

HYUNDAI AUTO CANADA CORP et al
Defendants

Court File No.

1186/19

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
LONDON

STATEMENT OF CLAIM

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