



Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BRIAN McCLOSKEY

Plaintiff

and

KIA CANADA INC, KIA MOTORS CORPORATION, and
HYUNDAI MOTOR COMPANY

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 August 24, 2022

Issued by _____
Local Registrar

Address of court office: Toronto Courthouse
330 University Avenue
Toronto, ON M5G 1R7

TO: KIA CANADA INC
180 Foster Crescent
Mississauga, ON L5R 4J5

TO: KIA MOTORS CORPORATION
12, Heolleung-ro, Seocho-gu
Seoul 06797
South Korea

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

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 |
|----------------|------------------------|
| Kia Forte | 2010-2020 |
| Kia Forte Koup | 2010-2013 |
| Kia Forte5 | 2011-2020 |
| Kia Optima | 2011-2019 |
| Kia Rio | 2020-2021 |
| Kia Rondo | 2008-2012 |
| Kia Seltos | 2021 |
| Kia Sorento | 2011-2020 |
| Kia Soul | 2010-2021 |
| Kia Sportage | 2011-2022 |

- (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 II 2.0-litre and 2.4-litre, Nu 1.8-litre and 2.0-litre, Gamma II 1.6-litre, and Lambda II 3.3-litre and 3.5-litre **MPI** engines designed, developed and manufactured by the Defendants;
- (d) **“Engine Defect”** means the latent manufacturing and workmanship defects in the Affected Vehicles that cause restricted oil flow, increased oil consumption, engine

damage, sudden vehicle stalling, catastrophic engine failure, and/or non-collision engine fires;

- (e) **“Kia”** means Kia Motors Corporation;
- (f) **“Kia Canada”** means Kia Canada Inc;
- (g) **“MPI”** means multi-point injection;
- (h) **“Hyundai”** means Hyundai Motor Company; and,
- (i) **“Mr McCloskey”** means Brian McCloskey.

RELIEF CLAIMED

2. The Plaintiff, Mr McCloskey, 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, manufacturing, testing, marketing, advertisement, promotion, distribution, sale, leasing, warranting, servicing, and/or repair of the Affected Vehicles;
 - (c) a declaration that the Defendants, or any of them, were negligent in their failure to warn Mr McCloskey and the Class Members of the Engine Defect;
 - (d) 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;
 - (e) a declaration that the Defendants, or any of them, breached the express and/or implied warranties for the Affected Vehicles;
 - (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 the latent Engine Defect to Mr McCloskey and the Class Members;
 - (g) a declaration that the Defendants, or any of them, were unjustly enriched at the expense of Mr McCloskey 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*, RSO 1990, c C.43, 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*, 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 McCloskey is an individual residing in Calgary, Alberta. He and his wife, Susan Catherine McCloskey (Ms McCloskey), are former owners of a 2012 Kia Sportage equipped with a Theta II 2.4-litre MPI Engine.
4. Mr McCloskey 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 Kia Canada is a corporation incorporated pursuant to the laws of Canada with its registered office located in Mississauga, Ontario. Kia Canada is and was at all material times a subsidiary of Kia.

6. Kia Canada imports into Canada for sale or lease newly manufactured Kia vehicles, including the Affected Vehicles, and is responsible for ensuring that those vehicles are compliant with the regulations for import into Canada.
7. Kia Canada distributes Kia vehicles in Canada, and sells, leases, services, and repairs the Affected Vehicles through its network of dealers. Money received by a dealer from the purchase or lease of a Kia vehicle flows from the dealer to Kia Canada.
8. Kia 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 Kia is a corporation organized and existing under the laws of South Korea. Kia controls and directs Kia Canada with respect to virtually all aspects of the Affected Vehicles.
10. The Defendant Hyundai is a corporation organized and existing under the laws of South Korea.
11. The Defendants Hyundai and Kia designed, engineered, researched, developed, tested, manufactured, marketed, supplied, and distributed the Engines in the Affected Vehicles sold in Canada.
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. The Engines contain an MPI fuel-delivery system, which injects gasoline at each cylinder, directly inside the cylinder's intake port, allowing greater control over how much gasoline the Engine burns and thereby increasing overall fuel efficiency.
14. The Engines use four reciprocating pistons (six reciprocating pistons in the Lambda II Engines) 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.
15. The 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.
16. 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.
17. 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.

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

The Latent Engine Defect

19. This action concerns a latent Engine Defect in the Affected Vehicles, which typically manifests itself during the limited warranty period or shortly after its expiration. Latent manufacturing and workmanship defects in the Affected Vehicles cause restricted oil flow, increased oil consumption, engine damage, sudden vehicle stalling, catastrophic engine failure, and/or non-collision engine fires (the “Engine Defect”).
20. The manufacturing, assembly, and quality-control processes for producing and installing these Engines must be both precise and robust, to minimize, if not eliminate, manufacturing errors and the possibility of impurities contaminating the production of the engine components.
21. As a result of an improper manufacturing and machining process, the quality of the workmanship in manufacturing the Engines, including, but not limited to, their components, such as the engine blocks, pistons and connecting rod bearings, to design specifications suffered.
22. Many of these manufacturing and workmanship defects would have been discoverable in routine quality-control inspections done to ensure that manufactured pieces meet design specifications. When engine components fail to meet design specifications, they fail to fit

together properly, prematurely wear and breakdown, and are prone to damaging themselves and/or other engine components, causing the Engine Defect.

Metal Debris Circulating in the Engines of the Affected Vehicles

23. As mentioned above, when engine components fail to meet design specifications, they fail to fit together properly and prematurely wear and breakdown, causing metal debris from those components or other components to circulate throughout the Engines via the engine oil. Metal debris in the engine oil also results from, *inter alia*, (i) the failure to properly clean the engine crankshaft to remove metal debris during manufacturing; and , (ii) residual metal debris from factory machining operations.
24. 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.
25. 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.

26. 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” noise. In some cases, the defective connecting rod bearings may eventually cause the piston and/or connecting rod to break through the engine block as a result of the deterioration. If the connecting rod breaks through the engine block, it can result in a non-collision engine fire as engine oil leaks through the broken cylinder wall and throughout the Engine.
27. 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 sudden vehicle stalling, catastrophic engine failure, and non-collision engine fires.
28. 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 engine 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.
29. 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 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, sudden vehicle stalling, catastrophic engine failure, and/or non-collision engine fires.

30. 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 sudden vehicle stalling, catastrophic engine failure, and/or non-collision engine fires.

The Life-Threatening and Dangerous Nature of the Latent Engine Defect

31. The Engine Defect is life-threatening and dangerous. As a result of latent manufacturing and workmanship defects, the Affected Vehicles are prone to 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 sudden vehicle stalling, catastrophic engine failure, and/or non-collision engine fires during operation.
32. The Engine Defect poses a significant risk of personal injury and/or property damage to Mr McCloskey and the other Class Members, occupants of the Affected Vehicles, and other members of the Canadian public because it can cause sudden vehicle stalling, catastrophic engine failure, and non-collision engine fires while the Affected Vehicles are in operation at any time and under any driving conditions and/or speed.
33. Numerous current and former owners and lessees of the Affected Vehicles 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.

34. 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.

The Defendants' Knowledge of the Latent Engine Defect

35. The Defendants have long been aware of the Engine Defect but have intentionally, negligently and/or recklessly concealed the Engine Defect from Mr McCloskey and the other Class Members; failed to warn Mr McCloskey and the other Class Members of the serious personal safety risks from the latent Engine Defect; and, failed to adequately notify the appropriate authorities of the safety risk.
36. At all material times, the Defendants had notice and knowledge of the Engine Defect through, *inter alia*, (i) numerous complaints they received from consumers, including Mr McCloskey and the Class Members; (ii) information received from dealers, including dealer 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.
37. 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 Engine Defect and its potential danger.

38. The Defendants also became aware of the Engine Defect from the substantial volume of reports of engine problems relating to the connecting rod bearings, lubrication channels, and fuel leakage.
39. For example, Kia Canada's customer relations department works closely with Kia-authorized service technicians to identify potentially widespread vehicle problems and assist in the diagnosis of vehicle issues. Kia Canada has received numerous reports of engine problems in the Engines relating to the connecting rod bearings, lubrication channels, and fuel leakage.
40. The Defendants also collect and analyze field data, including, but not limited to, repair requests made at dealers 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.
41. The Defendants' warranty departments similarly review and analyze warranty claims data submitted by their dealers, agents and authorized service technicians to identify defect trends in their vehicles.
42. The Defendants knew or ought to have known about the Engine Defect because of the high number of replacement parts ordered from the Defendants.
43. In Canada, Kia service centres are required to order replacement parts, including engines, piston assemblies, and connecting rod bearings, directly from Kia Canada. Other independent vehicle repair shops that service Affected Vehicles also order replacement

parts directly from Kia Canada. Kia Canada routinely monitors part sales reports and is responsible for the shipping of parts requested by dealers and technicians.

44. Kia 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 Kia Canada and ought to have alerted it to the scope and severity of the Engine Defect.
45. The Defendants knew or ought to know about the Engine Defect 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.
46. Although the Defendants became aware of the Engine Defect much earlier, US National Highway Traffic Safety Administration complaints establish that the Defendants knew, or ought to have known, of the Engine Defect at least as early as June 14, 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.
47. The Defendants are experienced in the design, testing, and manufacturing of passenger vehicles. As an experienced manufacturer, the Defendants conduct testing on incoming batches of components, including the Engines, to verify that the components are free from defects and comply with the Defendants' specifications.
48. In fact, the Defendants represent to their customers and the public that they put their vehicles, their engines and their engine components, through very stringent and tough tests.

49. 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 McCloskey and the Class Members thousands of dollars in expenses and presenting a serious safety risk to Mr McCloskey, the Class Members and the public.

The Defendants' Conduct While Knowing About the Engine Defect

50. Despite their knowledge of the Engine Defect:

- (a) the Defendants continued to market the Affected Vehicles as being safe and of a high quality;
- (b) Kia Canada routinely refused to repair the Affected Vehicles free of charge when the Engine Defect manifested – even within the warranty period;
- (c) Kia Canada routinely refused to offer to reimburse its customers who incurred out-of-pocket expenses to repair the Engine Defect – even within the warranty period;
- (d) Kia Canada and its agents refused to disclose the existence of the Engine Defect when Affected Vehicles displaying symptoms consistent with the Engine Defect were brought in for service;
- (e) Kia Canada and its agents ignored the Engine Defect in Affected Vehicles until it caused significant mechanical problems necessitating costly repairs;
- (f) Kia Canada has attempted to circumvent its warranty obligations related to the Engine Defect 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, increased oil consumption, sudden vehicle stalling, catastrophic engine failure, and non-collision engine fires;
- (h) despite knowing that the Engine Defect manifests even if the Class Members followed Kia's oil change guidelines, Kia Canada and its agents attempted to evade Kia Canada's 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 Kia-authorized dealer or service provider, before determining whether to make the necessary repairs under warranty;
- (i) the Defendants have refused to take any action to correct the Engine Defect when it manifests in the Affected Vehicles after the expiration of the warranty period; and,
- (j) Kia Canada has failed to recall and/or offer adequate engine repairs and/or replacements for every Affected Vehicle.

51. Although Kia Canada has recalled some of the Affected Vehicles due to the Engine Defect, (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 Engine Defect.

Transport Canada Recalls

52. Kia Canada has been slow to recall the Affected Vehicles, if at all.

53. Since December 4, 2020, Kia Canada has initiated five recalls with respect to the Engine Defect in the Affected Vehicles in Canada.
54. 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.
55. On December 4, 2020, Kia Canada initiated a recall of 39,658 model year 2012-2013 Kia Forte vehicles, model year 2012-2013 Kia Forte Koup vehicles, model year 2011-2013 Kia Optima vehicles, model year 2012 Kia Sorento vehicles, and model year 2012 Kia Sportage vehicles equipped with Theta II 2.4-litre Engines (and model year 2014-2015 Kia Forte vehicles, model year 2014-2015 Kia Forte Koup vehicles, and model year 2014-2015 Kia Soul vehicles equipped with Nu 2.0-litre gasoline direct injection engines) (Transport Canada Recall # 2020-597).
56. This recall campaign indicates (i) that in certain vehicles equipped with a Theta II 2.4-litre Engine, an engine compartment fire could occur while driving; (ii) that Kia Canada is conducting this recall as a preventative measure to prevent fire risk due to potential fuel leaks, oil leaks and/or engine damage; (iii) that the following symptoms might be present: an abnormal knocking noise from the Engine, illumination of the check engine light and/or oil pressure warning light, the smell of fuel, burning or smoke, or oil leaks; (iv) that if the vehicle continues to be driven with these symptoms, the Engine could fail and/or an engine compartment fire could occur; (v) that engine failure could cause a sudden loss of power with an inability to restart; (vi) that an engine compartment fire could create a risk of injury; and, (vii) that a sudden loss of engine power could increase the risk of a crash.

57. Under this recall campaign, dealers are to inspect the Engines and engine compartments for fuel and/or engine oil leaks, perform an engine test, and make any necessary repairs, including engine replacement. The recall campaign also involves performing the Knock Sensor Detection System (KSDS) software update – designed to detect engine damage from worn connecting rod bearings –, if it is available for the vehicle.
58. On February 1, 2021, Kia Canada announced that it would be conducting a Product Improvement Campaign for 48,787 model year 2010-2011 Kia Forte vehicles, model year 2010-2012 Kia Rondo vehicles, model year 2011 Kia Sorento vehicles, and model year 2011-2013 Kia Sportage vehicles equipped with Theta II 2.4-litre Engines (Transport Canada Recall # 2021-040).
59. Under this Product Improvement Campaign, Kia Canada is providing a software update to the engine control module to detect potential problems before the Engine fails. This recall campaign indicates that engine failure could cause a sudden loss of power with an inability to restart, could increase the risk of a crash, and could create the risk of a fire.
60. On April 14, 2021, Kia Canada initiated a recall of 443 model year 2018 Kia Forte vehicles equipped with Nu 2.0-litre Engines (Transport Canada Recall # 2021-224).
61. This recall campaign indicates (i) that in certain vehicles equipped with a Nu 2.0-litre Engine, small metal particles that are not captured by the oil filter can build up in the oil pump; (ii) that if this happens, the engine oil pressure may be reduced, causing engine wear and resulting in abnormal engine noise; (iii) that if this happens, the malfunction indicator lamp and/or oil pressure warning light may turn on; (iv) that if the vehicle continues to be driven with these symptoms, the Engine could fail; (v) that engine failure could cause a

sudden loss of power with an inability to restart; and, (vi) that a sudden loss of engine power could increase the risk of a crash.

62. Under this recall campaign, dealers are to replace the oil pan with a new one that has two magnets to capture small metal particles.
63. On April 14, 2021, Kia Canada also initiated a recall of 19,634 model year 2020 Kia Forte vehicles, model year 2021 Kia Seltos vehicles, and model year 2020-2021 Kia Soul vehicles equipped with Nu 2.0-litre Engines (Transport Canada Recall # 2021-225).
64. This recall campaign indicates (i) that in certain vehicles, the Engine's piston oil rings may be defective; (ii) that the defective piston oil rings can cause engine wear that can lead to increased oil consumption; (iii) that as a result of the engine wear, there could be an abnormal noise from the Engine and/or illumination of the oil pressure warning light; (iv) that if the vehicle continues to be driven with the engine wear, the Engine could fail; (v) that engine failure could cause a sudden loss of engine power; (vi) that a sudden loss of engine power could increase the risk of a crash; and, (vii) that an engine failure could create the risk of a fire.
65. Under this recall campaign, dealers are to inspect the Engines and replace any Engines where they find damage. The recall campaign also indicates that dealers are also to install a Piston-ring Noise Sensing System (PNSS) software update designed to alert the driver of potential damage before an engine failure occurs.

66. On July 9, 2021, Kia Canada announced that it would be conducting a Product Improvement Campaign for 1,565 model year 2014-2016 Kia Optima vehicles equipped with Theta II 2.4-litre Engines (Transport Canada Recall # 2021-424).
67. Under this Product Improvement Campaign, Kia Canada is providing a software update to the engine control module to detect potential problems before the Engine fails. This recall campaign indicates that engine failure could cause a sudden loss of power with an inability to restart, could increase the risk of a crash, and could create the risk of a fire.
68. Despite initiating the five recall campaigns described above, the Defendants have not developed a sufficient solution, remedy, or fix for the Engine Defect. Under these recall campaigns, the Engine Defect was left unaddressed; the Engines were replaced with MPI Engines containing the same Engine Defect; or, a software update was provided to detect the Engine Defect before the Engine fails. The Defendants still have no solution to correct the Engine Defect itself.

The Defendants' Warranty Practices

69. Kia Canada issued two relevant warranties with each Affected Vehicle: a "New Vehicle Limited Warranty" and a "Powertrain Limited Warranty." Both expressly warrant that the Affected Vehicle shall be free from material and/or workmanship defects.
70. Under the New Vehicle Limited Warranty, Kia Canada agreed to repair or replace any component with a material and/or workmanship defect reported within the earlier of five years or 100,000 km.

71. Under the Powertrain Limited Warranty, Kia Canada agreed to repair or replace any powertrain component, including engine components, with a material and/or workmanship defect reported within the earlier of five years or 100,000 km.
72. Kia Canada instructs owners and lessees of Affected Vehicles to bring their Affected Vehicles to a Kia-authorized dealer or service provider for the warranty repairs. Many Class Members have presented their Affected Vehicles to Kia-authorized dealers and service providers with complaints related to the Engine Defect.
73. Kia Canada has evaded its warranty obligations by failing to tell Class Members that their Affected Vehicles are defective and by representing that the cause of the Engine Defect is the Class Member's lack of maintenance or use of aftermarket oil filters.
74. Despite knowing that the Engine Defect manifests even if the Class Members follow Kia's oil change guidelines, Kia Canada has also evaded 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 Kia-authorized dealer or service provider, before determining whether to make the necessary repairs under warranty.
75. Kia Canada has routinely refused to repair the Affected Vehicles free of charge when the Engine Defect manifested within the warranty period, and has also routinely refused to offer to reimburse Class Members who incurred out-of-pocket expenses to repair the Engine Defect within the warranty period.

76. Kia Canada's failure to honour its warranty obligations imposes significant out-of-pocket expenses on Class Members, including out-of-pocket repair expenses, rental car expenses, and/or towing expenses.

The Plaintiff's Experience

77. On or around April 21, 2012, Mr and Ms McCloskey purchased a new 2012 Kia Sportage with a Theta II 2.4-litre MPI Engine from Northland Kia in Calgary, Alberta. They purchased this Affected Vehicle for personal, family and/or household uses.
78. On or around September 1, 2020, Ms McCloskey was driving in busy rush-hour traffic in Calgary, Alberta. While exiting the Glenmore Trail expressway onto the Crowchild Trail expressway at a speed of approximately 80 km/h, Ms McCloskey started to hear an abnormal knocking noise coming from the Affected Vehicle's Engine followed shortly by the illumination and flashing of all the dashboard warning lights and a sudden loss of engine power.
79. The sudden vehicle stalling in the McCloskeys' Affected Vehicle was a life-threatening and dangerous occurrence, especially given the level of traffic and the speed at which Ms McCloskey and other vehicles sharing the road with her were travelling when the sudden vehicle stalling occurred (approximately 80 km/h). Fortunately, Ms McCloskey was able to coast the Affected Vehicle to the right-hand lane of the expressway and exit to the right-hand shoulder of a side road just before the Engine catastrophically failed.
80. Ms McCloskey opened the hood of the Affected Vehicle and could smell oil. She did not try to restart the Affected Vehicle, choosing instead to have the Affected Vehicle towed to Northland Kia for diagnosis and repairs.

81. Northland Kia inspected the McCloskeys' Affected Vehicle on September 2, 2020. Mr and Ms McCloskey learned (1) that their Affected Vehicle had suffered a catastrophic engine failure, specifically an engine seizure; (2) that there were no recalls or open programs for their Affected Vehicle; and, (3) that the Engine in their Affected Vehicle needed to be replaced at a cost of \$11,922.81 (more than the then-fair-market value of the Affected Vehicle).
82. Mr McCloskey reported the sudden vehicle stalling and catastrophic engine failure in the McCloskeys' Affected Vehicle to Kia Canada and to Transport Canada.
83. Mr McCloskey reached out to Kia Canada with a request that Kia Canada cover the cost to replace the Engine in the McCloskeys' Affected Vehicle. Kia Canada refused to cover this cost. Given the high cost to replace the Engine (especially relative to the then-fair-market value of their Affected Vehicle) and fearing that the new replacement Engine could suffer the same sudden vehicle stalling and/or catastrophic engine failure, Mr and Ms McCloskey ultimately decided not to proceed with the engine replacement, donated their unrepaired Affected Vehicle to charity, and purchased a 2018 Toyota C-HR.
84. Approximately five months after Mr and Ms McCloskey donated their Affected Vehicle to charity, Mr McCloskey received a notice from Kia Canada for a recall related to the Engine Defect (Transport Canada Recall # 2020-597). The notice indicated that owners who had already paid for repairs related to the Engine Defect could obtain reimbursement from Kia Canada for those repair expenses. Mr McCloskey reached out to Kia Canada to request compensation for his losses, but Kia Canada refused to provide any compensation to Mr McCloskey.

85. As a result of the Engine Defect in the McCloskeys' 2012 Kia Sportage, Mr McCloskey has suffered, and will continue to suffer damages, including, but not limited to, towing expenses, inconvenience, loss of use of the Affected Vehicle, and loss of the Affected Vehicle's value for trade-in or sale.
86. At all material times, Mr and Ms McCloskey followed Kia Canada's maintenance recommendations and/or schedules for their 2012 Kia Sportage. Their Affected Vehicle had been serviced at Northland Kia shortly before the September 1, 2020 catastrophic engine failure and only had 99,178 km on its odometer at the time of the September 1, 2020 catastrophic engine failure.
87. Neither the Defendants nor any of their agents, affiliates, predecessors, or subsidiaries informed Mr or Ms McCloskey of the existence of the latent Engine Defect prior to their purchase of their Affected Vehicle. Had Mr and Ms McCloskey known of the Engine Defect in the 2012 Kia Sportage at the time of purchase, they would not have purchased the Affected Vehicle or would have paid substantially less to purchase the Affected Vehicle.

CAUSES OF ACTION

Negligent Design, Manufacture, and Testing

88. The Defendants are and were in a relationship of proximity to Mr McCloskey and the Class Members. It was reasonably foreseeable that if the Affected Vehicles contained the Engine Defect, harm to Mr McCloskey and the Class Members would result.
89. At all material times, the Defendants, or any of them, owed a duty of care to Mr McCloskey and the Class Members to:

- (a) exercise reasonable care in the design, research, development, testing, and manufacturing of the Affected Vehicles and their Engines before marketing, advertising, promoting, distributing, leasing, and/or selling them as fit for their intended and/or reasonably foreseeable use;
- (b) ensure that the Affected Vehicles were fit for their intended and/or reasonably foreseeable use;
- (c) conduct appropriate testing to determine that the Affected Vehicles were fit for their intended and/or reasonably foreseeable use;
- (d) take all reasonable steps necessary to avoid manufacturing a product that is unreasonably dangerous to those who use it;
- (e) exercise reasonable care in the warranting, servicing, and repair of the Affected Vehicles;
- (f) monitor, investigate, evaluate, and follow up on reports of defects in the Affected Vehicles;
- (g) properly, adequately, and fairly warn of the magnitude and scope of the latent Engine Defect;
- (h) ensure that consumers and the public were kept fully and completely informed of all defects associated with the Affected Vehicles in a timely manner;
- (i) not withhold from consumers and the public material facts concerning the safety, performance, and reliability of the Affected Vehicles; and,

(j) provide a timely and effective fix to rectify the Engine Defect.

90. 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, researching, 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.

91. Mr McCloskey'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 exercise reasonable care in the design, research, development, testing, and/or manufacturing of the Affected Vehicles before marketing, advertising, promoting, distributing, 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 safe, 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 Engine Defect;
- (d) the Defendants failed to provide Mr McCloskey and the Class Members with proper, adequate, fair, and timely warning of the latent Engine Defect;

- (e) the Defendants failed to design and establish an effective and timely procedure for repair of the Engine Defect;
- (f) the Defendants failed to adequately monitor, evaluate, and act upon reports of the Engine Defect;
- (g) the Defendants failed to provide any or any adequate updates and/or current information to Mr McCloskey and the Class Members in a timely fashion respecting the Engine Defect 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, and failed to otherwise act prudently in a timely manner to alert Mr McCloskey, the Class Members and the public to the latent Engine Defect;
- (i) the Defendants represented that the Affected Vehicles were safe and fit for their intended purposes when the Defendants knew or ought to have known that these representations were false;
- (j) the Defendants made representations regarding the Affected Vehicles' safety and fitness that were unreasonable given that the Defendants knew or ought to have known of the Engine Defect;
- (k) the Defendants knowingly and intentionally concealed from Mr McCloskey and the Class Members that the Affected Vehicles suffered from the Engine Defect (and the costs, risks, and diminished value of the Affected Vehicles as a result of the Engine Defect); 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 Engine Defect and the associated safety risks.

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

Failure to Warn

93. The Defendants owed a duty of care to Mr McCloskey and the Class Members to warn Mr McCloskey and the Class Members of the latent Engine Defect.

94. The Defendants breached their duty of care, as they failed to warn Mr McCloskey and the Class Members of the latent Engine Defect and its associated safety risks.

95. Mr McCloskey'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 provide Mr McCloskey and the Class Members with proper, adequate, fair, and timely warning of the latent Engine Defect;
- (b) the Defendants failed to provide Mr McCloskey and the Class Members with proper, adequate, fair, and timely warning of the magnitude and scope of the Engine Defect; and,
- (c) the Defendants failed to adequately monitor, evaluate, and act upon reports of the Engine Defect.

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

Breach of Warranties

97. As part of the purchase agreements, the Defendants expressly and/or impliedly warranted to Class Members that the Affected Vehicles were free from defects in material and workmanship and fit for their intended and/or reasonably foreseeable use.
98. Through the New Vehicle Limited Warranty and Powertrain Limited Warranty, Kia Canada expressly warranted to Class Members that the Affected Vehicles were to be free from defects in material and workmanship for a period of five years or 100,000 km. These warranties are applicable to the Engine Defect.
99. Despite and contrary to the foregoing warranties, the Defendants manufactured and distributed Affected Vehicles when they knew or ought to have known of the latent Engine Defect and concealed or failed to disclose the latent Engine Defect to Mr McCloskey and the Class Members.
100. The Defendants have breached their warranties with Class Members, and as a result, Class Members have suffered damages.

Unjust Enrichment

101. The Defendants caused Mr McCloskey and the Class Members to pay for an Affected Vehicle and/or repairs that they would not have otherwise purchased or leased; or, in the alternative, for which they should have paid less than they did.
102. As a result, the Defendants were enriched by the payment or overpayment.

103. Mr McCloskey and the Class Members suffered a deprivation equal to the Defendants' enrichment.

104. There is no juristic reason for the Defendants' enrichment and Mr McCloskey's and the Class Members' corresponding deprivation. Mr McCloskey and the Class Members are entitled to restitution for the Defendants' unjust enrichment.

DAMAGES

105. Mr McCloskey and the Class Members have suffered losses and damages caused by the wrongful and negligent acts of the Defendants.

106. Mr McCloskey and the Class Members face the loss of the ability to sell, or exercise lease purchase options for, the Affected Vehicles at Mr McCloskey's and the Class Members' anticipated fair market value.

107. Mr McCloskey and 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.

108. The Defendants' conduct described above was deliberate, reckless, wanton, entirely without care, secretive, callous, willful, disgraceful and in contemptuous disregard of the rights, personal safety and interests of Mr McCloskey, the Class Members and the public.

109. This conduct renders the Defendants liable to pay punitive damages to Mr McCloskey and the Class Members.

PLACE OF TRIAL

110. Mr McCloskey proposes that this action be tried in Toronto, Ontario.

SERVICE OUTSIDE OF ONTARIO WITHOUT LEAVE

111. Mr McCloskey pleads and relies on rule 17.02(g) and (p) of the *Rules of Civil Procedure*, allowing for service on the foreign Defendants, Hyundai and Kia, outside of Ontario without a court order. Specifically, pursuant to rule 17.02(g) and (p), this originating process may be served outside Ontario without a court order because this proceeding consists of claims in respect of a tort committed in Ontario and claims against persons carrying on business in Ontario.

August 24, 2022

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Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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