



BETWEEN:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Court File No.

CV '12 - 470990-
000P

LAURA VELL

Plaintiff

- and -

MATTEL CANADA INC., MATTEL, INC. AND FISHER-PRICE INC.

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.

Date: December 28, 2012

Issued by


Local Registrar

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10th Floor
Toronto, ON M5G 1E6

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6155 Freemont Boulevard
Mississauga, Ontario
L5R 3W2

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AND TO: Mattel Inc.
333 Continental Boulevard
El Segundo, California 90245-5012
USA

Tel: 310-252-2000
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AND TO: Fisher-Price Inc.
636 Girard Avenue
East Aurora, New York 14052
USA

Tel: 716-687-3300
Fax:

DEFINED TERMS

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

(a) **“Recalled Product(s)”** means the **Trikes, the Rampways, the Infant Toys With Inflatable Balls** and the **High Chairs** that were manufactured, distributed, sold and/or placed onto the market by the **Defendants** and which were subsequently recalled on September 29 and September 30 of 2010;

(b) **“Trike(s)”** include(s) the following - sold since 1997:

- (i) 72633 Hot Wheels Trike;
- (ii) 72639 Barbie™ Butterfly Trike;
- (iii) 72642 Lil' Kawasaki® Trike;
- (iv) 72643 Tough Trike;
- (v) 72644 Tough Trike;
- (vi) 72792 Kawasaki Trike;
- (vii) B8775 Kawasaki® Ninja® Tough Trike;
- (viii) B8776 Barbie™ Tough Trike;
- (ix) K6672 Nick Jr./Dora the Explorer Tough Trike;
- (x) K6673 Go, Diego, Go! Tough Trike;
- (xi) M5727 Barbie™ Tough Trike Princess Ride-On;
- (xii) N6021 Kawasaki Tough Trike;
- (xiii) T6209 Thomas & Friends™ Tough Trike; and
- (xiv) V4270 Go, Diego, Go!™ Kid-Tough™ Trike;

(c) **“Rampway(s)”** include(s) the following - sold since 2010:

- (i) T4261 Little People® Wheelies™ Stand 'n Play™ Rampway; and
- (ii) V6378 Little People® Wheelies™ Stand 'n Play™ Rampway Gift Set;

(d) **“Infant Toy(s) With Inflatable Ball(s)”** include(s) the following – sold since 2001:

- (i) 73408 Baby Playzone™ Crawl & Cruise Playground™;
- (ii) B2408 Baby Playzone™ Crawl & Slide Arcade™;
- (iii) C3068 Ocean Wonders™ Kick & Crawl™ Aquarium;
- (iv) H5704 Baby Gymnastics™ Play Wall;
- (v) H8094 Ocean Wonders™ Kick & Crawl™ Aquarium;
- (vi) J0327 1-2-3 Tetherball; and
- (vii) K0476 Bat & Score Goal™;

(e) **“High Chair(s)”** include(s) the following – sold since 2001:

- (i) 79638 Healthy Care™ High Chair;
- (ii) 79639 Healthy Care™ High Chair;
- (iii) 79640 Healthy Care™ High Chair;
- (iv) 79641 Healthy Care™ High Chair;
- (v) B0326 Deluxe Healthy Care™ High Chair;
- (vi) B2105 Deluxe Healthy Care™ High Chair;
- (vii) B2875 Healthy Care™ High Chair;
- (viii) C4630 Healthy Care™ High Chair;

- (ix) C4632 Link-a-doos™ Deluxe Plus Healthy Care™ High Chair;
- (x) C5936 Healthy Care™ High Chair;
- (xi) G4406 Healthy Care™ High Chair;
- (xii) G8659 Aquarium Healthy Care High Chair™;
- (xiii) H0796 Deluxe Healthy Care™ High Chair;
- (xiv) H1152 Healthy Care™ High Chair;
- (xv) H4864 Aquarium Healthy Care™ High Chair;
- (xvi) H7241 Healthy Care™ High Chair;
- (xvii) H8906 Close to Me™ High Chair;
- (xviii) H9178 Easy Clean™ High Chair;
- (xix) J4011 Easy Clean™ High Chair;
- (xx) J6292 Easy Clean™ High Chair;
- (xxi) J8229 Easy Clean™ High Chair;
- (xxii) K2927 Rainforest™ Healthy Care™ High Chair; and
- (xxiii) L1912 Healthy Care™ High Chair;

(f) **“Class” or “Class Members”** means all Persons in Canada, except Quebec residents who:

- (i) purchased or acquired (including by gift) a **Recalled Product** for or on behalf of themselves or a minor child over whom they have custody and control as a parent or guardian, or to be given as a gift to another person

or

- (ii) are the parent or guardian of a minor child who purchased or acquired (including by gift) a **Recalled Product**;

- (g) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c C-43, as amended;

- (h) “*Class Proceedings Act*” means the *Class Proceedings Act*, 1992, SO 1992, c 6, as amended;

- (i) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A, as amended;

- (j) “*Competition Act*” means the *Competition Act*, RSC 1985, c C-34, as amended;

- (k) “*Negligence Act*” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;

- (l) “*Sale of Goods Act*” means the *Sale of Goods Act*, R.S.O. 1990, c S.1, as amended;

- (m) “**Consumer Protection Legislation**” means:
 - (i) *Fair Trading Act*, RSA 2000, c F-2, as amended;
 - (ii) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, as amended;
 - (iii) *The Business Practices Act*, CCSM, c B120, as amended;
 - (iv) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, and *Trade Practices Act*, RSNL 1990, c T-7, as amended;
 - (v) *Business Practices Act*, RSPEI 1988, c B-7, as amended; and
 - (vi) *Consumer Protection Act*, SS 1996, c C-30.1, as amended;

(n) “Defendants”, “Mattel” or “Fisher-Price” means Mattel Canada Inc., Mattel, Inc. and Fisher-Price Inc.;

(o) “Plaintiff” means Laura Vell; and

(p) “Representation” means the Defendants’ false, misleading or deceptive representations that the Recalled Products were fit for the purpose for which they were intended (i.e. for their children to play with), that the Recalled Products were of a particular standard, quality and grade (i.e. that they were safe for children to play with).

CLAIM

2. The proposed Representative Plaintiff, Laura Vell, claims on her own behalf and on behalf of the members of the Class of persons as defined in defined in paragraph 4 below (the “Class”) the following relief on a joint and several basis as against Mattel Canada Inc., Mattel, Inc., Fisher-Price Canada Inc. and Fisher-Price Inc. (collectively the “Defendants”):

(a) An order pursuant to the *Class Proceedings Act* certifying this action as a Class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;

(b) A declaration that the Representation was a false and misleading representation contrary to s. 52(1) of the *Competition Act*;

- (c) A declaration that the Representation was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;
- (e) A declaration that the notice given by the Plaintiff on December 28, 2012, on her own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendants on behalf of all Class Members;
- (f) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (g) An accounting of revenues received by the Defendants resulting from the sale of their Recalled Products as a result of the Representation to the Plaintiff and to the Class Members;

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

² Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

³ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

- (h) A declaration that any funds received by the Defendants through the sale of their Recalled Products as a result of the Representation are held in trust for the benefit of the Plaintiff and Class Members;
- (i) In addition, or in the alternative, restitution or a refund of all monies paid to or received by the Defendants from the sale of their Recalled Products to members of the Class;
- (j) Restitution of all amounts incurred for replacement of the defective toys and associated costs and expenses, as suffered by Class members;
- (k) Damages pursuant to s. 36 of the *Competition Act*, to s. 18 (2) of the *Consumer Protection Act*, and to the parallel provisions of the Consumer Protection Legislation⁴ in the amount of \$10,000,000 or in an amount to be determined for each member of the Class;
- (l) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (m) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;

⁴ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 7(3); *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 171; *The Business Practices Act*, CCSM, c B120, s 23(2) ; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 10(2); *Trade Practices Act*, RSNL 1990, c T-7, s 14(2); *Business Practices Act*, RSPEI 1988, c B-7, s 4(1); and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

- (n) A permanent injunction restraining the Defendants from continuing any actions taken by them in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2 (9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis or solicitor and client basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, Laura Vell, is an individual residing in the City of Saint Catharines, in the Province of Ontario. Ms. Vell purchased one of the Defendants' Recalled Products in 2010 for her minor child.

The Class

4. The Plaintiff seeks to represent the following class of which she is a member (the "Proposed Class"):

All persons in Canada, except Quebec residents, who:

- (i) purchased or acquired (including by gift) a Recalled Product for or on behalf of themselves or a minor child over whom they have custody and control as a parent or guardian, or to be given as a gift to another Person; or
- (ii) are the parent or guardian of a minor child who purchased or acquired (including by gift) a Recalled Product

The Defendants

5. The Defendant Mattel Canada Inc. ("Mattel Canada") is a Canadian corporation with its principal place of business in Mississauga, Ontario. It is a wholly-owned subsidiary of Mattel, Inc. that is carrying on business throughout Canada, including within the Province of Ontario.

6. The Defendant Mattel, Inc. ("Mattel USA") is a Delaware corporation with its principal place of business in El Segundo, California. It is the parent company of all the other Defendants. It is the world's largest toy company based on revenue.

7. The Defendant Fisher-Price Inc. ("Fisher-Price") is a Delaware Corporation with its principal place of business in East Aurora, New York. It is a wholly-owned subsidiary of Mattel USA. It is involved in designing, manufacturing, marketing, and distributing various children's toys and other products destined to be used by children.

8. The Defendants are residents in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.
9. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

10. The Defendants are and, have been at all relevant times, engaged in the business of manufacturing, producing, distributing, marketing and/or selling toys that are sold through chain retailers, specialty retailers, wholesalers, as well as to directly to consumers throughout Canada.
11. These class proceedings concern toys that were manufactured, or caused to be manufactured, produced, distributed, marketed and/or sold by the Defendants, that were recalled due to inherent, hidden defects which rendered these products unsafe.
12. On September 29th and 30th 2010, the United States Consumer Product Safety Commission ("US CPSC") and Health Canada, in cooperation with the Defendants, announced a voluntary recall of the Recalled Products.
13. While the risks and causes of injuries vary among the Recalled Products, they generally include, but are not limited to: cuts, bruises, bleeding, broken teeth and choking. These injuries are mostly due to protruding objects (i.e. pegs, keys, wheels, and valves) on the Recalled Products. More specifically, the Recalled Products can cause "serious injury, including genital

bleeding” if a child lands “on the protruding plastic ignition key”, the balls and cars have associated choking risks and the high chairs have a laceration risk⁵.

14. There have been numerous cases of injuries occurring to children in Canada and in the United States caused by the Recalled Products;

15. It also apparent that many injuries which were not considered serious have gone unreported since they were: (1) not severe enough to require medical intervention, and/or (2) not known to be caused by a safety defect in the product itself;

16. Even for those children that have not yet been injured, continued use would cause them to be at an abnormally high risk of suffering bodily damages caused by the inherent defects in the Recalled Products;

17. Up to the present, the Defendants’ band-aid remedy has been to assume that parents and/or guardians are independently aware of the recall, to recommend an immediate stop to the use of these Recalled Products and to encourage parents and/or guardians to initiate contact with them to request a free repair kit.

18. In other words, it is the responsibility of the parents and/or guardians to inform themselves about the products that they bought and to verify if their product has been recalled, to stop using them for their intended purpose, to contact the Defendants and to wait for a repair kit that will possibly render their products safe for use by children (which they were expressly and/or impliedly told were safe prior to and/or during their purchases).

⁵ 1. <http://www.ctvnews.ca/fisher-price-recalls-11-million-items-for-children-1.558318>

19. Despite the global marketing its toys as safe for young children, the Defendants negligently manufactured and then allowed these children's products to be sold to consumers with dangerous defects that could cause serious medical harm.

20. The estimated sales figures of the Recalled Products in Canada are:

- (i) Trikes - 150,000 units at a sale price of approximately \$25.00;
- (ii) Rampways - 20,000 units at a sale price of approximately \$45.00;
- (iii) Infant Toys with Inflatable Balls - 125,000 units at a sale price ranging from approximately \$20.00 to \$68.00; and
- (iv) High Chairs - 125,000 units at a sale price ranging from approximately \$70.00 to \$115.00;

21. The Defendants' Recalled Products were intended to be placed into the stream of commerce, to be distributed, offered for sale and sold to the Plaintiff and to the public in Ontario and in other Provinces and Territories in Canada on a false Representation that the toys were safe for children.

22. The Defendants knew or ought to have known that purchasers of these Recalled Products would not be reasonably able to protect their interests, such that Class Members would be relying on the Defendants' Representation that the Recalled Products were fit for their intended purpose; i.e. that they were safe for their children to play with. The Class Members did in fact purchase the Defendants' Recalled Products for their children, who played with the toys in a fashion that children usually do and the Defendants were thus wholly negligent.

23. The Defendants knew or should have known about the safety defects prior to placing the Recalled Products onto the marketplace. The Defendants deceived consumers in that they failed to disclose the fact that the Recalled Products that they manufactured, or caused to be manufactured, produced, distributed, marketed and/or sold, were constructed in an unsafe fashion, with serious design flaws that could cause serious health problems.

24. The Representation was made for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to safety of the Defendants' Recalled Products.

25. The Defendants knew or should have known about the safety defects prior to September 29th and 30th 2010 (the date of the recall) and should have acted sooner so as to prevent injury.

26. The Defendants know or understand that the promotion and advertising of their Recalled Products in part targets consumers and customers in Canada.

27. The Defendants placed these Recalled Products into the stream of commerce in Ontario and elsewhere with the expectation that consumers, such as the Plaintiff and Class Members, would purchase the Recalled Products based on their Representation.

28. The Class Members have suffered and will suffer injuries, losses or damages as a result of the Defendants' conduct.

29. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendants' Recalled Products in reliance upon the Representation.

THE REPRESENTATIVE PLAINTIFF

30. In 2010, the Plaintiff purchased a Dora the Explorer Tough Trike from Toys 'R' Us in Saint Catharines, Ontario for a purchase price of approximately 50\$ plus taxes.

31. The Plaintiff believed that the Trike was safe for her young child to play with and thus, gave the product to her daughter. The Plaintiff has since read the recall notices and has had to stop her daughter from playing with her toy.

32. The Plaintiff has suffered damages as a result of purchasing the Recalled Product, including the costs of purchasing the product, including sales taxes, the loss of use and enjoyment of the Recalled Products, the loss of value of the Recalled Products, trouble, inconvenience and loss of time, and any and all bodily injuries caused by the Recalled Products.

CAUSES OF ACTION

Misrepresentation and Negligence of the Defendants

33. The Defendants breached their duty of care to the Plaintiff and to the Class Members by offering for sale Recalled Products that were not fit for the purpose for which they were purchased, i.e. for young children to safely play with. The Defendants produced and sold the Recalled Products to the Class Members who relied upon the Defendants' untrue and misleading

Representation. Class Members were unable to receive a substantial benefit and unknowingly placed their children at risk from the Recalled Products to their detriment.

34. The Defendants misrepresented to Class Members the particular standard, quality and grade of the Recalled Products. The Defendants did this with the full knowledge that the Class Members were relying on this information to inform their purchase decisions. The Class Members had no other way of knowing of the false nature of the Defendants' Representation regarding the Recalled Products. The aforesaid loss suffered by the Plaintiff and the Class Members was caused by this negligence and negligent misrepresentation.

35. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage to the Plaintiff and to the Class Members.

36. The loss, damage and injuries were foreseeable.

37. The Defendants' negligence proximately caused the loss, damage, injury and damages to the Plaintiff and to the other Class Members.

CAUSATION

38. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

39. The Class Members have suffered real and substantial injury, economic loss, and damages arising from the aforesaid acts, omissions, wrong doings, and breaches of legal duties

and obligations of the Defendants and are therefore entitled to the relief sought as well as judgment against the Defendants.

40. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to her and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to manufacture, distribute, market, test and sell the Recalled Products;
- (d) Each Defendant owed a duty of care to the other and to each Class Member by virtue of the common business plan to manufacture, distribute, market, test and sell the Recalled Products; and
- (e) The Defendants intended that their businesses be run as one global business organization.

41. The Plaintiff and the other Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate.

42. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

STATUTORY REMEDIES

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

44. The Plaintiff pleads and relies upon competition, consumer protection and trade legislation and common law, as it exists in this jurisdiction, and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

Breach of the *Sale of Goods Act*

45. At all times relevant to this action, the Plaintiff and Class Members were "buyer[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

46. At all times relevant to this action, the Defendants were "seller[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

47. The transactions by which the Plaintiff and Class Members purchased their “goods” from the Defendants were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

48. The Defendants were aware that the consumers purchased the Recalled Products for the particular purpose of giving to their minor children to safely play with and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose.

49. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s.15 of Part I of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

Breach of the *Consumer Protection Act*

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

51. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

52. The transactions by which the Plaintiff and Class Members purchased their Recalled Products from the Defendants were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

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

- (a) Representing that the Recalled Products had performance characteristics, uses and/or qualities, which they did not have;
- (b) Representing that the Recalled Products are of a particular standard, quality and grade; and
- (c) The Defendants knew or ought to have known about the substantial risk of injury and that the consumer would be unable to receive a substantial benefit from the Recalled Products.

54. The Plaintiff states that the Representation was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Recalled Products as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

55. The Plaintiff and the Class Members relied on the Representation.

56. The reliance upon the Representation by the Plaintiff and Class Members is established by her or her purchase and/or use of the Recalled Products. Had the Plaintiff and Class Members known that the Representation was false and misleading they would not have purchased and/or allowed their children to use the Recalled Products.

Breach of the *Competition Act*

57. Further or alternatively, the Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

58. The Defendants made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting the business interests of the Defendants;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect;
- (d) Stated performance characteristics, uses and/or qualities that the Recalled Products did not have; and
- (e) Stated a particular standard, quality and grade that was not based on adequate and proper testing.

59. The Plaintiff and Class Members relied upon the Representation by buying and/or using the Recalled Products and suffered damages and loss.

60. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

61. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

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

Compensatory Damages (Economic and Non-Economic Losses)

63. As a result of their regretful purchase of the Recalled Products, the Plaintiff and the Class Members have suffered and will suffer a loss, damage, injury and sustained damages, the particulars of which include, *inter alia*:

- (a) The costs of purchasing the Recalled Products; and
- (b) Other damages as described herein.

Punitive, Exemplary and Aggravated Damages

64. The Defendants have demonstrated and taken a cavalier and arbitrary approach with respect to their obligations to the Class Members.

65. At all material times, the conduct of the Defendants as set forth above was deliberate and oppressive towards its customers and the general public, and the Defendants conducted themselves in a wanton and reckless manner, as set forth above.

66. The Defendants' aforesaid acts, omissions, wrongdoings and breaches of legal duties and obligations constitute unfair business practices and dealings with its customers and with the public.

67. As a result of the aforesaid acts, omissions, wrong doings and breaches of legal duties and obligations by the Defendants, the Plaintiff and Class Members have sustained substantial injury, economic loss and damages, and are entitled to awards of aggravated, punitive, and exemplary damages.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

68. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

69. The Plaintiff reserves the right to elect at the Trial of the Common Issues to Waive the Tort of Negligence and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Recalled Products as a result of the Defendants' false Representation which resulted in revenues and profit for the Defendants.

70. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Recalled Products and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through revenues and profits from the sale of the Recalled Products;
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including the price of the Recalled Products; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

71. The Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Recalled Products;
- (b) The Class Members suffered a corresponding deprivation by purchasing the Recalled Products;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;

- (e) The integrity of the toy market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

72. Further, or in the alternative, the Plaintiff claim an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

73. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Do the Recalled Products have a hidden defect?
- (b) Are the Recalled Products unsafe?
- (c) Did the Defendants fail to perform adequate testing on the Recalled Products prior to releasing them?
- (d) Did the Defendants know or should they have known that the Recalled Products are unsafe and/or defective?

- (e) Did the Defendants fail to adequately disclose to consumers that the Recalled Products were unsafe and/or defective or did the Defendants do so in a timely manner?
- (f) Did the Defendants impliedly warrant these products for fitness for a particular purpose?
- (g) Did the Defendants intend that the Recalled Products be purchased by the Plaintiff, Class Members and/or others?
- (h) Did the Defendants intend or foresee that the Plaintiff or other Class Members would purchase the Recalled Products based on the Representation regarding the safety standard?
- (i) Did the Defendants engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Recalled Products?
- (j) Did the Defendants' negligence proximately cause loss or injury and damages?
- (k) Did the Class Members suffer direct losses or damages?
- (l) Did the Class Members suffer indirect losses or damages?
- (m) Did the Defendants' acts or practices breach the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act* or other similar/equivalent legislation?

- (n) Are the Defendants responsible for all related costs (including, but not limited to, loss of value, lost time, trouble and inconvenience, loss of use and enjoyment, reimbursement of purchase price, bodily injury) to class members as a result of the problems associated with the Recalled Products?

- (o) Are the Defendants responsible to pay compensatory and/or punitive damages to class members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

74. The members of the proposed Class number in the hundreds of thousands. As a result, the Class is so numerous that joinder in a single action is not practical. However, proceeding with the Class Members' claim by way of a class proceeding is both practical and feasible.

75. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by the offices of Consumer Law Group. These actions include *A. Snyder & A. Winkler v. Mattel Canada Inc. et alii*, an action commenced before the Quebec Superior Court in Montreal (November 4, 2010, File No.: 500-06-000526-109).

76. Individual members of the proposed class do not have a significant interest in individually controlling the prosecution of their claim by way of separate actions and individualized litigation would also present the potential for varying, inconsistent and contrary judgments and would magnify the delay and expense to all parties resulting from multiple proceedings on the same issues. The cost to pursue individual actions concerning this claim

would effectively deny the individual Class Members access to the Courts and appropriate legal relief.

77. The Plaintiff will fully and adequately protect the interests of the proposed Class Members and has retained counsel to represent the Class Members who are qualified to prosecute complex class action litigation. Neither the Plaintiff nor her solicitors have interests which are contrary to, or conflicting with, the interests of the proposed Class.

LEGISLATION

78. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

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

- (a) Defendant Mattel Canada Inc. has its head office in Ontario;
- (b) The Defendants engage in business with residents of Ontario;

- (c) The Defendants derive substantial revenue from carrying on business in Ontario;
and
- (d) The damages of Class Members were sustained in Ontario.

80. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

Service Outside of Ontario

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

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

- (e) Against a person outside Ontario who is necessary and/or proper party to a proceeding properly brought against another person served in Ontario; i.e. Mattel Inc. and Fisher-Price Inc. (rule 17.02(o));
- (f) Against a person carrying on business in Ontario (rule 17.02(p)); and
- (g) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)).

Date: December 28, 2012

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Court File No. *CV 72 479990*

MATTEL CANADA INC. et alii
Defendants

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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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