SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

DEC 15 2021

S2110928

ACTION NO.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**JACE MARSHALL, INFANT,
BY HIS LITIGATION GUARDIAN, MICHELLE ERBE,
AND MICHELLE ERBE**

PLAINTIFFS

AND:

**ABBOTT LABORATORIES CO., ABBOTT LABORATORIES, INC.,
MEAD JOHNSON & COMPANY, LLC, MEAD JOHNSON NUTRITION
COMPANY, AND MEAD JOHNSON NUTRITION (CANADA) CO.**

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

Parties and Overview

1. This action concerns cow's milk-based infant formulas manufactured by the Defendants (the "Formula(s)"), which for infants born prematurely, can cause or contribute to the development of necrotizing enterocolitis ("NEC").

2. NEC is an infection and inflammation of the intestine. It occurs when harmful bacteria breach the walls of the intestine, causing portions of the intestine to become inflamed and often result in tissue death. It is most common in babies who are born early (premature) who are given cow's milk-based products. If the infection becomes severe, it can cause severe damage to the intestine, which can cause serious injury or death. Some children with NEC may have ongoing problems with digestion, growth, or development.

3. According to the World Health Organization, babies born prematurely are defined as being born alive before 37 weeks of pregnancy are completed.

4. The Plaintiff, Jace Marshall, an infant (the "Plaintiff Infant"), through his litigation guardian and co-Plaintiff, Michelle Erbe (the "Plaintiff Parent") (collectively, the "Plaintiffs"), have an address for service of Suite 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia.

5. The Plaintiff Infant was given Formula manufactured by one or more of the Defendants after his premature birth and developed NEC as a result.

6. The Plaintiffs bring this action on their own behalf and on behalf of all premature infants born before 37 weeks gestation ("Premature Infants") who are resident in Canada who were given cow's milk-based Formulas manufactured by the Defendants, their parents/guardians, and their beneficiaries pursuant to the *Family Compensation Act,* R.S.B.C. 1996, c. 126 and comparable legislation in the other Provinces and Territories, to be further defined in the Plaintiffs' application for class certification.

Defendant Manufacturers

7. The Defendant, Abbott Laboratories Co., is an extraprovincial incorporated company with a head office at 600 – 1741 Lower Water Street, in the City of Halifax, in the Province of Nova Scotia, and a local delivery office at 2600 – 1066 West Hastings Street, in the City of Vancouver, in the Province of British Columbia.

8. The Defendant, Abbott Laboratories, Inc., is an American incorporated company with a business address at 1209 Orange Street, in the City of Wilmington, in the County of New Castle, in the State of Delaware 19801 (collectively, the "Abbott Defendants").

9. At all material times, the Abbott Defendants manufactured and sold Formulas in Canada, including those bearing the Similac® brand name.

10. The Defendant, Mead Johnson & Company, LLC, is an American incorporated company with a business address at 251 Little Falls Drive, in the City of Wilmington, in the County of New Castle, in the State of Delaware 19808.

11. The Defendant, Mead Johnson Nutrition Company, is an American incorporated company with a business address at 251 Little Falls Drive, in the City of Wilmington, in the County of New Castle, in the State of Delaware 19808.

12. The Defendant, Mead Johnson Nutrition (Canada) Co. is an extraprovincial incorporated company with a head office at 900 – 1959 Upper Water Street, in the City of Halifax, in the Province of Nova Scotia, and a local delivery office at

20th Floor – 250 Howe Street, in the City of Vancouver, in the Province of British Columbia (collectively, the "Mead Defendants").

13. At all material times, the Mead Defendants manufactured and sold Formulas in Canada, including those bearing the Enfamil® brand name.

14. The Defendants Abbott Laboratories Co., Abbott Laboratories, Inc., Mead Johnson & Company, LLC, Mead Johnson Nutrition Company and Mead Johnson Nutrition (Canada) Co., are collectively referred to herein as the "Defendants".

15. At all material times, the Defendants manufactured, designed, formulated, prepared, tested, marketed, packaged, distributed and sold their Formulas in Canada.

Defendants' Knowledge of Risk of NEC with use of their Formulas

16. Nutrition for Premature Infants like the Plaintiff Infant is extremely important. Premature births occur in roughly 8% of all pregnancies in Canada (roughly 30,000 births per year), and are associated with high mortality and morbidity rates given the infants' vulnerabilities.

17. Cow's milk-based formulas were historically believed to be beneficial for the healthy development of Premature Infants. However, over the last several decades, scientific literature has confirmed the significant risk to Premature Infants of the development of NEC and other health complications after ingesting cow's milk-based products including the Formulas.

18. For well over 30 years, the Defendants have known or should have known that ingestion of their Formulas could cause or contribute to the development of NEC in Premature Infants, and failed to warn the public, including parents, medical professionals and other consumers about these risks.

19. A study from 1990 found that NEC was 6 to 10 times more common in exclusively formula-fed Premature Infantsas compared with those fed breast milk alone, and three times more common as compared with those fed formula plus

breast milk. A 2007 study found that an exclusively breastmilk diet for Premature Infants is associated with decreased NEC rates, mortality rates and other health benefits. A 2010 study established that when Premature Infants were breastfed an exclusive diet of mother's milk, donor milk, and human milk fortifier, these infants were 90% less likely to develop NEC.

20. In a 2011 report, *The Surgeon General's Call to Action to Support Breastfeeding*, the US Surgeon General warned that "for vulnerable premature infants, formula feeding is associated with higher rates of necrotizing enterocolitis". The report also warned that Premature Infants who are not breastfed are 138% more likely to develop NEC.

21. The Defendants have also employed an aggressive marketing approach that includes targetting parents of Premature Infants in hospitals and health care providers with messages that their Formulas are necessary for the growh and development of their vulnerable infants, all while knowing that the Formulas increase the risk of developing NEC and failing to disclose this fact.

22. Despite their knowledge about the risks of NEC through use of their Formulas, the Defendants' packaging on their Formulas failed to make any reference to the risk of developing NEC or other related health conditions. None of the Defendants' marketing material or packaging in relation to the Formulas references the scientific literature showing how signifantly their products increase the risk of NEC in Premature Infants.

23. The Defendants have represented in their communicaitons to parents/guardians of Premature Infants and health care provdiers that their Formulas are safe and effective.

24. Misleading and/or deceptive statements, express and implied, made by the Abbott Defendants include the following:

    - While breastfeeding is best for you and your baby, if you have made the choice to use formula, rest assured that Similac®

products provide all the nutrition that your baby needs to grow and develop.

- Fortunately, there is infant formula, which is the only safe alternative to breast milk.
- Our promise is a commitment to giving your baby the best, and it has been for almost a century.
- However, if you need to supplement breastfeeding or choose to formula feed your baby, you can feel confident nourishing your baby with Similac®.
- Our Similac® formulas are non-GMO* and made with milk from cows not treated with artificial growth hormones. Our products are easy to digest‡ and offered in different formats, to meet your baby's needs at every stage.
- Similac NeoSure is complete nutrition* for babies born prematurely. Our post-discharge baby formula has increased protein, vitamins, and minerals compared to term infant formula and promotes excellent catch-up growth. This special blend has protein, calories, vitamins, and minerals, including calcium, to help your baby grow. Similac NeoSure is from the #1 infant formula brand for premature babies
- #1 PREMATURE INFANT FORMULA BRAND†: And the #1 brand fed in the NICU

25. Misleading and/or deceptive statements, express and implied, made by the Mead Defendants include the following:

- Enfamil A+® is the #1 chosen baby formula brand
- #1 Formula chosen by Pediatric Hospitals

- #1 Pediatrician Recommended
- #1 Choice of Moms*
- Enfamil A+ has a clinically proven level of DHA, a type of omega-3 fat.
- Enfamil A+® newborn formulas help support your newborn's development. We offer newborn formulas that are enriched with DHA, a type of Omega-3 fat and a building block of an infant's rapidly growing brain. Find the right formula to help nourish your child's growth today from Enfamil A+
- Whether you're already home with your sweet pea or are preparing to make that exciting milestone transitioning from the NICU, Enfamil preemie formulas are designed to support your baby's special nutritional needs.
- Enfamil NeuroPro Enfacare is designed to support the special nutritional needs to support catch-up growth in babies born prematurely or at a low birth weight.
- Our NeuroPro Enfacare is formulated to support the special nutritional needs of babies born prematurely or at a low birth weight and is often recommended to be used through 9 months of age.
- Milk-based, 22 Cal/fl oz formula with enriched nutrition and a blend of nutrients to help support baby's immune system
- The only post-discharge formula brand that has a fat-protein blend of MFGM components and DHA, previously only found in breast milk†
- Enfamil Premature is a specially designed formula to help low-birth-weight or premature babies who can't breastfeed grow & get the nutrition they need.

26. The above-referenced representations do not disclose that ingestion of the Formulas significantly increases the risk of developing NEC, nor any information about NEC or other health complications.

27. The Defendants chose to omit information about the risk of NEC associated with ingestion of Formulas, despite their knowledge of these risks. The Defendants have continued to manufacture, market and sell their Formulas despite their knowledge of the risk of devleoping NEC, generating huge profits as a result of their continued sale.

The Plaintiffs

28. The Plaintiff Infant was born premature at 27 weeks gestation. After birth, he ingested Formula manufactured by one of more of the Defendants, and subsequently developed NEC.

29. The Plaintiff Parent only learned of the possible connection between the Plaintiff Infant's ingestion of Formula and development of NEC in 2021.

30. As a result of the defective nature of the Formula and the Defendants' failure to disclose the risk of developing NEC by ingestion of Formula, the Plaintiffs have incurred damages including:

    (a) General damages for the tort of battery;

    (b) Personal injury including the development of NEC and prolonged and serious mental distress;

    (c) The increased material risk of further health complications associated with NEC;

    (d) Special damages for the cost of medical monitoring and medical tests incurred to the date of trial and future care costs for ongoing medical monitoring and medical tests;

    (e) Damages in accordance with s. 36 of the *Competition Act*, RSC 1985, c. C-34 for a breach of s. 52; and

(f) Such further and other damages as shall be proven at trial.

31. The Plaintiff Parent relied on the representations of the Defendants with respect to the safety and efficacy of using the Formulas.

32. The Plaintiff Infant would not have ingested Formula had the Plaintiff Parent and/or the health care providers involved in the Infant Plaintiff's care been informed that its ingestion could increase the risks of developing NEC and/or had the Plaintiff Parent and/or the health care providers been provided with accurate information and/or warnings.

Part 2: RELIEF SOUGHT

33. The Plaintiffs claim, on their own behalf, and on behalf of a class of similarly situated persons resident in Canada, as follows:

(a) An order certifying this action as a class proceeding and appointing the Plaintiffs as the representative Plaintiffs under the *Class Proceeding Act*;

(b) General damages for Premature Infants who ingested Formulas;

(c) General damages for mental distress for parents and/or guardians of Premature Infants who ingested Formulas;

(d) Special damages;

(e) In trust claims for parents and/or guardians of Class Members;

(f) Punitive damages;

(g) Relief pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and comparable legislation in the other provinces and territories;

(h) Relief pursuant to the *Competition Act*, RSC c. C-34;

(i) Recovery of health care costs incurred by the Ministry of Health Services on their behalf pursuant to the *Health Care Cost Recovery Act*, S.B.C. 2008, c.27, and comparable legislation in the other provinces and territories;

(j) Costs;

(k) Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and

(l) Such further and other relief this Honourable Court may deem just.

Part 3: LEGAL BASIS

Negligence and Failure to Warn

34. As the manufacturers, marketers, developers, distributors, labelers and/or importers of Formulas, the Defendants were in such a close and proximate relationship to the Plaintiffs, and other Class Members, as to owe them a duty of care. They caused Formulas to be introduced into the stream of commerce in Canada, and they knew that any dangers or adverse effects related to the Formulas would cause foreseeable injury to the Plaintiffs and Class Members.

35. The Defendants owed a duty to the Plaintiffs and Class Members to exercise reasonable care when designing, testing, manufacturing, marketing, labeling, promoting, and selling Formulas.

36. The Defendants owed a duty to warn physicians, hospitals, NICU's, parents and guardians that their Formulas were not safe for Premature Infants and that their ingestion increased the risk of developing NEC, severe injury and death.

37. The Defendants owed a duty of care to the Plaintiffs and Class Members to ensure that the Formulas were safe and effective for their intended use. Particulars of the Defendants' negligence include:

(a) Failing to ensure that the Formulas were manufactured to product standards;

(b) Supplying an unsafe product to consumers;

(c) Failing to implement appropriate quality control testing for the raw materials they manufactured, or in the alternative when they received raw materials from their supplier;

(d) Employing inadequately trained personnel in the design, manufacturing, and/or quality control of the Formulas;

(e) Placing the Formulas on the market when they knew or ought to have known that the Formulas had potential risks that outweighed their potential benefits;

(f) Manufacturing and/or marketing a product that they know, or ought to have known, had an unreasonably high risk of causing illness and/or harm to consumers;

(g) Failing to implement a timely recall of the Formulas once the risks were known to them;

(h) Failing to warn physicians, hospitals, NICU's, parents and guardians that their Formulas were not safe for Premature Infants and that their ingestion increased the risk of developing NEC, severe injury and death;

(i) Failing to update the Formulas' product information with the risks associated with their ingestion and the development of NEC once those risks were known to them;

(j) Manufacturing and/or marketing a product that was not fit for the purpose for which it was intended;

(k) Failing to manufacture and/or market a product in a good and workmanlike manner and in accordance with generally accepted standards;

(l) Manufacturing and continuing to sell products for consumption by Premature Infants when the Defendants knew or ought to have known that the Formulas were unsuitable and dangerous for such purposes due to the elevated risk of developing NEC with the ingestion of Formulas; and

(m) Such further and other particulars of negligence as will be alleged at trial.

Battery

38. By ingesting Formulas, Class Members were exposed to injurious substances, constituting a harmful and offensive contact to the person.

39. The Plaintiff Infant and Class Members ingested Formulas following their parents' and/or guardians' consent to same. However, that consent was vitiated as their parents/guardians and/or health care providers were unaware that ingestion of Formulas significantly increased the risk of developing NEC. The Plaintiff Infant and Class Members would not have ingested Formulas if their parents/guardians and/or health care providers had known they were feeding their Premature Infants a product that could increase the risk of developing NEC.

40. By distributing Formulas, the Defendants intended the products to be ingested and thereby exposed the Class Members to substances that increased the risk of developing NEC.

41. Since a time that is presently not known to the Plaintiffs, each Defendant knew that Formulas increased the risks of developing NEC for Premature Infants and therefore intended Class Members be exposed to a product that increased that risk.

42. Alternatively, the tort of battery is made out because the Defendants were willfully blind or recklessly indifferent to whether Formulas increased the risk of developing NEC. The Defendants took no steps (or alternatively, insufficient steps) to investigate and address the risks of their product when they knew there

was a risk or likelihood that the Formulas would or could be harmful. In this context of knowing of the risk, the Defendants took no steps or insufficient steps to determine the health risks of the Formulas, therefore amounting to reckless indifference.

43. The Defendants acted with reckless indifference to the consequences of failing to implement appropriate quality control and/or pre-market and post-market investigation processes, in the face of their duty to do so, and knew that they were consequently placing the Class Members at significant risk.

44. The Defendants were aware of the risk that certain consequences could result from the ingestion of Formulas but were indifferent to the risk. The Defendants continuously failed to establish, maintain and enforce appropriate quality control processes and/or pre-market and post-market investigation, in order to mitigate and/or investigate risks associated with use of Formulas. The Defendants' failure to implement appropriate safety processes was an unreasonable risk to take and constituted reckless indifference.

45. The Defendants' failure to implement appropriate safety and monitoring processes constituted either conscious wrongdoing or a marked departure from the standards by which responsible and competent manufacturers govern themselves when manufacturing infant formula products in Canada.

46. By failing to implement adequate safety and monitoring measures, the Defendants failed to conform with applicable disclosure and reporting requirements pursuant to the *Food and Drugs Act* and industry standards.

47. The Formulas were more dangerous than donor breast milk and/or alternative formulas available on the market to nourish Premature Infants like the Infant Plaintiff. Ingestions of donor breast mild and/or alternative formulas did not pose an increased risk of developing NEC.

48. As a direct result of the Defendants' wrongful acts as pleaded herein, the Plaintiff Infant ingested a product manufactured by the Defendants, which intentionally caused harmful or offensive contact with the Plaintiff Infant to which the Plaintiffs

and Class Members did not consent. As a result, the Defendants committed the tort of battery. The Plaintiffs suffered damages as a result of the battery, including the development of NEC and related health complications, emotional upset, prolonged mental distress, anxiety and will require therapy and extensive medical monitoring.

Business Practices and Consumer Protection Act

49. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of Formulas for personal use by the Plaintiff Infant and by Class Members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"). With respect to those transactions, the Plaintiff Infant and Class Members who ingested Formulas are "consumers" and the Defendants were "suppliers" within the meaning of the *BPCPA*.

50. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Formulas had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of the Formulas. The Defendants' conduct in its solicitations, offers, advertisements, promotions, sales and supply of Formulas, including as described above in paragraphs 24 - 25, were deceptive acts and practices contrary to s. 4 of the *BPCPA*. The Defendants' deceptive acts and practices included the failure to properly disclose all material facts regarding the risks of ingesting Formulas.

51. As a result of the Defendants' deceptive acts and practices, the Plaintiffs and Class Members have suffered loss and damages. The Plaintiffs seek injunctive relief and declaratory relief and damages and statutory compensation pursuant to ss. 171 and 172 of the *BPCPA* on their own behalf and on behalf of Class Members who ingested Formulas in Canada and their parents and/or guardians. Such relief includes the disgorgement of the profits or revenues received by the Defendants from the sale of Formulas in Canada.

52. By placing their trademark on Formulas thereby identifying the Defendants as the manufacturers and/or distributors of Formulas, the Defendants intended to

convey to consumers that Formulas were of high quality and were manufactured by reputable companies.

53. The declaratory and injunctive relief sought by the Plaintiffs in this case includes an order under s. 172 of the *BPCPA* that the Defendants advertise any judgment against them and that they properly inform consumers and their physicians of the risks of the Formulas which includes sending a "Dear Doctor Letter" to alert physicians to this problem.

Breaches of the Competition Act

54. As a result of their representations about the Formulas, the Defendants breached section 52 of the *Competition Act*, RSC c C-34 (the "*Competition Act*") and committed an unlawful act because their representations:

    (a) were made for the purpose of promoting, directly or indirectly, the use of the Formulas;

    (b) were made for the purpose of promoting indirect or directly, any business interests of the Defendants;

    (c) were made to the public;

    (d) were made knowingly and recklessly; and

    (e) were false and misleading in a material respect.

55. The Plaintiffs and the Class Members suffered damages as a result of the Defendants' unlawful breach of section 52 of the *Competition Act*. Those damages include

    (a) purchasing and using Formulas when they would not have otherwise done so;

    (b) the cost of purchasing Formulas; and

    (c) other losses incidental to their harms caused by their use of Formulas.

56. The Plaintiffs and Class Members also seek their costs of investigation, pursuant to section 36 of the *Competition Act*.

Unjust Enrichment

57. As a result of the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Formulas to the Plaintiffs and Class Members, the Defendants were unjustly enriched and benefited therefrom. The material facts are pleaded in paragraphs 49 through 53.

58. As a result of the Defendants' sale and supply of Formulas, the Plaintiffs and Class Members suffered a corresponding deprivation.

59. There is no juristic reason why the Defendants' enrichment should be permitted, including at equity, under contract or pursuant to any statutory obligations.

60. The Defendants have accordingly been unjustly enriched to the extent of those amounts paid by the Plaintiffs and Class Members.

Causation and Damages

61. As a result of the Defendants' negligence and the Defendants' breach of the *BPCPA*, and/or other similar legislation in the other provinces and territories, the Plaintiffs and Class Members have suffered and will continue to suffer loss and damage. Such loss and damage was foreseeable by the Defendants. Particulars of the loss and damage suffered by the Plaintiffs and Class Members which were caused or materially contributed to by the aforementioned acts of the Defendants include:

    (a) Personal injury;
    (b) Special damages for medical expenses and out of pocket expenses;
    (c) Loss of both past and prospective income; and
    (d) Cost of future care.

62. The Plaintiffs and Class Members have suffered injuries which are permanent and lasting in nature, including diminished enjoyment of life, as well as the need for lifelong medical monitoring and/or treatment.

63. The conduct of the Defendants warrants a claim for punitive damages. They have conducted themselves in a high-handed, wanton and reckless manner, and without regard to public safety.

64. This case raises issues of general deterrence. A punitive damage award in this case is necessary to express society's condemnation of conduct such as the Defendants', to advance public safety and to achieve the goal of both specific and general deterrence.

Health Care Cost Recovery

65. The Plaintiffs rely upon health and hospital insurance legislation in British Columbia and similar legislation elsewhere and claim health care costs incurred by themselves and Class Members and paid by provincial and territorial governments as a result of the wrongdoing of the Defendants:

a. On behalf of Her Majesty the Queen in right of the Province of New Brunswick, the Plaintiffs claim the cost of "entitled services" under *Health Services Act*, SNB 2014, c 112, ss 1 and 3 and General Regulation, NB Reg 84-115, s 2 and Schedule II.

b. On behalf of the government of British Columbia, the Plaintiffs claim the past and future cost of providing "health care services" under *Health Care Costs Recovery Act*, SBC 2008, c 27, ss 1-3 and 7 and *Health Care Costs Recovery Regulation*, BC Reg 397/2008, s 3.

c. On behalf of Her Majesty in right of Alberta and the Minister of Health of Saskatchewan, the Plaintiffs claim the direct and indirect costs of past and future "health services" under *Crown's Right of Recovery Act*, SA 2009, c C-35, ss 1, 2(1) and 38 and *Crown's Right of Recovery Regulation*, Alta Reg 87/2012, s 3; and *The Health Administration Act*, RSS 1978, c H-0.0001, s 19.

d. On behalf of the Minister of Health of Manitoba, the Plaintiffs claim the past and future cost of "insured hospital, medical, and other services under *The Health Services Insurance Act*, RSM 1987, c H35, ss 2, 97 and *The Medical Services Insurance Regulation*, Man Reg 49/93, s 1.

e. On behalf of Her Majesty in right of the Province of Nova Scotia, the Plaintiffs claim the past and future cost of "insured hospital services", and other care, services, and benefits under *Health Services and Insurance Act*, RSNS 1989, c 197, ss 2 and 18.

f. On behalf of the Government of Yukon, and the Ministers of Health of the Northwest Territories and Nunavut, the Plaintiffs claim the cost of providing "insured services", including in-patient and out-patient services under *Hospital Insurance Services Act*, RSY 2002, c 112, ss 1 and 10-11 and *Yukon Hospital Insurance Services Regulations*, YCO 1960/35, s 2; *Hospital Insurance and Health and Social Services Administration Act*, and RSNWT 1988, c T-3, ss 1 and 19-20 and *Hospital Insurance Regulations*, RRNWT 1990, c T-12, s 1.

g. On behalf of the Ontario Health Insurance Plan, the province of Quebec, the Minister of Health and Wellness of Prince Edward Island, and the Crown in right of Newfoundland and Labrador, the Plaintiffs claim the cost of "insured services" under *Health Insurance Act*, RSO 1990, c H.6, ss 1, 11.2, and 30-31 and General, RRO 1990, Reg 552; *Hospital Insurance Act*, CQLR c A-28, ss 1 and 10 and Regulation respecting the application of the *Hospital Insurance Act*, CQLR c A-28, r 1, s 3 and *Health Insurance Act*, CQLR A-29, ss 1, 3, and 18; *Hospital and Diagnostic Services Insurance Act*, RSPEI 1988, c H-8, ss 1 and 14 and General Regulations, PEI Reg EC539/63, s 1; and *Medical Care and Hospital Insurance Act*, SNL 2016, c M-5.01, ss. 41-42 and 44, and *Hospital Insurance Regulations*, CNLR 742/96, s 2 and Schedule.

Limitation Period

66. The Defendants willfully concealed their knowledge of the risk of NEC to Premature Infants through ingestion of their Formulas from the Plaintiffs and Class Members. The Plaintiffs and Class Members rely on the doctrine of fraudulent concealment and *Pioneer Corp. v. Godfrey*.

67. In addition, the Plaintiffs and Class Members could not reasonably have known that loss or damage had occurred, that it was caused or contributed to by actions or inactions of the Defendants, or that a court proceeding would be an appropriate means to seek to remedy the injury until this action was filed.

68. The Plaintiffs and Class Members rely on the doctrines of postponement and discoverability to postpone the running of the limitation period until 2021.

69. The Plaintiffs and Class Members plead and rely on and the *Limitation Act*, SBC 2012, c 13, and in particular ss 8, 21(3). In the alternative, or in addition, the Plaintiffs and Class Members rely on the *Limitation Act*, SBC 2012, c 13, s 30 and the *Limitation Act*, RSBC 1996, c 266. In addition, the Plaintiffs and Class Members plead and rely on the *Emergency Program Act*, Ministerial Order No. M089 and related enactments to suspend the running of the limitation period from March 26, 2020.

Jurisdiction

70. The Plaintiffs rely on ss. 13, 7 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 and plead that there is a real and substantial connection between the subject matter of this action and the Province of British Columbia for the following reasons:

    (a) The Defendants marketed and sold Formulas in British Columbia;

    (b) The Defendants conspired together in relation to the wrongful acts described herein, causing the Plaintiffs and Class Members to sustain harm in British Columbia;

    (c) The Plaintiffs reside in British Columbia; and

(d) The Plaintiffs' damages were sustained in British Columbia.

Form 11 (Rule 4-5 (2))

ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE OUTSIDE BRITISH COLUMBIA

The Plaintiffs claim the right to serve this pleading/petition on the Defendants outside British Columbia on the ground that:

The Plaintiffs have at all material times have been a resident of British Columbia and has suffered loss in British Columbia. The Supreme Court of British Columbia has jurisdiction with respect to this matter and the Plaintiffs plead the *Court Jurisdiction and Proceedings Transfer Act*, 2003, SBC Chapter 28 and amendments thereto.

Plaintiffs' address for service:	**RICE HARBUT ELLIOTT LLP** Barristers and Solicitors 820 - 980 Howe Street Vancouver, BC V6Z 0C8
Fax number address for service (if any):	(604) 682-0587
E-mail address for service (if any):	Nil
Place of trial:	Vancouver
The address of the registry is:	800 Smithe Street, Vancouver

Date: 15 /DEC/2021

Counsel for the Plaintiffs,
Anthony Leoni

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A claim for negligence, failure to warn and, *inter alia*, breach of consumer protection legislation relating to undisclosed risks associated with the development of necrotizing enterocolitis and the ingestion of cow's milk-based infant formulas manufactured and sold by the Defendants, with injury, loss and damages to the Plaintiffs and a class of similarly situated persons resident in Canada.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☒ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☒ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

1. *Class Proceedings Act*, R.S.B.C. 1996, c. 50
2. *Health Care Cost Recovery Act*, S.B.C. 2008, c. 27
3. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2