CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO : 500-06-001049-200

SUPERIOR COURT
(Class Action)

ETIENNE LOMBARD

Petitioner

vs.

EVENFLO COMPANY, INC.

-and-

GOODBABY CANADA INC.

Respondents

JOINT APPLICATION BY THE PARTIES TO TEMPORARILY STAY THE CLASS ACTION
(Articles 18 and 577 of the *Code of Civil Procedure*)

TO ONE OF THE HONOURABLE JUSTICES OF THE QUEBEC SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PARTIES RESPECTFULLY SUBMIT THE FOLLOWING:

I. INTRODUCTION

1. The Parties are jointly seeking a temporary stay of all proceedings related to the *Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative Plaintiff* filed by Petitioner Étienne Lombard on March 2, 2020, as amended on June 3, 2020 (the "**Quebec Action**").

2. The proposed class in the Quebec Action is the following:

> *"All persons residing in Quebec who have purchased an Evenflo "Big Kid" booster seat or any other group to be determined by the Court;"*

3. The principal reason for seeking a temporary stay of the Quebec Action is the parallel national multi-district litigation class action underway in the United States District Court for the District of Massachusetts of *In Re: Evenflo Company, Inc., Marketing, Sales Practices and Products Liability Litigation* (MDL No. 1:20-md-02938-DJC, the "**US Action**"). A copy of the Transfer Order and the various Conditional Transfer Orders in MDL No. 1:20-md-02938-DJC are attached hereto as **Exhibit R-1**, *en*

liasse. Evenflo Company, Inc. is both a Respondent in the Quebec Action and the Defendant in the US Action.

4. In addition, there is a parallel action underway in Ontario in *Candice Bennett vs. Evenflo Company, Inc. and Goodbaby Canada Inc.*, in court docket number CV-20-00083702-00CP (the "**Ontario Action**"), which excludes Quebec residents, as appears from a copy of the Ontario Action attached hereto as **Exhibit R-2**.

II. THE US ACTION

5. The US Action is based on substantially the same facts, raises substantially similar issues, and seeks similar remedies as the Quebec Action. A *Consolidated Amended Class Action Complaint and Demand for Jury Trial* in MDL No. 1:20-md-02938-DJC was filed on October 20, 2020 (the "**Consolidated Amended Class Action Complaint**") and is attached hereto as **Exhibit R-3**.

6. On November 20, 2020, the Defendant in the US Action filed a Motion to Dismiss the Consolidated Amended Class Action Complaint as appears from a copy of said Motion to Dismiss attached hereto as **Exhibit R-4**. The US plaintiffs' opposition and response to said Motion to Dismiss was submitted on December 18, 2020 and the US Defendant's reply thereto was submitted on January 8, 2021, as appears from a copy of these proceedings attached hereto *en liasse* as **Exhibit R-5**.

7. The parties in the US Action are now scheduled to present their oral arguments on the Motion to Dismiss on February 17, 2021.

III. STAY OF PROCEEDINGS

8. The central allegation raised by the Petitioner in the Quebec Action, which is substantially similar to those raised by the Plaintiffs in the US Action, is that the Respondents marketed the Big Kid booster seat as "side-impact tested" and safe for children as small as 40 pounds when the Respondents' tests "were self-created, virtually impossible to fail and entirely unrelated to the actual forces involved in side-impact collisions".

9. The basic allegations in support of both of these proceedings (i.e. the "cause"), which are the same, can be summarized as follows: No federal regulation or standard exists for side-impact testing of car seats and booster seats. The plaintiffs in these proceedings contend that the Respondents allegedly made misrepresentations or omitted material facts with regards to the side-impact testing of the Big Kid booster seats conducted by the Respondents. They further claim that, as a result of Respondents' representations, consumers have purchased products that are "substantially different than represented" and are therefore entitled to damages suffered from having purchased the Big Kid booster seats.

10. The object of the proceedings is also substantially similar insofar as they both claim compensatory and punitive (or exemplary) damages and seek injunctive relief requiring the Respondents to: (i) recall all Big Kid booster seats still in use, (ii) cease selling said booster seats, and (iii) add labelling to all future Big Kid model booster seats.

11. Should the US Defendant's Motion to Dismiss the Consolidated Amended Class Action Complaint be denied, extensive resources will be spent in the US Action on discovery alone (namely document production and depositions of factual witnesses).

12. The results of the US Defendant's Motion to Dismiss will undoubtedly have an impact on the Quebec Action as the viability of the claim in the US, would be similar to the viability of the claim in Canada.

13. It is respectfully submitted that it would not accord with the interests of justice, the principles of proportionality and wise expenditure of judicial and party resources to duplicate the substantial efforts and expenses concerning the exact same alleged representations regarding Respondents' side-impact testing conducted on the Big Kid booster seats. Instead, it makes far more sense to wait for a judgment from the US on the same issues that would otherwise be raised here.

IV. THE RIGHTS AND INTERESTS OF THE QUEBEC CLASS MEMBERS IN THE CONTEXT OF A STAY

14. It is in the interests of the members of the Quebec class that the Quebec Action be temporarily stayed for a period of six (6) months (subject to further review) in order to allow sufficient time for the steps described above in the US Action to proceed.

15. The rights of the proposed Quebec class members will not be negatively impacted in any way during this six-month period. To the contrary, a temporary stay will allow for progress to be made in the US Action on the Motion to Dismiss, whose outcome can only benefit Quebec class members, most notably through the saving of resources.

16. At the conclusion of the temporary stay period of six (6) months (if not earlier), the parties may apply for further orders in respect of the progress of the Quebec Action, based on developments in the US Action.

V. CONCLUSION

17. The temporary stay of the Quebec Action for a period of six (6) months will afford the parties significant savings in time, energy, and financial resources, as well as to achieve significant savings in judicial resources.

18. On an ongoing basis during the pendency of the stay, the Respondents undertake to keep this Court advised of any material developments in the US Action.

FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:

GRANT the Application to Temporarily Stay the Class Action;

STAY the *Amended Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative Plaintiff* filed by Etienne Lombard for a period of six (6) months from the date of the judgment herein;

RESERVE the rights of the parties to seek a further temporary stay or permanent stay in the present file;

WITHOUT LEGAL COSTS.

MONTRÉAL, January 13, 2021

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NOTICE OF PRESENTATION

TAKE NOTICE that the present Application to Temporarily Stay the Class Action will be presentable for adjudication before one of the Honourable Judges of the Superior Court, at the Montréal Courthouse, located at 1 Notre-Dame East, Montréal, Québec, at a date and time to be set by the Court.

MONTRÉAL, January 13, 2021

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CANADA

PROVINCE OF QUÉBEC
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NO : 500-06-001049-200

ETIENNE LOMBARD

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vs.

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-and-

GOODBABY CANADA INC.

Respondents

LIST OF EXHIBITS
(JOINT APPLICATION BY THE PARTIES TO TEMPORARILY STAY THE CLASS ACTION)

EXHIBIT R-1: Copy of the US multi-district litigation (MDL) panel's decision No. 1:20-md-02938-DJC dated June 2, 2020;

EXHIBIT R-2: Copy of the Ontario Statement of Claim in *Candice Bennett vs. Evenflo Company, Inc. and Goodbaby Canada Inc.*, in court docket number CV-20-00083702-00CP;

EXHIBIT R-3: Copy of the Consolidated Amended Class Action Complaint and Demand for Jury Trial in US MDL No. 1:20-md-02938-DJC;

EXHIBIT R-4: Copy of Memorandum in support of Evenflo Company, Inc.'s Motion to Dismiss the Consolidated Amended Class Action Complaint dated November 20, 2020 in US MDL No. 1:20-md-02938-DJC;

EXHIBIT R-5 ***en liasse*****:** Copy of the Plaintiffs' Response to Motion and Opposition to Motion and copy of the US Defendant's Reply to Response to Motion in US MDL No. 1:20-md-02938-DJC;

MONTRÉAL, January 13, 2021

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

MDL No. 2938

TRANSFER ORDER

Before the Panel: Plaintiffs in three actions have filed two separate motions under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation. Movants in two actions seek centralization in the District of Massachusetts. Movant in one action seeks centralization in the Eastern District of Wisconsin.[1] Plaintiffs' motions include eleven actions pending in eight districts, as listed on Schedule A. The Panel also has been notified of seventeen potentially-related actions filed in eight districts.[2]

All responding parties support centralization. Plaintiffs in eight actions and potential tag-along actions support centralization in the District of Massachusetts. Defendant Evenflo Company, Inc. (Evenflo), and plaintiffs in seven actions and potential tag-along actions support centralization in the Southern District of Ohio.

On the basis of the papers filed and hearing session held,[3] we find that the actions listed on Schedule A involve common questions of fact, and that centralization in the District of Massachusetts will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. These actions share factual questions arising from allegations that Evenflo misled consumers to purchase its "Big Kid" booster seats by (1) claiming the seats were "side impact tested" and exceeded governmental standards, without revealing that Evenflo created its own test, which showed that a child seated in its booster could be in danger in a side impact crash; and (2) failing to inform consumers that the seats were dangerous for children weighing less than 40

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[1] In her reply, the latter movant supports centralization alternatively in the District of Massachusetts or the District of South Carolina, and states she is joined by plaintiffs in three additional actions and five potentially-related actions, represented by common counsel.

[2] These and any other related actions are potential tag-along actions. *See* Panel Rules 1.1(h), 7.1, and 7.2.

[3] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of May 28, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2938 (J.P.M.L. May 12, 2020), ECF No. 84.

pounds. Each of these overlapping class actions will involve discovery regarding the design, testing, and marketing of the booster seat, as well as Evenflo's decision to represent the booster seat as safe for children under 40 pounds. Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification and other issues, and conserve the resources of the parties, their counsel, and the judiciary.

The District of Massachusetts is an appropriate transferee district for this litigation. Ten cases are pending there before the Honorable Denise J. Casper, an experienced transferee judge. We are confident she will steer these cases on an efficient and prudent course. Additionally, the District of Massachusetts, where Evenflo's senior management are located, is an easily accessible district for this nationwide litigation.[4]

IT IS THEREFORE ORDERED that the actions listed on Schedule A and pending outside the District of Massachusetts are transferred to the District of Massachusetts , and, with the consent of that court, assigned to the Honorable Denise J. Casper for coordinated or consolidated pretrial proceedings.

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[4] Certain plaintiffs in favor of centralization in the Southern District of Ohio argue that the Panel should centralize this litigation in the Southern District of Ohio because the Supreme Court's ruling in *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773 (2017), may pose an impediment to certification of a nationwide class elsewhere. Specifically, a single plaintiff speculates in her brief that defendant "likely will argue" that specific jurisdiction is lacking in the District of Massachusetts, which presents an "unnecessary risk that could adversely impact the effort to certify a national class." *Anderson* Resp., MDL No. 2938, ECF No. 31 at pp. 5, 2. This argument is unavailing, because the Panel does not consider the possible implications of potential rulings when it selects a transferee district. *See In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 289 F. Supp. 3d 1322, 1325 (J.P.M.L. 2017) (rejecting certain plaintiffs' arguments in favor of centralization in districts with precedent favorable to plaintiffs on the issue of Article III standing). Indeed, an assessment of the legal merits is beyond the Panel's authority. *See In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339-40 (J.P.M.L.1972) ("The framers of Section 1407 did not contemplate that the Panel would decide the merits of the actions before it and neither the statute nor the implementing Rules of the Panel are drafted to allow for such determinations."). Plaintiff further argues that the uncertainty created by the specter of such jurisdictional arguments suggests that transfer to any district outside the Southern District of Ohio would be inefficient and could result in additional case filings and pretrial proceedings. *See Anderson* Resp. MDL No. 2938, ECF No. 31 at pp. 2-3. We cannot surmise whether these predictions will bear out and decline to base our transfer decision on such conjecture.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Ellen Segal Huvelle
Catherine D. Perry
Matthew F. Kennelly

R. David Proctor
Nathaniel M. Gorton
David C. Norton

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION MDL No. 2938

SCHEDULE A

Eastern District of California

PERRY v. EVENFLO COMPANY, INC., C.A. No. 2:20-00377

District of Massachusetts

XAVIER, ET AL. v. EVENFLO COMPANY, INC., C.A. No. 1:20-10336
EPPERSON, ET AL. v. EVENFLO COMPANY, INC., C.A. No. 1:20-10359
MATTHEWS v. EVENFLO COMPANY, INC., C.A. No. 1:20-10379

District of Minnesota

ANDERSON v. EVENFLO COMPANY, INC., C.A. No. 0:20-00569

Eastern District of New York

SCHNITZER v. EVENFLO COMPANY, INC., C.A. No. 2:20-01000

Eastern District of North Carolina

RAMASAMY v. EVENFLO COMPANY, INC., C.A. No. 5:20-00068

Southern District of Ohio

WILDER v. EVENFLO COMPANY, INC., C.A. No. 3:20-00061
SAPEIKA v. EVENFLO COMPANY, INC., C.A. No. 3:20-00068

District of South Carolina

ALSTON v. EVENFLO COMPANY, INC., C.A. No. 9:20-00801

Eastern District of Wisconsin

ROSE v. EVENFLO COMPANY, INC., C.A. No. 2:20-00287

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

MDL No. 2938

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO −1)

On June 2, 2020, the Panel transferred 8 civil action(s) to the United States District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See* _F.Supp.3d_ (J.P.M.L. 2020). Since that time, no additional action(s) have been transferred to the District of Massachusetts. With the consent of that court, all such actions have been assigned to the Honorable Denise J. Casper.

It appears that the action(s) on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the District of Massachusetts and assigned to Judge Casper.

Pursuant to Rule 7.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, the action(s) on the attached schedule are transferred under 28 U.S.C. § 1407 to the District of Massachusetts for the reasons stated in the order of June 2, 2020, and, with the consent of that court, assigned to the Honorable Denise J. Casper.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the District of Massachusetts. The transmittal of this order to said Clerk shall be stayed 7 days from the entry thereof. If any party files a notice of opposition with the Clerk of the Panel within this 7−day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

John W. Nichols
Clerk of the Panel

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION MDL No. 2938

SCHEDULE CTO−1 − TAG−ALONG ACTIONS

DIST	DIV.	C.A.NO.	CASE CAPTION
CALIFORNIA CENTRAL			
CAC	2	20−03443	Janet Juanich v. Evenflo Company Inc et al
CALIFORNIA EASTERN			
CAE	2	20−00610	Hampton v. Evenflo Company, Inc.
FLORIDA MIDDLE			
FLM	6	20−00437	Correa Talutto et al v. Evenflo Co., Inc.
LOUISIANA EASTERN			
LAE	2	20−00828	Alexie v. Evenflo Company Inc
MISSOURI EASTERN			
MOE	4	20−00367	Naughton v. Evenflo Company, Inc.
OHIO SOUTHERN			
OHS	2	20−01069	Woodson et al v. Evenflo Company, Inc.
OHS	3	20−00081	Feinfeld v. Evenflo Company, Inc.
OHS	3	20−00118	Gladstone et al v. Evenflo Company, Inc.
OHS	3	20−00163	Brinkerhoff v. Evenflo Company, Inc.
WASHINGTON EASTERN			
WAE	2	20−00081	Reed v. Evenflo Company Inc

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

CANDICE BENNETT

Plaintiff

- and -

EVENFLO COMPANY, INC. AND **GOODBABY CANADA 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.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 5, 2020

Issued by _____
Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: **Evenflo Company, Inc.**
225 Byers Road
Miamisburg, Ohio
45342, U.S.A.

Tel: (937) 415-3300
Fax: (937) 415-3112

AND TO: **Goodbaby Canada Inc.**
181 Bay Street, Suite 4400
BCE Place, Bay Wellington Tower
Toronto, Ontario, M5J 2T3

Tel: (905) 361-9808

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) "**Booster Seat**" means a removable device designed to be used in a vehicle for seating a person whose mass is at least 18 kg, to ensure that the seat belt assembly fits properly (as defined at s. 100 (1) of the ***Motor Vehicle Restraint Systems and Booster Seats Safety Regulations***;

(b) "**Evenflo Big Kid Booster Seat(s)**" or "**Big Kid Booster Seat(s)**" means the Evenflo-branded **Booster Seat** that was designed, researched and developed, tested, manufactured, imported/exported, distributed, supplied, marketed, advertised, promoted, packaged, labelled, and/or sold by the **Defendants**;

(c) "**Class**" or "**Class Members**" means all persons residing in Canada, excluding Quebec, who have purchased an **Evenflo Big Kid Booster Seat**;

(d) "***Class Proceedings Act***" means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;

(e) "***Sale of Goods Act***" means the *Sale of Goods Act*, RSO 1990, c S.1, as amended, including ss. 15 & 51;

(f) "**Sale of Goods Legislation**" means:

(i) The *Sale of Goods Act*, RSBC 1996, c 410, as amended (British Columbia);

(ii) The *Sale of Goods Act*, RSA 2000, c S-2, as amended (Alberta);

(iii) The *Sale of Goods Act*, RSS 1978, c S-1, as amended (Saskatchewan);

(iv) The *Sale of Goods Act*, CCSM c S10, as amended (Manitoba);

(v) The *Sale of Goods Act*, RSNL 1990. c S-6, as amended (Newfoundland);

(vi) The *Sale of Goods Act*, RSNB 2016, c 110, as amended (New Brunswick);

(vii) The *Sale of Goods Act*, RSNS 1989, c 408, as amended (Nova Scotia);

(viii) The *Sale of Goods Act*, RSPEI 1 988, c S-1, as amended (Prince Edward Island);

(ix) The *Sale of Goods Act*, RSY 2002, c 198, as amended (Yukon);

(x) The *Sale of Goods Act*, RSNWT 1988, c S-2, as amended (Northwest Territories and Nunavut);

(g) "***Consumer Protection Act***" means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14 & 15;

(h) "**Consumer Protection Legislation**" means:

(i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia);

(ii) The *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta);

(iii) *The Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan);

(iv) *The Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba);

(v) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland and Labrador);

(vi) The *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick);

(vii) The *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia);

(viii) The *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island);

(ix) The *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon);

(x) The *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and

(xi) The *Consumer Protection Act,* RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut);

(i) "***Motor Vehicle Safety Act***" means the *Motor Vehicle Safety Act*, SC 1993, c 16, as amended;

(j) "***Motor Vehicle Safety Regulations***" means the *Motor Vehicle Safety Regulations*, C.R.C., c. 1038, as amended;

(k) "***Motor Vehicle Restraint Systems and Booster Seats Safety Regulations***" means the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90, as amended, including Part 4;

(l) "***Highway Traffic Act***" means the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended;

(m)"***Seat Belt Assemblies Regulation***" means *Seat Belt Assemblies*, RRO 1990, Reg 613 under the ***Highway Traffic Act***;

(n) "**Canadian Seat Belt Regulations**" means:

(i) The *Motor Vehicle Act Regulations*, BC Reg 26/58, as amended, including Division 36 (British Columbia);

(ii) The *Vehicle Equipment Regulation*, Alta Reg 122/2009, as amended, including Part 5 (Alberta);

(iii) *The Vehicle Equipment Regulations*, 1987, RRS c V-2.1 Reg 10, as amended, including ss. 60-63.1 & 248 (Saskatchewan);

(iv) *The Highway Traffic Act*, CCSM c H60, as amended (Manitoba);

(v) The *Seat Belt Regulation*, NB Reg 83-163, as amended (New Brunswick);

(vi) The *Seat Belt and Child Restraint System Regulations*, N.S. Reg. 366/2008, as amended (Nova Scotia);

(vii) The *Highway Traffic Act*, RSPEI 1988, c H-5, as amended, including Part V, s. 92 (Prince Edward Island);

(viii) The *Highway Traffic Act*, RSNL 1990 Chapter H-3, as amended, including ss.178 & 178.1 (Newfoundland and Labrador);

(ix) The *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT (Nu) 1990 c M-35, as amended (Nunavut);

(x) The *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT 1990 c M-35, as amended (Northwest Territories);

(xi) The *Motor Vehicles Act*, SY 2019, c.6, as amended, including s. 194 and Part VII, ss. 86-88 (Yukon);

(o) "**Test Method 213.2**" means Test Method 213.2 — Booster Seats (May 2012), published by Transport Canada;

(p) "***Competition Act***" means the *Competition Act*, RSC 1985, c C-34, as amended, including ss. 36 & 52;

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

(r) "***Courts of Justice Act***" means the *Courts of Justice Act*, RSO 1990, c C.43, as amended, including ss. 128, 129, & 130;

(s) "***Canada Consumer Product Safety Act***" means the *Canada Consumer Product Safety Act*, SC 2010, c 21, as amended, including ss. 6-11, 14, & 41;

(t) "***Restraint Systems and Booster Seats for Motor Vehicles Regulations***" means the *Restraint Systems and Booster Seats for Motor Vehicles Regulations*, SOR/2016-191, as amended, including s. 1;

(u) "***Consumer Packaging and Labelling Act***" means the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c C-38, as amended, including ss. 7, 9 & 20;

(v) "**Defendants**" or "**Evenflo**" means Evenflo Company, Inc. and Goodbaby Canada Inc.; and

(w) "**Plaintiff**" means Candice Bennett; and

(x) "**Representation(s)**" or "**Safety Misrepresentations**" means the **Defendants'** false, misleading or deceptive representations that their **Big Kid Booster Seats** were rigorously "side impact tested" at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds, when these "tests" were self-created, virtually impossible to fail, and entirely unrelated to the actual forces involved in side-impact collisions;

THE CLAIM

2. The proposed Representative Plaintiff, Candice Bennett, claims on her own behalf and on behalf of the members of the Class of persons as defined in paragraph 5 below (the "Class") as against Evenflo Company, Inc. and Goodbaby Canada Inc. (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 in marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid Booster Seats as rigorously "side impact tested" at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds, in failing to disclose the risks associated with using the Big Kid

Booster Seats, and/or in not performing scientifically-appropriate testing on the Evenflo Big Kid Booster Seats, the Defendants committed the following:

(i) Fraudulent or negligent misrepresentation;

(ii) Fraudulent concealment;

(iii) Negligence;

(iv) Breach of express contractual warranty;

(v) Breach of implied warranties;

(vi) Breach of the implied covenant of good faith and fair dealing;

(vii) Unfair practices in violation of the *Sale of Goods Act* and the parallel provisions of the Sale of Goods Legislation, the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*;

(viii) Breach of the *Canada Consumer Product Safety Act*;

(ix) Breach of the *Consumer Packaging and Labelling Act*;

(c) A declaration that this Statement of Claim is considered as notice given by the Plaintiff on her own behalf and on behalf of "person similarly situated" and is sufficient to give notice to the Defendants on behalf of all Class Members;

(d) 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 Legislation;

(e) General damages in an amount to be determined in the aggregate for the Class Members;

(f) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the purchase price of the Evenflo Big Kid Booster Seats or, in the alternate, the cost of its replacement;

(g) Punitive (exemplary) and aggravated damages in the aggregate in an amount that this Honourable Court deems appropriate;

(h) An order that Class Members are entitled to a refund of the purchase price of their Evenflo Big Kid Booster Seats, including, but not limited to sales taxes, based *inter alia* on revocation of acceptance and rescission;

(i) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of the Evenflo Big Kid Booster Seats;

(j) A declaration that any funds received by the Defendants through the sale of their Evenflo Big Kid Booster Seats are held in trust for the benefit of the Plaintiff and Class Members;

(k) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Evenflo Big Kid Booster Seats to members of the Class on the basis of unjust enrichment;

(l) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Evenflo Big Kid Booster Seat to members of the Class on the basis of *quantum valebant*;

(m) An interim interlocutory and permanent order restraining the Defendants from continuing to sell the Evenflo Big Kid Booster Seat until the false, misleading, and deceptive representations are removed from their packaging and labelling and from any other form of misleading marketing, advertisement, or promotion, including on the Defendants' websites;

(n) An order requiring the Defendants to engage in a corrective marketing campaign and to engage in any further necessary affirmative injunctive relief, such as recalling existing products;

(o) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;

(p) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;

(q) 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, 129, and 130 of the *Courts of Justice Act*;

(r) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;

(s) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and

(t) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, Candice Bennett, is an individual residing in the city of Coldwater, in the province of Ontario.

4. On November 16, 2018, the Plaintiff purchased 2 Evenflo Big Kid Amp High Back Belt-Positioning Booster Car Seats in static black from the Toys "R" Us website for $49.97 each plus sales taxes, for a total cost of $104.94.

The Class

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

> All persons, entities or organizations resident in Canada, excluding Quebec, who have purchased an Evenflo "Big Kid" booster seat.

The Defendants

6. Defendant Evenflo Company, Inc. is an American corporation headquartered in Miamisburg, Ohio. It is a wholly-owned subsidiary of China-based Goodbaby International Holdings Limited that designed, researched and developed, tested, manufactured,

imported/exported, distributed, supplied, marketed, advertised, promoted, packaged, labelled, and/or sold car seats and other baby and child-related products. It conducts business throughout Canada, including within the province of Ontario.

7. Evenflo Company, Inc. is the current owner and registrant of the Canadian trade-mark "EVENFLO" (TMA363284), which was filed on May 19, 1988 and registered on November 10, 1989.

8. Defendant Goodbaby Canada Inc. ("Goodbaby") is a Canadian corporation headquartered in Toronto, Ontario, which, prior to January 23, 2018, was known as Evenflo Canada Inc. It is a wholly-owned subsidiary of Goodbaby International Holdings Limited that designs, researches and develops, tests, manufactures, distributes, markets, advertises, promotes, packages, labels, and sells car seats and other baby and child-related products. Its corporate directors include John Ball, located in the Goodbaby Toronto office and Michael Qu, located in the Evenflo Company, Inc. office in Miamisburg, Ohio. It conducts business throughout Canada, including within the province of Ontario.

9. Defendant Goodbaby is registered with Transport Canada to affix the National Safety Mark (NSM) onto the Evenflo Big Kid booster seats (J80) under s. 213.2 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, which establishes the Canadian Motor Vehicle Safety Standard (CMVSS) for booster seats.

10. Defendants are and have been at all relevant times, either directly or indirectly, engaged in the business of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging,

labelling, and/or selling the Evenflo Big Kid Booster Seats that are the subject of the present Statement of Claim, throughout Canada.

11. Given the close ties between the Defendants and considering the preceding, they are jointly and severally liable for the acts and omissions of each other.

12. Unless the situation indicates otherwise, both Defendants will be referred to as "Evenflo" throughout this proceeding.

NATURE OF THE CLAIM

13. These class proceedings concern booster seats that were falsely marketed, advertised, promoted, packaged, labelled, sold, and/or represented by the Defendants to be rigorously "side impact tested" at 2X the "Federal Crash Test Standard" and safe for children as small as 40 pounds, when these "tests" were self-created, virtually impossible to fail, and entirely unrelated to the actual forces involved in side-impact collisions (the "Safety Misrepresentations").

14. A booster seat is a child safety car seat designed specifically to protect children from injury or death during vehicle collisions by raising the child to ensure that the seatbelt can be correctly adjusted so that it crosses over the middle of the shoulder (collarbone) and over the hips (pelvis).

15. In Canada, under the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations* (s. 100 (1)), a child must weigh at least 18 kgs (40 pounds) before they can be placed into a booster seat.

16. The Defendants' Evenflo Big Kid Booster Seat was falsely and prominently marketed, advertised, promoted, packaged, labelled, sold, and/or represented as "side impact tested" and safe

for children as small as 40 pounds; however, the Defendants' so-called "tests" were self-created and entirely unrelated to the actual forces involved in side-impact collisions.

17. Contrary to the Defendants' representations, legitimate science and appropriate testing reveals that the Big Kid Booster Seats provide dubious benefit to children involved in side-impact collisions.

I. Side-Impact Collisions

18. Side-impact collisions are vehicle crashes where the side of one or more vehicles is impacted. These crashes often occur at intersections, in parking lots, and when two vehicles pass on a multi-lane roadway.

19. In 2017, there were 1,841 motor vehicle fatalities in Canada and 9,960 serious injuries, of these statistics, 32 vehicle fatalities and 131 serious injuries were of children 4 and under, and 43 vehicle fatalities and 303 serious injuries were of children aged 5 to 14 years old. The total number of injuries for all ages was 154,886 and, from this, 2,744 were of the age group 0-4, and 6,514 were between 5 and 14.

20. Side-impact collisions are a serious automotive injury problem and have been shown to have higher rates of death and serious injury. An occupant on the struck side of a vehicle may sustain far more severe injuries than an otherwise similar front or rear collision crash.

21. Side-impact collisions pose a great risk to children and injury patterns vary across the pediatric age range. In a study conducted by the TraumaLink and the Department of Pediatrics of the Children's Hospital of Philadelphia whereby 93 children in 55 side-impact crashes were

studied, 23% of them had received a clinically-significant injury and, of these, head (39%), extremity (22%), and abdominal injuries (17%) were the most common. The cases revealed that serious injuries occur even in minor crashes.

22. Though less common than head-on crashes, side-impact collisions are more likely to result in serious harm, including traumatic brain injuries, spinal injuries, and atlanto-occipital dislocation ("AOD"), which occurs when the ligaments attached to the spine are severed. According to a 2015 study, AOD (sometimes referred to as "internal decapitation") is "3 times more common in children than in adults" because, compared to adults, children have proportionally larger heads and laxer ligaments".

II. Child Restraints

23. Although models may vary, there are three established styles, or stages, of car seats or child restraints for kids: rear-facing, forward-facing, and booster:

(i) Stage 1: A rear-facing seat in which the child itplaced with its back to the driver – this is considered the safest position for young kids and it's legally required across Canada for all children from birth until reaching a weight of at least 20 pounds, with most jurisdictions having even more stringent requirements,

(ii) Stage 2: A forward-facing seat orients the child in the same direction as the rest of the passengers. This type, as with a Stage 1 seat, is equipped with its own five-point harness,

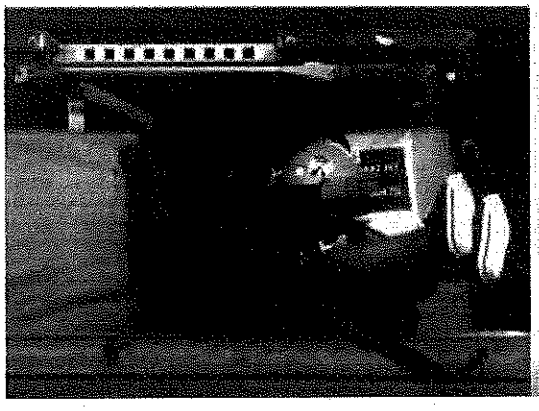
(iii) Stage 3: A booster seat, which is used in conjunction with the vehicle's built-in seat belt. The purpose of the booster is to ensure that the seat belt follows the correct path

— the shoulder strap needs to sit squarely on the child's shoulder, not climbing up onto the neck, and the lap belt should fall low across the hips, not higher onto the torso.

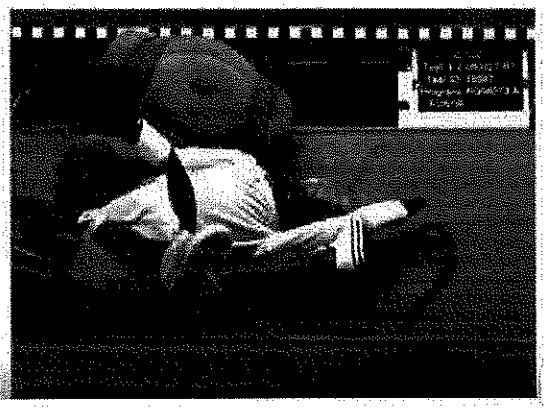
24. These thresholds are important because, according to scientific consensus, booster seats (stage 3) do not adequately protect toddlers. To deliver its full safety benefit in a crash, an adult seat belt must remain on the strong parts of a child's body, i.e. across the middle of the shoulder and the upper thighs. Even if young children are tall enough for a belt to reach their shoulders, they rarely sit upright for long and often wriggle out of position.

25. By contrast, a tightly adjusted five-point harness (stage 2) secures a child's shoulders and hips, and goes between the legs. Harnesses secure children's bodies so that they are less likely to be ejected, and they disperse crash forces over a wider area. This difference is illustrated by the following video stills, which are taken from comparison tests of the Evenflo "SecureKid," a seat that can accommodate a child up to 65 pounds with an internal harness, and the Evenflo Big Kid:

EVENFLO SECUREKID
Harnessed Seat



EVENFLO BIG KID
Belt-Positioning Booster Seat



26. As can be seen above, in the test of the SecureKid, the dummy's head and torso remained entirely within the seat's confines. By contrast, in the test of the Big Kid, the seat belt slipped off the dummy's shoulder, and the dummy's head and torso flailed far outside the seat.

27. Although this latter test "passed" Evenflo's side-impact testing, as will be discussed in more detail hereinbelow, Evenflo's director of manufacturing engineering has previously admitted that it placed the dummy's neck in severe extension, and thus more at risk for injurious head contact.

28. As compared with seat belts, child restraints, when not misused, are associated with a 28% reduction in risk of death adjusting for seating position, vehicle type, model year, driver and passenger ages, and driver survival status.

III. Canadian Laws and Regulations concerning Booster Seats and Testing Procedures

29. In Canada, car seat regulations vary for each of the provinces and territories.

30. Ontario's *Highway Traffic Act* requires children weighing 18 kg to 36 kg (40 to 80 lbs), standing less than 145 cm (4 ft. 9 in.) tall and who are under the age of 8 to use a booster seat or allows the continued use of a forward-facing seat as long as the car seat manufacturer recommends its use. Section 8 of the *Seat Belt Assemblies Regulation* provides as follows:

> 8. (1) Passengers under eight years old are classified as follows for the purposes of this section:
>
> ...
>
> 3. Children weighing 18 kilograms or more but less than 36 kilograms and who are less than 145 centimetres tall are classified as pre-school to primary grade children. O. Reg. 195/05, s. 1.
>
> ...

> (4) The driver of a motor vehicle on a highway is required to ensure that a pre-school to primary grade child passenger is secured as set out in subsection (7) or (7.1) and subsection (8). O. Reg. 195/05, s. 1; O. Reg. 236/09, s. 2 (3).
> ...
> (7) A pre-school to primary grade child shall be secured,
>
> (a) if there is a seating position in the motor vehicle that has a seat belt assembly consisting of a pelvic restraint and a torso restraint, in that position,
>
> (i) on a child booster seat that is used in the manner recommended by its manufacturer and that conforms to,
>
> (A) Standard 213.2 (Booster Cushions) made under the *Motor Vehicle Safety Act* (Canada),
> ...
> (ii) by the motor vehicle's complete seat belt assembly, worn as described in subsection (9);

31. Most of the other Canadian provinces and territories provide similar legislation – the Canadian Seat Belt Regulations – although most other province provide that a child must remain in a booster seat until they reach the same age and height restrictions or be 9 years old (Alberta, the Northwest Territories, and Nunavut do not regulate the use of booster seats).

32. While the laws do vary from province to province, they do share a singular purpose: to prevent injury by ensuring that children are properly, and safely, restrained.

33. Federally, a child may not be placed into a booster seat until s/he is at least 18 kgs (40 pounds).

34. With regard to the safety testing of booster seats, the Canadian *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations* provides the following Canadian Motor Vehicle Safety Standard (CMVSS) as follows:

Prescribed Standards

103 ...

CVMSS 213.2

(3) Every booster seat must conform to the applicable standards set out in Part 4, CMVSS 213.2 — Booster Seats.

...

PART 4

CMVSS 213.2 — Booster Seats

General

Interpretation

400 In this Part, *Test Method 213.2* means *Test Method 213.2 — Booster Seats* (May 2012), published by the Department of Transport.

...

Testing

Dynamic testing

407 A booster seat that is subjected to a dynamic test in accordance with section 3 of Test Method 213.2 must, when in any adjustment position,

(a) exhibit no complete separation of any load-bearing structural element, and no partial separation exposing a surface with

(i) a protrusion of more than 9.5 mm, or

(ii) a radius of less than 6.4 mm;

(b) remain in the same adjustment position during the test as it was in immediately before the test began, except a component of the booster seat used to ensure that the vehicle seat belt is adjusted as recommended by the manufacturer;

(c) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), limit the resultant acceleration at the location of the accelerometer mounted in the upper thorax of the anthropomorphic test device to not more than 60 g, except for intervals of not more than 3 ms;

(d) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), limit the resultant acceleration of the centre of gravity of the head of the anthropomorphic test device during the movement of the head towards the front of the vehicle to not more than 80 g, except for intervals of not more than 3 ms, unless it is established that any resultant acceleration above 80 g is caused by another part of the anthropomorphic test device striking its head;

(e) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), not allow any portion of the head of the anthropomorphic test device to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 813 mm forward of the Z point on the standard seat assembly, measured along the SORL; and

(f) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), not allow either knee pivot point to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 915 mm forward of the Z point on the standard seat assembly, measured along the SORL.

35. The anthropomorphic test devices referred to above, commonly referred to as dummies, are mechanical surrogates of the human that are used by the automotive industry to evaluate the occupant protection potential of various types of restraint systems in simulated collisions of new vehicle designs.

36. Test Method 213.2 – Booster Seats referenced in Part 4 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, which were issued by Transport Canada on January 1, 2010 and revised in May 2012, provide *inter alia* the following federal standards for the testing of booster seats and the dummies for a frontal impact (Canadian Motor Vehicle Safety Standard 213.2 (CMVSS 213.2)):

- That the seat assembly must be mounted on a dynamic test platform that has an accelerometer that is linked to a data processing system;

- That for the dynamic testing, the mass and height range of the anthromorphic test device (dummy) must match that of the persons for whom the manufacturer recommends the booster seat (under s. 409(1)(e) of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90;

- Regulations on the dummy's clothing in terms of temperature for washing and drying, that it be light-weight cotton, size 12½ sneakers with rubber toe caps, uppers of Dacron and cotton, or nylon anda total mass of 0.453 kg;

- That in terms of testing for a frontal barrier impact, the change in velocity must be 48 km/hr, that the temperature must be between 20.6°C and 22.2°C with humidity of at 10% and not more than 70%;

- Regulations regarding the placement of the booster seat and the dummy;

37. Unfortunately, Test Method 213.2 only references testing for frontal barrier impact and not side-impact collisions, although it is quite clear that certain of these standards would apply to testing any type of collision, including side-impact.

38. There are no federal regulations for booster seats in side-impact crashes. So Evenflo made up its own test and then passed itself.

39. As a result of this absence, parents and guardians are left to rely on the claims of car seat manufacturers regarding side-impact crashworthiness who are in competition with each other for

sales and market share. Among the major players in the child safety seat industry is Evenflo, who designs, researches and develops, tests, manufactures, imports/exports, distributes, supplies, markets, advertises, promotes, packages, labels, and sells a range of juvenile products including car seats, strollers, high chairs, and infant carriers.

IV. The Evenflo Big Kid Booster Seat

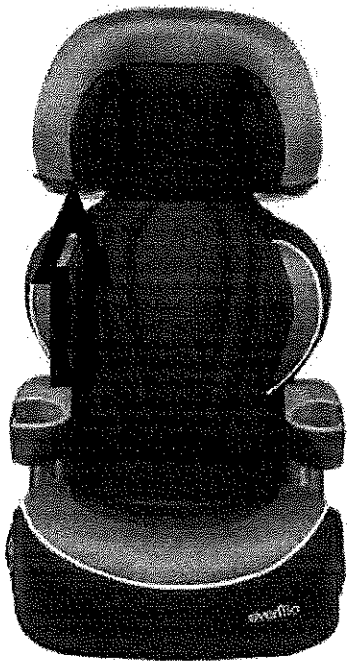
40. Evenflo launched its Big Kid booster seat in the early 2000s, with the goal of "regaining control in the market" for booster seats from its main competitor, Graco, which had recently released a popular model called the "TurboBooster".

41. At the time of the Big Kid Booster Seat's development, Evenflo's team proposed creating a booster seat with similar features to Graco's TurboBooster, but priced to sell for about $10 less. Evenflo sought to develop a product that would sell briskly at large retailers (e.g., Walmart, Canadian Tire, Costco, Babies "R" Us/ Toys "R" Us, Amazon). Evenflo succeeded and within a few years, an internal design review deemed the Big Kid "the reliable workhorse in the Evenflo platform stable".

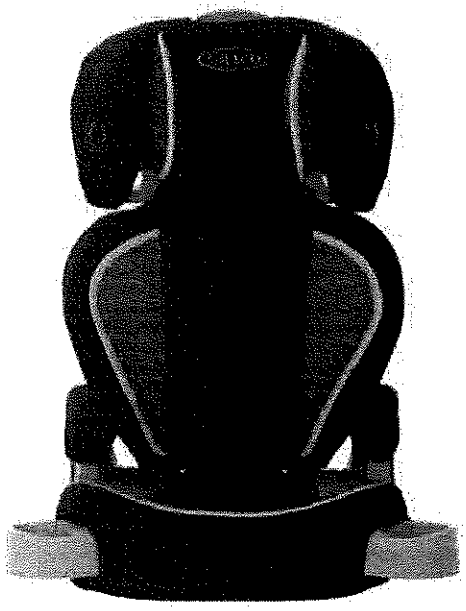
42. Despite the Big Kid Booster Seat's success, by 2008, Graco was still outselling Evenflo. The marketing department wanted to make the Big Kid look more like the TurboBooster on the shelves of big box retailers. The company felt the Big Kid's "on-shelf perception" was poor compared with the TurboBooster because Graco's seat looked like it had more side support.

43. To make its seat look more like Graco's, Evenflo added side wings – curved extensions that protrude from the backrest of the Big Kid booster seat (pictured below). One Evenflo

document describing the strategy behind the product launch said the consumer benefits of these new side wings included "increased perceived side protection":



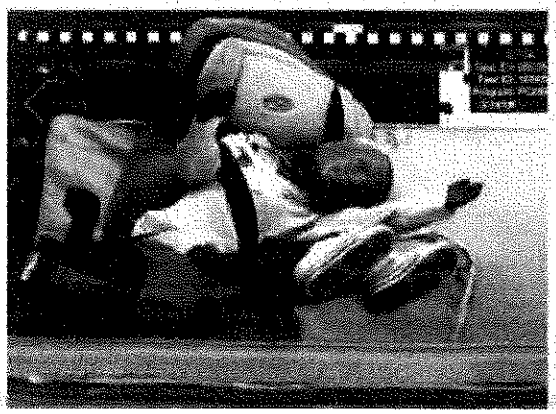
Big Kid



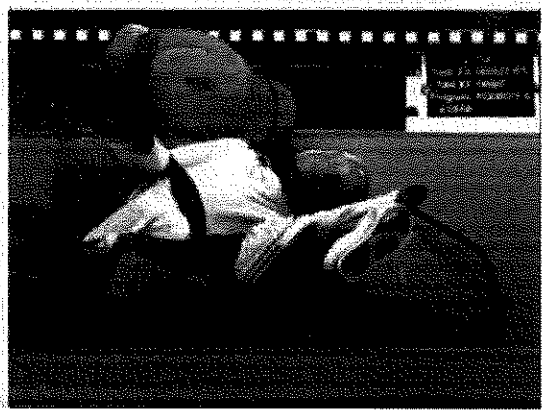
TurboBooster

44. Consistent with these side wings having no material benefit other than consumer perception and increased profits for the Defendants, Evenflo's own side-impact testing showed no difference in safety between the two models:

BIG KID BOOSTER SEAT
Model 338 — No Side Wings

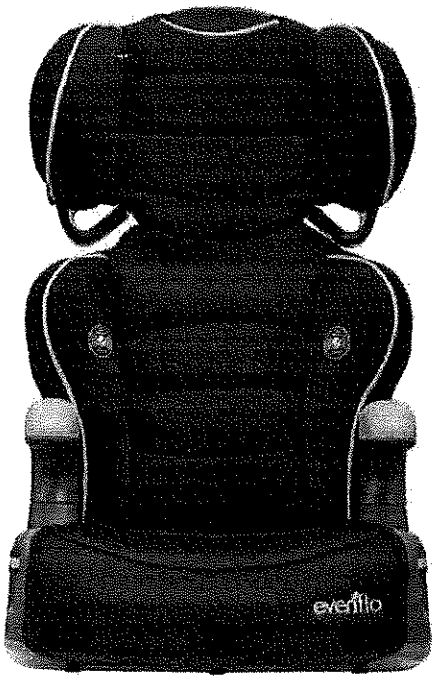


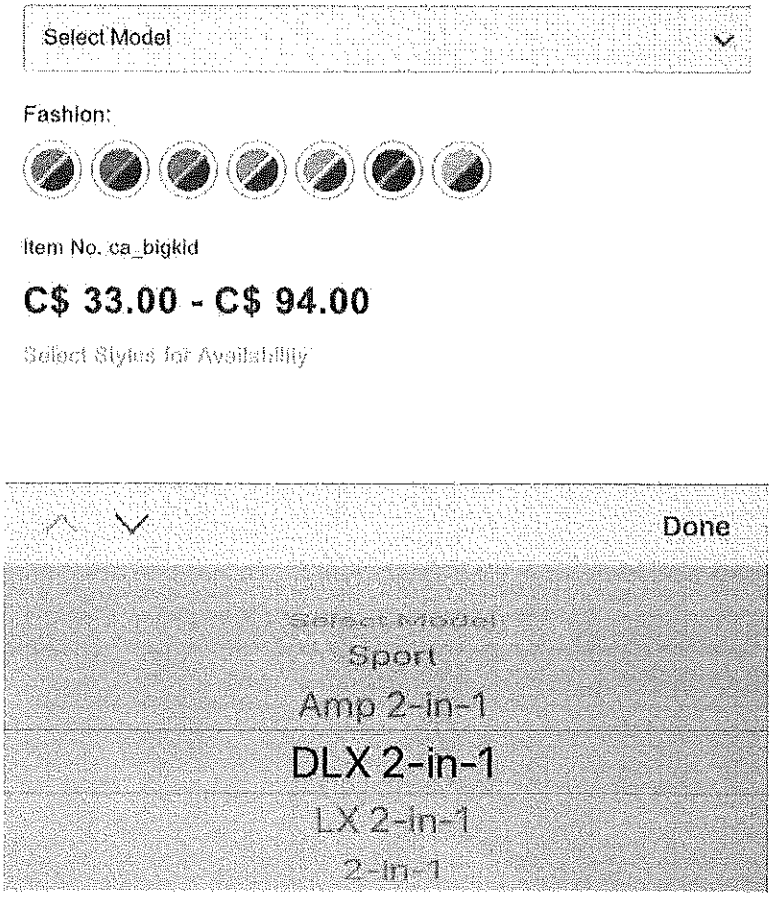
BIG KID BOOSTER SEAT
Model 309 — With Side Wings



45. Evenflo offers the Big Kid booster seat in 7 different colour combinations and in 5 different models; Sport, Amp 2-in-1, DLX 2-in-1, LX 2-in-1, and 2-in-1 at a price point of between $33.00 and $94.00 as pictured below:

Car Seats / Booster / Big Kid Booster Car Seat





46. At Canadian Tire, the Big Kid booster seat is sold for $79.99, at Best Buy for $74.99, at Walmart for $74.97, and at Babies "R" Us for $63.67.

V. Evenflo's development of a supposed "test" to bolster its marketing and sales

47. As part of its quest to gain an upper hand on Graco and to enhance the perceived safety of the Big Kid Booster Seat, Evenflo also began to "test" the side-impact crashworthiness of its new Big Kid booster seat prior to its 2008 release – absent a federal standard, Evenflo made up its own rules.

48. Evenflo developed its own test, then used supposed passing of that test as a means by which to distinguish its new product from the competition in the minds of consumers.

49. Evenflo has represented publicly that its side-impact testing is "rigorous" and analogous to "government" tests. For example, according to a blog post authored by Sarah Haverstick, a "Safety Advocate" and "Child Passenger Safety Technician" at Evenflo, "the engineers at Evenflo have designed the Evenflo Side Impact Test protocol" as a "rigorous test [that] simulates the government side impact tests conducted for automobiles:

> **Side Impact Testing**
> Currently, there is no federal standard for side impact testing of car seats and booster seats. However, the engineers at Evenflo have designed the Evenflo Side Impact Test protocol. This rigorous test simulates the government side impact tests conducted for automobiles.

50. This claim is misleading at best. Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 32 kms per hour (20 miles per hour), then suddenly decelerating it – by contrast the actual federal regulations in Canada for testing frontal barrier impact require a velocity of 48 km per hour under Test Method 213.2.

51. This difference is not explained in Evenflo's marketing materials, nor is it explained on Evenflo's website. To the contrary, a section of Evenflo Company, Inc.'s website entitled "Safety Technology" states the following:

> At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. We also continually enhance our products with new technologies that distribute crash forces away from your child during a crash.
>
> Some of those technologies include:
> ...

Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side impact standards.

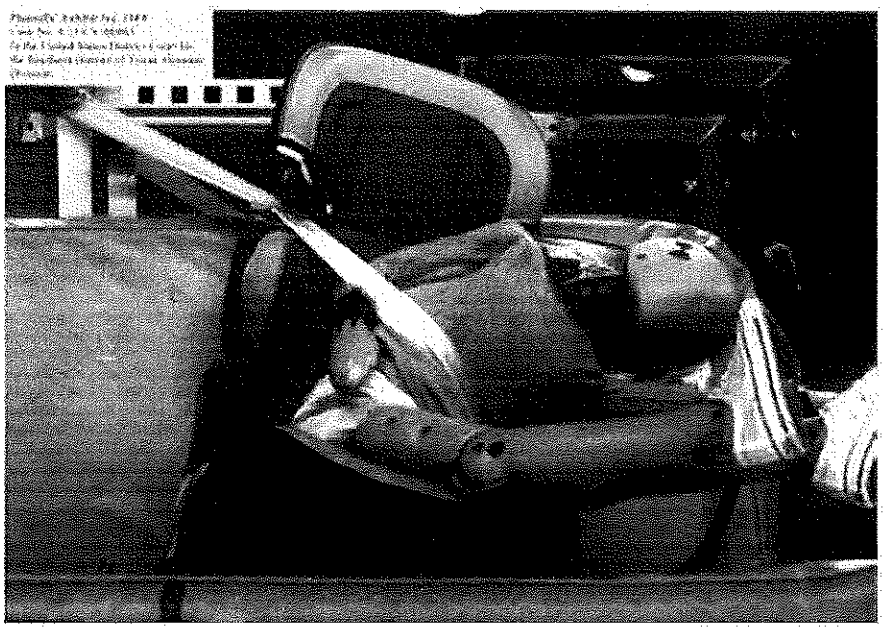
52. The same webpage includes the following descriptions of Evenflo's side-impact testing:

> Evenflo Side Impact Testing
>
> Evenflo Side impact testing simulates a crash in which the vehicle carrying the car seat is struck on the side by another vehicle. An example of a real life side impact collision is when a car crossing an intersection is struck on the side by another car that ran a stop sign.
>
> Why is it important to car seat safety?
>
> Approximately one out of four vehicle crashes have a side impact component. According to the National Highway Traffic Safety Administration (NHTSA), impacts to the side of the vehicle rank almost equal to frontal crashes as a source of fatalities and serious injuries to children ages 0 to 12.
>
> How are car seats tested now?
>
> Federal car seat safety standards require a frontal impact test with a 30 mph velocity change. This approximates the crash forces generated in a collision between a vehicle traveling 60 mph and a parked car of similar mass, or the energy produced in a fall from a three story building. There are currently no provisions in the U.S. and Canadian standards for side impact testing. NHTSA is in the process of developing a child side impact test standard.
>
> What is the Evenflo Side Impact Testing?
>
> At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo Side Impact test protocol. The Evenflo Side Impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5-star government side impact tests conducted for automobiles.
>
> All Evenflo car seats meet or exceed all applicable federal safety standards and Evenflo's side impact standards.
>
> For car seat safety that you can depend on, trust Evenflo. Shop our collection of side impact tested car seats today.

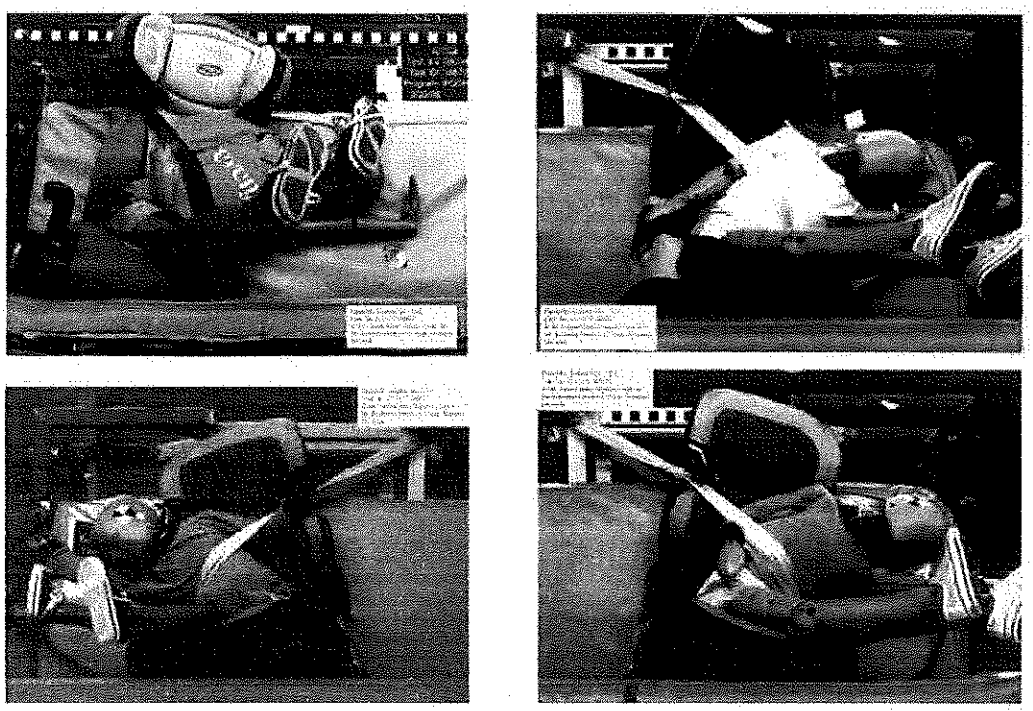
53. Not only is Evenflo's side-impact test less rigorous than the federal government testing protocol for front crashes. It is, for all intents and purposes, impossible to fail and therefore, completely and utterly meaningless.

54. Records of Evenflo's internal side-impact tests of various models indicate that, following each test, an Evenflo technician answers whether the test showed "dummy retention", meaning, did it stay in the seat or fall on the floor, which is indicated by checking either "yes" or "no" on a form, then sends the report to an engineer who decides whether the Big Kid model passes or fails.

55. In other words, there are only two ways to fail Evenflo's "rigorous" side-impact test: (1) if a child-sized dummy escapes its restraint entirely, and thus ends up on the floor; or (2) the booster seat itself breaks into pieces. The following video still is from a side-impact test "passed" by Evenflo's Big Kid Booster Seat:



56. The same technician has stated that, in 13 years, he did not once perform a "failed" side-impact test on a booster seat. He also testified that the following images—all of which are from "passed" Evenflo side-impact tests, and use a dummy based on a three-year-old child would have been ticked as "yes":



57. The above images show the seat belt slipping off the dummy's shoulders and instead tightening around its abdomen and ribs. This kind of violent movement at high speed can cause serious damage to a child's internal organs, head, neck and spine, including paralysis and even death.

58. Evenflo was aware of these risks. A safety engineer at Evenflo has admitted under oath that, when real children move in this way, they could suffer catastrophic head, neck and spinal injuries — or die.

59. In other words, the same proprietary side-impact tests deemed successful by Evenflo's engineers plainly demonstrate that Big Kid Booster Seats place many children at risk of serious injury or death.

VI. Evenflo's Representations Regarding its Big Kid Booster Seat

60. In 2008, Evenflo began intentionally misrepresenting the safety of its products to consumers and retailers in order to drive up sales. Evenflo prominently markets the Big Kid booster seat (one of its most popular products) as "side impact tested" and, as safe for children as light as 40 pounds. But these claims are false: Evenflo's own testing demonstrates that the Big Kid booster seat leaves children vulnerable to serious head, neck, and spine injuries in a side-impact crash.

61. On its website, Evenflo Company, Inc. represents the following:

> Perfect for your growing child, this seat belt booster combines the peace of mind parents require, with colorful options your child will love.
> ...
> Safety Testing
>
> At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard.
>
> - Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards.
> - Designed and tested for structural integrity at energy levels approximately 2X the federal crash test standard.
> - FMVSS 213: Federal Motor Vehicle Safety Standards for Child Restraint Systems
> - FMVSS 302: Federal Motor Vehicle Safety Standards for Flammability of Interior Materials
> - CMVSS 302: Canada Motor Vehicle Safety Standard
> - CMVSS 213: Canada Motor Vehicle Safety Standard
> - Evenflo Temperature Testing: All current Evenflo car seats are tested for product integrity at both high and low temperatures.

62. There are no federal standards for side-impact testing of car seats and booster seats making any claims of doubling that standard nonsensical.

63. On its website and in its marketing, Evenflo tells parents and guardians that its in-house side-impact testing, which it calls the Evenflo Side Impact Test protocol, is "rigorous," simulates realistic conditions, and is equivalent to federal testing.

64. In reality, Evenflo's tests are anything but: videos reveal that when child-sized crash dummies seated in Big Kid Booster Seats are subjected to the forces of a T-bone collision, they are thrown far out of their shoulder belts.

65. To date, Evenflo continues to prominently advertise its products as "side impact tested," going so far as to stitch a "side impact tested" label into many of its Big Kid Booster Seats themselves:

66. In other words, by creating a test that has no basis in science or safety and then concluding that its products "pass" this "test", Evenflo is able to aggressively market its Big Kid booster seats as "side-impact tested".

67. In the owner's manual for the Big Kid booster seat, Evenflo represents that "By properly using this child restraint and following these instructions (and the instructions that accompany

your vehicle), you will greatly reduce the risk of serious injury or death to your child from a crash" and that it was safe for children between 40 to 110 pounds (18 to 49.8 kgs).

68. Evenflo's misleading and deceptive marketing strategy has been phenomenally successful: since its launch, Evenflo has sold more than 18 million Big Kid booster seats, making the product one of the best-selling models in Canada. It has likely earned hundreds of millions of dollars of profits on these dubious safety products that are, in reality, a mere shadow of what Evenflo claims.

69. Evenflo has now subjected millions of children to the risk of grave injury and death. Meanwhile, it continues to hold itself out to the public as keenly concerned with children's safety. According to Sarah Haverstick, a "Safety Advocate" and "Child Passenger Safety Technician" at Evenflo, "safety is a word that is embedded into [Evenflo's] DNA and will always be our number one priority for our customers".

70. Had Evenflo disclosed the results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat, which does not fulfill its main function – to keep children safe in a vehicle in the event of a collision. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid Booster Seats are safe.

VII. The ProPublica Report and the U.S. Congress Investigation into Evenflo's Conduct

71. On February 6, 2020, ProPublica published a report detailing its investigation into Evenflo's product marketing and testing practices in relation to the Big Kid Booster Seat.

72. ProPublica's investigation showed how the company put marketing over safety in pushing its booster seats as "side impact tested," even though its own tests showed a child using that seat could be paralyzed or killed in such a crash.

73. In the course of its investigation, ProPublica had obtained internal videos of Evenflo's side-impact tests that had been performed on the Big Kid booster seat, internal corporate documents, and depositions that had not previously been made public. As detailed hereinabove, Evenflo's "tests" showed child-sized dummies thrown violently out of their seat belts with their heads and torsos being thrown far outside the confines of the booster seats. Evenflo's top car seat engineer admitted in a 2019 deposition that if real children's bodies moved that way, they could suffer catastrophic injuries and even die; however, Evenflo gave each of its tests passes.

74. The ProPublica video report on its investigation, describes the 2016 deposition of an Evenflo project engineer who at the time said that parents should not misinterpret the side-impact test labels. David Sandler, then-Associate Director of Project Engineering at Evenflo, attested to the following: "we side-impact test our seats, but I don't think we say that we offer any type of side-impact protection".

75. The ProPublica video news report describes a lawsuit that involved a 5-year old girl who had been properly strapped into an Evenflo Big Kid booster seat during a side-impact crash, where she had been sitting opposite the side of impact. She suffered "internal decapitation"; her spinal cord was damaged in the accident leaving her paralyzed from the neck down.

76. In response to ProPublica's reporting, on February 12, 2020, the United States House of Representatives' Subcommittee on Economic and Consumer Policy sent a letter to Evenflo

Company, Inc.'s CEO requesting documents and information on Evenflo's Big Kid model booster seats.

77. The letter from the U.S. Congress states the following:

> Evenflo has marketed the "Big Kid" seat as safe and "Side Impact Tested." That safety representation appears to be inconsistent with the video evidence of side impact testing. In fact, your company's internal tests appear to show that side impacts could put children sitting in the "Big Kid" seat in grave danger.
>
> In order to assist the Subcommittee in its review of this matter, please provide the following information by February 24, 2020, regarding "Big Kid" and other belt-positioning booster seats marketed or sold by Evenflo:
>
> 1. All impact test videos, including side-impact test videos; and
> 2. All documents referring or relating to the following:
>   a. Labeling concerning the age, weight, and height of children for whom the seat is intended, including on marketing materials, packaging, instructional materials, or the seat itself;
>   b. Labeling of safety-related terms, including "Side Impact Tested," on marketing materials, packaging, instructional materials, or the seat itself;
>   c. Labeling of potential risks, including "Serious Injury or Death," on marketing materials, packaging, instructional materials, or the seat itself;
>   d. Safety and risk standards used by Evenflo in connection with side-impact testing, including what constituted a "passing" result; and
>   e. Actual results and records of impact and other safety testing; and
> 3. All communications with the U.S. federal agencies referring or relating to safety standards; and
>
> All communications with Canadian regulators relating to any recall.

78. On February 14, 2020, two U.S. Senate members sent a letter to the U.S. National Highway Traffic Safety Administration (NHTSA) – the equivalent to Transport Canada, but in the U.S. – "demanding answers about reported negligence by a booster seat manufacturer [named] Evenflo".

79. The letter requested that NHTSA "act swiftly to finalize a long overdue rule establishing effective side impact performance requirements for all child restraint systems" and stated the following:

> There are real world consequences to [NHTSA's] inaction. For example, ProPublica reported the details of potential negligence of a booster seat manufacturer, Evenflo, in developing and marketing its "Big Kid" booster car seat product that may fail to protect children in side impact crashes, which accounted for an estimated 25 percent of vehicle collision fatalities for children under the age of 15 in 2018.
>
> Evenflo suggests that their car seat products meet or exceed all applicable Federal safety standards for side impact testing, a claim that appears misleading. Evenflo also asserts that their products meet the company's own side impact standards. However, alleged videos of side impact testing calls into question the level of protection these standards provide.

80. In addition, the letter requested responses to the following questions by March 4, 2020:

1. On what date and in what manner did NHTSA first learn about concerns related to the safety performance of Evenflo booster seats in side impact collisions?
2. Evenflo's website states that it provides car seats that are "Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side impact standards." Please identify which applicable Federal Motor Vehicle Safety Standard (FMVSS) addressing side impact performance requirements Evenflo is citing, and confirm whether Evenflo consulted with NHTSA in establishing the company's side impact standards.
3. Has Evenflo's "Big Kid" booster car seat ever failed NHTSA compliance testing under FMVSS 213?
4. What actions has, or will, NHTSA take in coordination with the Federal Trade Commission and the Consumer Product Safety Commission to crack down on false and deceptive advertising by makers of child safety seats and booster seats?
5. When will NHTSA publish a final rule creating a Federal Motor Vehicle Safety Standard that establishes effective side impact performance requirements for all child restraint systems?

VIII. Summative Remarks

81. The Defendants have spent over a decade maximizing their profits by waging a disinformation campaign against parents and guardians, relentlessly telling them that Big Kid Booster Seats are "side-impact tested" and safe for children as small as 40 pounds.

82. The Defendants have apparently done no scientific testing to determine at what height or weigh, if any, it is actually safe to use a Big Kid Booster Seat. Though the Defendants could have treated their testing as an opportunity to answer this question regarding the safety of their product, consistent with their stated commitment to making safety a "number one priority for our customers", they have yet to actually do so.

83. The Defendants' ongoing practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid booster seat as "side impact tested" and safe for children as small as 40 pounds – when in fact, the Big Kid Booster Seat was not subjected to any meaningful tests, nor is safe by any stretch of the word for a child in the event of a collision – is likely to deceive ordinary consumers who reasonably understood that the Big Kid Booster Seats will protect their children in the event of a side-impact crash. In reliance upon the Defendants' claims, Class Members sought out and purchased Big Kid Booster Seat(s).

84. The advertisements and representations made by the Defendants as set forth above were and are false and/or misleading. The acts and practices of the Defendants, as alleged herein, constitute unfair or deceptive acts or practices and the making of false statements.

85. As a result of the Defendants' deceptive claims, consumers have purchased products that are substantially different than represented and have unknowingly and unwittingly subjected their children or guardians to a serious risk of injury and death.

86. Had Evenflo disclosed the methods and results of its side-impact testing to the public, no responsible parent or guardian would have purchased a Big Kid Booster Seat. As noted above, these tests demonstrate, unequivocally, that Big Kid Booster Seats place many children at risk of serious injury or death. Evenflo's engineers have admitted that they knew this.

87. Through their deceptive practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid Booster Seat as "side impact tested" and safe for children as small as 40 pounds despite the lack of any foundation of truth to this, the Defendants have been able to gain significant market share for their Big Kid Booster Seat by deceiving consumers about the attributes of the Big Kid Booster Seats and differentiating them from other traditional, comparable booster seats that are actually safe. The Defendants were motivated to mislead consumers for no other reason than to take away market share from competing products, thereby increasing their own profits.

88. The Plaintiff and the other Class Members were among the intended recipients of the Defendants' deceptive representations and omissions described herein. The Defendants' deceptive representations and omissions, as described herein, are material in that a reasonable person would attach importance to such information and would be induced to act upon such information in making purchase decisions.

89. As a result of Evenflo's failure to disclose the risks associated with using Big Kid Booster Seat models, as well as its false and misleading claims that these models were "side-impact tested," the Plaintiff and Class Members were misled into purchasing these car seats, which they otherwise would not have purchased.

90. The Defendants placed their Evenflo Big Kid Booster Seats into the stream of commerce in Canada with the intention and expectation that customers, such as the Plaintiff and Class Members, would purchase the Evenflo Big Kid Booster Seats based on their representations.

91. The Defendants knew or ought to have known that purchasers of their Evenflo Big Kid Booster Seats would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Evenflo Big Kid Booster Seats and that customers would be relying on the Defendants' safety representations to their detriment.

92. The Plaintiff and the Class Members that she seeks to represent suffered economic damages by purchasing the Evenflo Big Kid Booster Seats; they did not receive the benefit of the bargain and are therefore entitled to damages.

93. The Defendants must be brought to task for their inexcusable behaviour. Though it will never be able to make amends for untold number of children who have been injured or killed in its misleadingly marketed Big Kid booster seats, Evenflo should, at the very least, be forced to recall each and every Big Kid Booster Seat still in use and refund their purchase price.

THE REPRESENTATIVE PLAINTIFF

94. On November 16, 2018, the Plaintiff purchased 2 Evenflo Big Kid Amp High Back Belt-Positioning Booster Car Seats in static black from the Toys "R" Us website for $49.97 each plus sales taxes, for a total cost of $104.94.

95. The Plaintiff purchased the Evenflo Big Kid Booster Seats based on the Defendants' marketing and after having read the product labelling. Specifically, she believed that the Evenflo Big Kid Booster Seats were side-impact tested and that they were safe for her 4-year old child, who weighed 40 pounds at the time.

96. The Evenflo Big Kid Booster Seats were shipped to the Plaintiff on November 20, 2018 and in December 2018, they were installed in both the Plaintiff's vehicle and her spouse's vehicle.

97. The Plaintiff was unaware that the Evenflo Big Kid Booster Seats had not been subjected to any meaningful side-impact tests and that they were not actually safe to transport her daughter.

98. In consequence, Plaintiff now realizes that she has been misled by the Defendants; had she known the true facts, the Plaintiff would not have purchased and used the Evenflo Big Kid Booster Seats.

99. The Plaintiff has suffered damages as a result of purchasing the Evenflo Big Kid Booster Seats, including the costs of purchase, i.e. $104.94. In addition to the monetary damages, she has also endured pain, suffering, stress/distress, anxiety/anguish, and trouble and inconvenience.

CAUSES OF ACTION

A. Fraudulent and/or Negligent Misrepresentation

100. The tort of negligent misrepresentation can be made out as:

(a) There was a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff and to the Class;

(b) The Defendants made Representation(s) that were untrue, inaccurate and/or misleading;

(c) The Defendants acted negligently in making the Representations;

(d) The Representations were relied upon by the Plaintiff and by the Class reasonably; and

(e) The Plaintiff and the Class sustained damages as a result of their reliance.

101. Fraudulent misrepresentation can equally be made out as the Defendants made the representation that the Evenflo Big Kid Booster Seats were "side impact tested" and safe for children as small as 40 pounds, knowing that this was false as the "tests" were completely and utterly meaningless and the Defendants intended that the Plaintiff and Class Members would rely upon these representations in purchasing the Evenflo Big Kid Booster Seats.

102. The Defendants represented to the Plaintiff and the Class Members, by means of their marketing, advertising, promotion, packaging, labelling, and other representations that the Evenflo

Big Kid Booster Seats were "side impact tested" and safe for children as small as 40 pounds – these Representations were untrue as set forth herein.

103. At the time that the Defendants made the misrepresentations herein alleged, they had no reasonable grounds for believing the Representations to be true, as there was ample evidence to the contrary set forth in detail above.

104. The Defendants made the Representations herein alleged with the intention of inducing the Plaintiff and the Class Members to unknowingly purchase their Evenflo Big Kid Booster Seats.

105. The Plaintiff and the Class Members relied upon the Representations and, in reliance upon them, purchased the Evenflo Big Kid Booster Seats. Said reliance was reasonable.

106. Plaintiff and the Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendants in this regard.

107. Had the Plaintiff and the Class Members known the true facts, they would either not have purchased the Evenflo Big Kid Booster Seats or would not have paid such a high price.

108. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

B. Fraudulent Concealment

109. The Defendants made material omissions as well as affirmative misrepresentations regarding the Evenflo Big Kid Booster Seat in claiming them to have been tested using its

"rigorous" in -house side-impact testing, the Evenflo Side Impact Test protocol, and that they have been proven to be safe for their intended use. In reality, Evenflo's own testing demonstrates that the Big Kid Booster Seat leaves children vulnerable to serious head, neck, and spine injuries in a side-impact crash.

110. The Defendants failed to disclose: (i) that the Evenflo Big Kid Booster Seats had not been subject to any meaningful scientific testing to ensure their safety for children as small as 40 pounds and (ii) that the testing that they had performed demonstrated that the Big Kid Booster Seats were actually unsafe.

111. Recall that there are only two ways to fail the "test"; if the dummy completely escapes the restraint or if the booster seat breaks into pieces – the passing grades of the tests where the dummies were placed at risk of injury or death, were entirely misleading and meaningless.

112. Evenflo kept the actual results of its tests secret, choosing instead to pass everything and to run a disinformation campaign aimed at convincing millions that its Big Kid Booster Seats are safe for their children thereby creating a false sense of security.

113. Evenflo had an independent duty to disclose the truth about the safety risks posed by its Big Kid Booster Seats because these seats put children's health and well-being at serious risk in side-impact car crashes.

114. The Defendants knew that the representations were false at the time that they were made.

115. The Defendants were under a duty to disclose that the Evenflo Big Kid Booster Seat were unsafe because it was known and/or accessible only to the Defendants, who had superior

knowledge and access to the facts, and the Defendants knew it was not known to or reasonably discoverable by the Class until it was too late. The Class Members could not, in the exercise of reasonable diligence, have discovered independently that the Evenflo Big Kid Booster Seats had not actually been subjected to any meaningful tests and that the tests that they had been subjected to indicated that they were unsafe.

116. The Defendants' misrepresentations and false claims that the Evenflo Big Kid Booster Seats are safe for their intended use are material because any reasonable consumer would have considered that this was true – why else would someone purchase a booster seat?

117. Whether or not the Evenflo Big Kid Booster Seats have been tested and proven to be safe in the event of a side-impact crash is certainly a material safety concern. The facts concealed and/or not disclosed by the Defendants to the Plaintiff and Class Members are material facts in that a reasonable person would have considered them important in deciding whether to purchase an Evenflo Big Kid Booster Seat.

118. In addition, the Defendants intentionally made the false statements and omissions in order to sell their Evenflo Big Kid Booster Seats and to avoid the expense and public relations consequences of a refund and recall.

119. The Defendants actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Class Members to purchase the Evenflo Big Kid Booster Seats and to protect its profits and it did so at the expense of the Class.

120. Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. Class Members' actions

were reasonable and justified. The Defendants were in exclusive control of the material facts concerning the manner of testing (and lack thereof) of the Evenflo Big Kid Booster Seats and such facts were not known to the public or to the Class Members.

121. Class Members relied on the Defendants' representations in relation to the Evenflo Big Kid Booster Seats that they were purchasing and they purchased such Evenflo Big Kid Booster Seats. Said reliance was reasonable. Class Members were without the ability to determine the truth on their own and could only rely on the Defendants' statements and representations.

122. As a result of the concealment and/or suppression of facts, Class Members have sustained and will continue to sustain damages.

123. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

C. Negligence

124. The Defendants had a positive legal duty to use reasonable care to perform their legal obligations to the Plaintiff and to Class Members, including, but not limited to designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats in a reasonably acceptable manner and without misrepresentation.

125. The Defendants knew and it was reasonably foreseeable that in purchasing the Evenflo Big Kid Booster Seats, the Plaintiff and Class Members would trust and rely on the Defendants' skill

and integrity. The Defendants also knew and it was reasonably foreseeable that, if the Evenflo Big Kid Booster Seats were not subjected to proper testing procedures and that if they misrepresented this testing out its outcomes, that Class Members would suffer damages as detailed herein.

126. The standard of care reasonably expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats. The Defendants, through their employees, officers, directors, and agents, failed to meet the reasonable standard of care. The aforesaid loss suffered by the Class Members was caused by this negligence.

127. The Defendants failed to properly market, advertise, promote, package, label, and/or sell the Evenflo Big Kid Booster Seats such that it failed to reveal the deficiencies with its testing of the Evenflo Big Kid Booster Seats using its "Evenflo Side Impact Test protocol" and instead promoted its testing as being rigorous and as 2X the supposed federal standard.

128. The Defendants failed to adequately and scientifically test the Evenflo Big Kid Booster Seats to ensure a proper design and to ensure proper and timely modifications to the Evenflo Big Kid Booster Seats to eliminate the foreseeable safety risks and else, change its false representations and represent the truth.

129. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage and posed a real and substantial risk to the health of the Class Members.

130. The loss, damages and injuries were foreseeable.

131. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

D. Breach of Express Contractual Warranty

132. The Defendants are "merchants" in the business of selling Evenflo Big Kid Booster Seats to foreseeable consumers such as the Plaintiff and the members of the Class.

133. The Plaintiff and the members of the Class purchased the Defendants' Evenflo Big Kid Booster Seats either directly from the Defendants or through retailers, such as Walmart, Canadian Tire, Costco, Babies "R" Us/ Toys "R" Us, and Amazon, among others.

134. The Defendants expressly represented on their websites, packaging and labelling as well as in their marketing, advertising, and promotion of the Evenflo Big Kid Booster Seats that they were rigorously "side impact tested" at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds. These express representations become a basis of the bargain between the Defendants and Class Members, implicating the Defendants' liability for breach thereof.

135. Each model of the Big Kid Booster Seat has an identical or substantially identical warranty.

136. In fact, the Defendants' Booster Seat is not safe in the event of a side-impact collision because each of the express warranties is a false and misleading misrepresentation.

137. The Evenflo Big Kid Booster Seats do not conform to these express representations because they are not rigorously side-impact tested, there is no "Federal Crash Test Standard" for

side-impact testing and their testing protocol is a complete farce – thus, the Defendants breached their express warranties.

138. The Defendants made the Representations in order to induce the Plaintiff and Class Members to purchase their Evenflo Big Kid Booster Seats.

139. The Defendants breached these warranties and/or contract obligations by placing the Evenflo Big Kid Booster Seats into the stream of commerce and selling them to consumers, when they are unsafe and pose a significant safety risk to children in the event of a side-impact crash. The lack of safety inherent in the Evenflo Big Kid Booster Seat renders it unfit for its intended use and purpose and substantially and/or completely impairs its use and value.

140. The Defendants breached their express warranties by selling the Evenflo Big Kid Booster Seats, which are in actuality not free of defects, are unsafe for use, and cannot be used for their ordinary purpose of protecting children in the event of a side-impact collision. The Defendants breached their express written warranties to Plaintiff and Class Members in that the Evenflo Big Kid Booster Seats were not safe for their intended purpose at the time that they left the Defendants' possession or control and were sold to Plaintiff and Class Members, creating a serious safety risk to Plaintiff, Class Members, and their children.

141. The Evenflo Big Kid Booster Seats that Plaintiff and Class Members purchased were uniformly deficient with respect to their ability to protect children in the event of a side-impact collision, which caused each of them damages including loss of the benefit of their bargain.

142. The Plaintiff and the Class Members did rely on the express warranties and promises of the Defendants.

143. The Defendants knew or should have known that, in fact, said Representations and warranties were false, misleading, and untrue.

144. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

E. Breach of Implied Warranties

145. By designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats, in addition to misrepresenting their safety in the event of a side-impact crash, the Defendants also created and breached implied warranties.

146. At all times relevant hereto, applicable law imposed a duty that requires that the Evenflo Big Kid Booster Seats be of merchantable quality and fit for the ordinary purposes for which they are used.

147. The Defendants knew of the specific use, i.e. protecting children in the event of a collision, for which the Evenflo Big Kid Booster Seats were purchased, and they impliedly warranted that the products were fit for such use, especially so as the Defendants marketed them for this particular purpose. The fact that they are not actually safe in the event of a side-impact crash wholly impairs the use, value, and safety of the Evenflo Big Kid Booster Seats.

148. The Evenflo Big Kid Booster Seats were unsafe at the time they left the Defendants' possession. At all times relevant hereto, the Defendants were aware of the lack of safety as well

as their safety misrepresentation at the time that these transactions occurred. Thus, the Evenflo Big Kid Booster Seats, when sold to consumers at all times thereafter, were not in merchantable condition or quality and were not fit for their ordinary intended purpose.

149. The Evenflo Big Kid Booster Seats are unfit, unsafe, and inherently unsound for use, and the Defendants knew that they would not pass without objection in the trade; that they were not fit for the ordinary purpose for which they were used, and that they were unsafe and were unmerchantable.

150. Thus, the Defendants breached the implied warranty of merchantability as well as the implied warranty of fitness for a particular purpose in selling the Evenflo Big Kid Booster Seats without proper testing and with the Safety Misrepresentations.

151. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

F. Breach of Implied Covenant of Good Faith and Fair Dealing

152. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

153. The Class Members entered into agreements to purchase the Evenflo Big Kid Booster Seats, and/or were in contractual privity with Defendants as a result of the express warranties described herein.

154. The contracts and warranties were subject to the implied covenant that the Defendants would conduct business with the Plaintiff and the Class Members in good faith and would deal fairly with them.

155. The Defendants breached those implied covenants by selling to the Class Members, unsafe Evenflo Big Kid Booster Seats with its Safety Misrepresentations, when they knew, or should have known, that the contracts and/or warranties were unconscionable and by abusing their discretion in the performance of the contract or by intentionally subjecting the Plaintiff and the Class Members to a risk beyond that which they would have contemplated at the time of purchase.

156. The Defendants also breached the implied covenants by not placing terms in the contracts and/or warranties that conspicuously disclosed to the Plaintiff and the Class Members that the Evenflo Big Kid Booster Seats had not been subjected to any meaningful tests for side-impact crashes.

157. As a direct and proximate result of Defendants' breach of its implied covenants, the Plaintiff and the Class Members have been damaged in an amount to be determined at trial.

158. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

STATUTORY REMEDIES

159. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Canada Consumer Product Safety Act*, *Consumer Packaging and Labelling Act*, and/or other similar/equivalent legislation.

160. The Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and equivalent/similar legislation and common law in the other Canadian provinces and territories. 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.

A. Breach of the *Sale of Goods Act* and the Sale of Goods Legislation

161. At all times relevant to this Claim, Class Members were "buyer[s]", the Defendants were "seller[s]", the Evenflo Big Kid Booster Seats were "goods", and the transactions by which Class Members purchased the Evenflo Big Kid Booster Seats from the Defendants were "sale[s]" within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

162. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased the Evenflo Big Kid Booster Seats, are buyers located in those provinces for the purposes of the Sale of Goods Legislation. The Defendants carried on business in those provinces and territories and were, among other things, sellers for the purposes of the Consumer Protection Legislation.

163. The Defendants were aware that consumers purchased the Evenflo Big Kid Booster Seats for the particular purpose of protecting children in the event of a collision and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose and/or would be in merchantable condition.

164. Pursuant to s. 15 of the *Sale of Goods Act*, there were implied conditions as to merchantable quality or fitness of the Evenflo Big Kid Booster Seats whose purpose was obviously and primarily for the particular purpose of protecting children in the event of a collision, whose true nature could not have been revealed upon examination. The Evenflo Big Kid Booster Seats, when sold and at all times thereafter, were not merchantable and were not fit for the ordinary purpose for which they are used.

165. The Evenflo Big Kid Booster Seats were sold by the Defendants in the ordinary course of their business.

166. The Plaintiff and Class Members reasonably relied on the Defendants' skill and judgment in making the Representations.

167. The Defendants committed a fault or wrongful act by breaching the implied conditions as to fitness for a particular purpose and to merchantability. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed, the Defendants are liable for damages relating thereto. The Class is entitled to maintain an action for breach of warranty under s. 51 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act* and Consumer Protection Legislation

168. The Defendants are resident in Ontario for the purpose of s.2 of the *Consumer Protection Act*.

169. At all times relevant to this action, Class Members were "consumer[s]", the Defendants were "supplier[s]", the Evenflo Big Kid Booster Seats were "goods", and the transactions by which the Class Members purchased the Evenflo Big Kid Booster Seats were "consumer transaction[s]" within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

170. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased the Evenflo Big Kid Booster Seats for personal, family or household purposes and/or not for resale or for the purpose of carrying on business (as those concepts apply in the various provinces and territories), are consumers located in those provinces for the purposes of the Consumer Protection Legislation. The Defendants carried on business in those provinces and territories and were, among other things, suppliers for the purposes of the Consumer Protection Legislation.

171. The Defendants have engaged in unfair practices by making a representation to Class members, which were and are "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 Evenflo Big Kid Booster Seats have performance characteristics, uses, benefits, and/or qualities, which they do not have;

(b) Representing that the Evenflo Big Kid Booster Seats are of a particular standard, quality, or grade, which they are not;

(c) Representing that the Evenflo Big Kid Booster Seats are available for a reason that does not exist; and

(d) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact as such use or failure deceives or tends to deceive.

172. The Safety Misrepresentations were and are unconscionable because *inter alia* the Defendants knew or ought to have known that consumers are not reasonably able to protect their interests and are unable to receive a substantial benefit from the Evenflo Big Kid Booster Seats.

173. The Safety Misrepresentations were and are false, misleading, deceptive and/or unconscionable such that they constituted an unfair practice which induced Class Members to purchase the Evenflo Big Kid Booster Seats as a result of which they are entitled to damages.

174. The Plaintiff and the Class Members relied on the Defendants Safety Misrepresentations. Said reliance is established by the purchase of the Evenflo Big Kid Booster Seats. Had Class Members known that the Representations were false and misleading they would either not have purchased the Evenflo Big Kid Booster Seats or would not have paid such a high price.

C. Breach of the *Competition Act*

175. At all times relevant to this action, the Defendants' sale of the Evenflo Big Kid Booster Seats was a "business" and the Evenflo Big Kid Booster Seats were "product[s]" within the meaning of those terms as defined in s. 2 of the *Competition Act.*

176. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act* because the Representations.

(a) Were made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;

(b) Were made knowingly or recklessly;

(c) Were made to the public; and

(d) Were false and misleading in a material respect.

177. Class Members relied upon the representations by purchasing the Evenflo Big Kid Booster Seats and suffered damages and loss.

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

179. 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*.

180. 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.

D. Breach of the *Canada Consumer Product Safety Act*

181. At all times relevant to this action, the Defendants was "sell[ing]" the Evenflo Big Kid Booster Seats, which were "article[s]" and "consumer product[s]", that were a "danger to human health and safety" within the meaning of those terms as defined in s. 2 of the *Canada Consumer Product Safety Act*.

182. The Defendants' Representations regarding the Evenflo Big Kid Booster Seats were "advertise[ments]" within the meaning of that term as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

183. The Defendants knowingly manufactured, imported, advertised and/or sold the Evenflo Big Kid Booster Seats, which are a "danger to human health and safety" and in so doing, breached ss. 7 (a) and 8 (a) of the *Canada Consumer Product Safety Act*.

184. In addition, the Defendants packaged and labelled the Evenflo Big Kid Booster Seats in a false, misleading or deceptive manner (i) that may reasonably be expected to create an erroneous impression regarding the fact that it is not a danger to human health or safety and (ii) regarding its

certification related to its safety or its compliance with a safety standard", which is in breach of ss. 9 and 10 of the *Canada Consumer Product Safety Act*.

185. As such of these breaches, the Defendants are liable to pay damages under s. 41 of the *Canada Consumer Product Safety Act*.

E. Breach of the *Consumer Packaging and Labelling Act*

186. At all times relevant to this action, the Defendants were "dealer[s]", the Evenflo Big Kid Booster Seats were "prepackaged product[s]", the Evenflo Big Kid Booster Seat packaging were "labels", and the Defendants' representations thereon were "advertise[ments]" within the meaning of those terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

187. The Defendants labelled, marketed, packaged, promoted, advertised, and sold the Evenflo Big Kid Booster Seats with "false or misleading representation[s]" under s. 7 of the *Consumer Packaging and Labelling Act* in that they used expressions, words, figures, depictions and/or symbols descriptions and/or illustrations of the type, quality, performance, function, and/or method of manufacture or production that may reasonably be regarded as likely to deceive the Plaintiff and Class Members.

188. In addition, the Defendants sold and/or advertised the Evenflo Big Kid Booster Seats, which were packaged and/or labelled in such a manner that the Plaintiff and Class Members might, and were, reasonably be misled with respect to the quality of the product.

189. As such, the Defendants breached ss. 7 and 9 of the *Consumer Packaging and Labelling Act* and are liable to pay damages as a result under s. 20.

CAUSATION

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

191. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

192. By reason of the acts, omissions and breaches of legal obligations of the Defendants, Class Members have suffered injury, economic loss and damages, the particulars of which include, but are not limited to, the following general, special, and punitive damages:

A. General Damages (Non-Pecuniary Damages)

193. The general damages being claimed herein include:

a) Pain;

b) Suffering;

c) Stress/distress;

d) Anxiety/anguish;

e) Trouble; and

f) Inconvenience.

B. Special Damages

194. The special damages being claimed herein include the purchase price of the Evenflo Big Kid Booster Seats or, in the alternative, the cost of its replacement as well as any other damages as described herein.

C. Punitive (Exemplary) and Aggravated Damages

195. The Defendants has taken a cavalier and arbitrary attitude to their legal and moral duties to the Class Members.

196. At all material times, the conduct of the Defendants as set forth was malicious, deliberate, and oppressive towards their customers and the Defendants conducted themselves in a willful, wanton and reckless manner with regard to Class Members, such as to warrant punitive damages.

197. By engaging in such deplorable conduct and tactics, the Defendants committed a separate actionable wrong for which this Honourable Court should voice its disapproval and displeasure with an award of punitive damages.

198. In addition, it should be noted that it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations in Canada.

199. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

200. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct including tortious, statutory and otherwise, constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

201. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrongs 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 Evenflo Big Kid Booster Seats as a result of the Defendants' unfair practices and false representations which resulted in revenues and profit for the Defendants.

202. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Evenflo Big Kid Booster Seats and as such, *inter alia*, that:

(a) The Defendants has obtained an enrichment through revenues and profits from the sale of the Evenflo Big Kid Booster Seats;

(b) Class Members have suffered a corresponding deprivation in having paid the cost of the Evenflo Big Kid Booster Seats; and

(c) The benefit obtained by the Defendants and the corresponding detriment experienced by 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.

203. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of 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 Evenflo Big Kid Booster Seats;

(b) Class Members suffered a corresponding deprivation by purchasing the Evenflo Big Kid Booster Seats;

(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 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.

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

EFFICACY OF CLASS PROCEEDINGS

205. The members of the proposed Class potentially number in the thousands and are geographically dispersed. Because of this, joinder into one action is impractical and unmanageable. Class members are readily identifiable from information and records in the possession of the Defendants and third-party merchants like Walmart, Canadian Tire, Costco, Babies "R" Us/ Toys "R" Us, and Amazon.

206. Continuing with the Class Members' claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

207. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendants. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

208. This class proceeding overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

209. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the class.

210. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the class to effectively pursue their respective rights and have access to justice.

211. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

212. The Plaintiff pleads and relies on the *Class Proceedings Act,* the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Canada Consumer Product Safety act*, the *Consumer Packaging and Labelling Act*, and other Sale of Goods Legislation and Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

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

(a) Defendant Goodbaby Canada Inc. has its head office in Ontario;

(b) The Defendants engages in business with residents of Ontario;

(e) The Defendants intended that their businesses be run as one global business organization.

216. 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.

217. 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*.

SERVICE OUTSIDE ONTARIO

218. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) 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));

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Court File No./N° du dossier du greffe: CV-20-00083702-00CP

CANDICE BENNETT

Plaintiff

Court File No.:

EVENFLO COMPANY, INC. AND GOODBABY CANADA INC.

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: EVENFLO CO., INC. MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	Civil Action No. 1:20-md-02938-DJC
	CLASS ACTION
This Document Relates To: ALL ACTIONS	JURY TRIAL DEMANDED

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

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Plaintiffs, on behalf of themselves and all others similarly situated, in this action against Defendant Evenflo Company, Inc., allege the following based on personal knowledge, the investigation of counsel, and information and belief.

I. INTRODUCTION

1. The safety of our children is of paramount importance. Consequently, a company that sells consumer products purporting to mitigate the risk of injury and death to children involved in car accidents must be completely truthful about the safety and efficacy of its products and must back its claims of safety and safety testing with valid science. Such a company must not create false and misleading messaging about its products in the naked search for profits. This case arises because Defendant Evenflo Company, Inc. ("Evenflo") broke these simple rules. To better compete with its archrival Graco Children's Products, Evenflo labeled and advertised its "Big Kid" booster seats as: (1) "side impact tested"; and (2) safe for children as small as 30 pounds. But Evenflo knew as early as 1992 that booster seats were not safe for kids under 40 pounds and its so-called "side impact" tests were self-created and entirely unrelated to the actual forces in side impact collisions. Legitimate science and legitimate testing reveals that the Big Kid booster seats provide dubious benefit to children involved in side impact collisions, especially those under 40 pounds. Moreover, Evenflo itself sold its Big Kid booster seats as safe only for children *above 40 pounds* in Canada and other jurisdictions, and its internal documents make clear that it refused to raise that weight floor for Big Kid booster seats sold in the U.S.—over the objections of its own safety engineers—solely to ensure it sold more of them.

2. In 2018, side impact crashes were responsible for more than a quarter of deaths in vehicle collisions of children under 15. Though less common than head-on crashes, side impact collisions are more likely to result in serious harm—including traumatic brain injuries, spinal

injuries, and atlanto-occipital dislocation ("AOD"), which occurs when the ligaments attached to the spine are severed.[1]

3. Since the early 2000s, various states' laws have mandated the use of car seats for children. Though these laws vary in their specifics, they share a simple purpose: to prevent injury by ensuring that children are properly, and safely, restrained. However, while federal rules govern car seats' required crashworthiness in head-on collisions, neither individual states nor the federal government have developed side-impact testing rules for child safety seats.

4. As a result, when assessing side impact crashworthiness, parents and guardians are left to rely on the claims of seat manufacturers—who compete fiercely with one another for sales. Evenflo is among the major players in the child safety seat market and manufactures and sells a range of juvenile products including car seats, strollers, high chairs, and infant carriers.

5. Evenflo—in a cynical ploy to out-compete its main rival, Graco—intentionally misrepresents the safety of its products to parents and other consumers. Specifically, Evenflo prominently markets one of its most popular products, the "Big Kid" booster seat, as: (1) "side impact tested"; and (2) until recently, as safe for children as light as 30 pounds. But these claims are false: Evenflo's own testing demonstrates that the Big Kid booster seat leaves children—especially those under 40 pounds—vulnerable to serious head, neck, and spine injuries, and especially so in a side impact crash.

6. On its website and in its marketing, Evenflo tells parents and guardians that its in-house side-impact testing is "rigorous," simulates realistic conditions, and is equivalent to federal

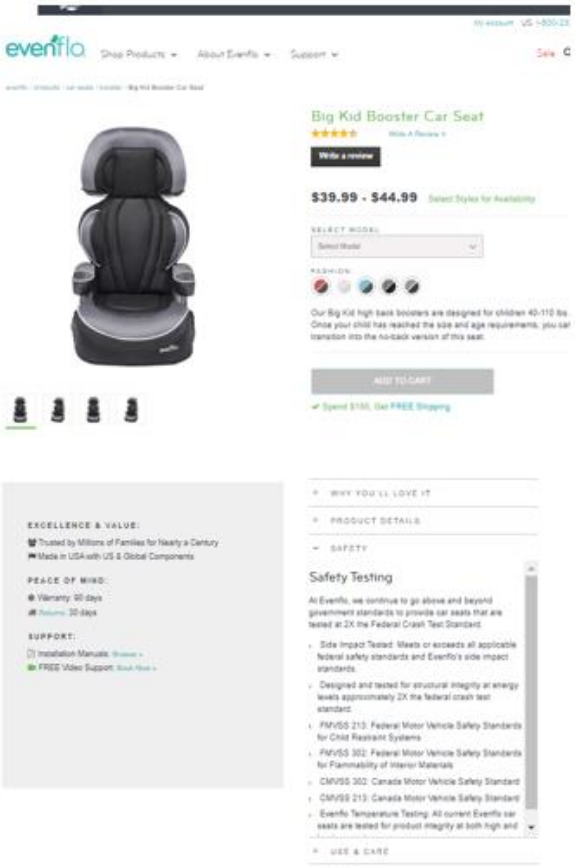
[1] According to a 2015 study, AOD (sometimes referred to as "internal decapitation") is "3 times more common in children than in adults" because, compared to adults, children have proportionally larger heads and laxer ligaments. Graham Hall et al., *Atlanto-occipital dislocation*, 6(2) WORLD J. ORTHOPEDICS 236–243 (2015), available at https://www.ncbi.nlm.nih.gov/pubmed/25793163.

testing. In reality, Evenflo's tests are anything but: videos reveal that when child-sized crash dummies seated in Big Kid booster seats are subjected to the forces of a T-bone collision, they are thrown far out of their shoulder belts.

7. In fact, the bar for "passing" Evenflo's side-impact testing is so low that there are only two ways the booster seats will fail: (1) if a child-sized dummy ends up on the floor, or (2) the booster seat itself breaks into pieces. The following video still is from an actual side-impact test performed by Evenflo as a basis for its claim that its seats are "side impact tested." Alarmingly, this Big Kid booster seat "passed" Evenflo's test even though the child-sized dummy is grotesquely stretched and tossed outside the seat:

8. Evenflo's top booster seat engineer has admitted that when children move in the manner depicted in the video, they can suffer catastrophic head, neck, and spinal injuries, or die.

But for more than 10 years, and despite possessing knowledge of its products' unequivocal dangers, Evenflo has marketed its side-impact testing as "rigorous," and has stated publicly that its "test simulates the government side impact tests conducted for automobiles." To date, Evenflo continues to prominently advertise its products as "side impact tested," going so far as to stitch a "side impact tested" label into many of its seats' backs:



9. In other words, only by creating a test that Evenflo Big Kid booster seats *always pass*—even when experts admit that children would be severely injured if they were in the tested seats—then announcing its products "pass" that test—can Evenflo aggressively market its Big Kid booster seats as "side impact tested."

10. Evenflo's dishonesty and deceptive marketing strategy has been phenomenally successful. Since launch, Evenflo has sold more than 18 million Big Kid booster seats, making the product one of the best-selling models in the United States. The keys to this success are in no small part due to Evenflo's refusal (until recently) to limit the weight range to children over 40 pounds and its false claim that its booster seats have evidenced that they are safe through "rigorous" side impact tests, when in truth, the tests are a sham. Evenflo has likely earned hundreds of millions of dollars of profits on these dubious "safety products" that, in reality, provide only a mere shadow of the safety Evenflo claims.

11. Evenflo has now subjected millions of children to the risk of grave injury and death. Meanwhile, it continues to hold itself out to the public as keenly concerned with children's safety. According to Sarah Haverstick, a "Safety Advocate" and "Child Passenger Safety Technician" at Evenflo, "safety is a word that is embedded into [Evenflo's] DNA and will always be our number one priority for our customers." Evenflo boldly makes these statements to the public in it marketing materials.

12. Had Evenflo truthfully disclosed and reported that the safe weight range of its seats was above 40 pounds, virtually no parent would purchase the booster seat for a child weighing less than 40 pounds. Likewise, had Evenflo disclosed the real results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat. Instead, Evenflo kept the proper weight range and these test results secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe for children as light as 30 pounds, especially in side impact collisions.

13. Plaintiffs bring this proposed class action for damages and injunctive relief on behalf of themselves and all other persons and entities nationwide who purchased a "Big Kid"

booster seat manufactured by Evenflo between 2008 and the present. Plaintiffs bring this action for violation of relevant state consumer protection acts and for fraudulent concealment on behalf of state classes of Big Kid booster seat owners.

II. PARTIES

A. Plaintiffs

1. Alabama Plaintiff

a. Natalie Davis

14. Plaintiff Natalie Davis is an Alabama citizen residing in Pell City, Alabama.

15. In 2018, Plaintiff Davis purchased a Big Kid booster seat for her son at a Bargain Hunt located in Birmingham, Alabama.

16. Prior to her purchase, Plaintiff Davis researched the Evenflo Big Kid Booster seat and various other seats online, and ultimately purchased the Big Kid Booster seat because of its advertised side impact protection. Plaintiff Davis also recalls seeing Evenflo's "side impact tested" labeling on the seat's box at the time of purchase, and relied on these representations in making her purchase decision.

17. Had Plaintiff Davis known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

2. Alaska Plaintiff

a. Jilli Hiriams

18. Plaintiff Jilli Hiriams is an Alaska citizen residing in Chugiak, Alaska.

19. In or about August 2016, Plaintiff Hiriams purchased a Big Kid booster seat at the Fred Meyer in Eagle Rock, Alaska, when her oldest child was approximately 40 pounds. In or about August 2017, Plaintiff Hiriams purchased a second Big Kid booster seat from the Walmart

in Eagle Rock, Alaska, when her next oldest child was about 35 pounds. In or about October 2018, Plaintiff Hiriams purchased a third Big Kid booster seat when her next oldest child was approximately 30 pounds.

20. At the time of her first purchase and each subsequent purchase, Plaintiff Hiriams reviewed Evenflo's marketing and packaging materials. She particularly noted Evenflo's claims of safety and that the seat was safe for children from 30–110 pounds and had been "side impact" tested. The weight range was particularly important because Ms. Hiriams has four children and she wanted her younger children to be able to use the same seat once they reached the minimum age. The weight range and claimed "side impact" testing were the primary reasons that Ms. Hiriams chose the Evenflo booster seats over the other available products.

21. Had Plaintiff Hiriams known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seats, or would have paid less for them.

3. California Plaintiffs

a. Mike Xavier

22. Plaintiff Mike Xavier is a California citizen residing in Roseville, California.

23. In approximately 2012, Plaintiff Xavier purchased eight Evenflo Big Kid booster seats. Plaintiff purchased some of these seats at a Walmart in Sacramento, California, and others at a Babies R Us in Daly City, California. Plaintiff Xavier not only has twins but also, at the time of purchase, owned four vehicles. For this reason, he wanted a set of seats for each vehicle.

24. In May 2011, Plaintiff Xavier, his wife, and his two children were in a side impact collision that resulted in their vehicle being totaled. For this reason, side impact crashworthiness was a significant part of Plaintiff Xavier's purchase decision. Plaintiff Xavier distinctly remembers Evenflo's marketing of its Big Kid booster seats as "side impacted tested"—indeed, these claims

"set his mind" on purchasing them. At the time of his purchase in 2012, Plaintiff Xavier's twins were approximately three years old and weighed approximately 30 pounds.

25. Had Plaintiff Xavier known about the defective nature of Evenflo's Big Kid booster seats, he would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Desinae Williams

26. Plaintiff Desinae Williams is a California citizen residing in Mojave, California.

27. In 2018, Plaintiff Williams purchased an Evenflo Big Kid booster seat for her son at a Target store located in California. Evenflo's affirmative representations concerning the Big Kid booster seat's supposed safety and quality were material to Plaintiff Williams, and she relied on those representations in connection with her purchase. Plaintiff Williams further believed Evenflo was a trusted brand and that its Big Kid booster seat would provide protection from side impact collisions.

28. Had Plaintiff Williams known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

c. Keith Epperson

29. Plaintiff Keith Epperson is a citizen of the State of California, residing in the City of Atascadero.

30. In 2013, Plaintiff Epperson purchased an Evenflo Big Kid booster seat for his child at a Walmart in Paso Robles, California.

31. Prior to purchase, Plaintiff Epperson researched various seats online and in-store. He ultimately purchased the Big Kid model because he believed Evenflo was a trusted brand and

would provide safety for his child in the event of an accident, especially in the case of a side impact collision.

32. In particular, Plaintiff Epperson perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government and he believed that the seat was safe for use by children under 40 pounds, because the labeling said so.

33. Had Plaintiff Epperson known about the unsafe nature of Evenflo's Big Kid Booster seats, he would not have purchased his seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

d. Mona-Alicia Sanchez

34. Plaintiff Mona-Alicia Sanchez is a California citizen residing in Moreno Valley, California.

35. On or about February 4, 2017, Plaintiff Sanchez purchased an Evenflo Big Kid High Back booster seat at a Walmart located in Fontana, California.

36. Prior to purchasing the Big Kid booster seat, Plaintiff Sanchez reviewed the packaging for it, which she specifically noted included the statement that the seat was safe for children as light as 30 pounds. This claim was critically important to Plaintiff Sanchez because she wanted to make sure that the booster seat she purchased would be safe for her son to use. He was approximately 32 pounds at the time she purchased the booster seat.

37. Had Plaintiff Sanchez known about the unsafe nature of Evenflo's Big Kid Booster seats, she would not have purchased her seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

e. Heather Hampton

38. Plaintiff Heather Hampton is a citizen of California residing in Wilton, California.

39. On or about October 29, 2019, Plaintiff Hampton purchased two Evenflo Big Kid Sport High Back Booster Seats for $29.88 each at Walmart in Galt, California, for her two children who were four and five years old.

40. Because Plaintiff Hampton's children weighed 33 pounds and 36 pounds when she was shopping for booster seats, she was looking for a booster seat that was safe for children weighing less than 40 pounds. Evenflo's assurance that its Big Kid booster seat was safe for children weighing 30 to 110 pounds was, therefore, critical to her purchase decision.

41. Had Plaintiff Hampton known about the unsafe nature of Evenflo's Big Kid Booster seats, she would not have purchased her seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

f. Elise Howland

42. Plaintiff Elise Howland is a citizen of Illinois residing in Beecher City, Illinois.

43. In approximately 2014, when she resided in California, Plaintiff Howland purchased an Evenflo Big Kid booster seat for her child at a Walmart store located in San Diego, California. Plaintiff Howland recalls seeing Evenflo's "side impact tested" labeling and safety ratings on the seat's box at the time of purchase and relied on these representations in making her purchase decision. Plaintiff Howland also purchased the seat because it was marketed for children weighing thirty pounds or more. At the time of purchase, Plaintiff Howland's child weighed approximately forty pounds.

44. Had Plaintiff Howland known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

4. Colorado Plaintiff

a. Casey Hash

45. Plaintiff Casey Hash is a citizen of the State of Colorado residing in the City of Pagosa Springs.

46. In 2010, Plaintiff Hash purchased an Evenflo Big Kid booster seat for her child at a Walmart in Durango, Colorado.

47. Prior to purchase, Plaintiff Hash researched various seats through word-of-mouth, online, and in-person at Walmart by comparing all of the available products.

48. At the time of her purchase, Plaintiff Hash's child had just reached 30 pounds in weight. Plaintiff Hash purchased the Big Kid model because of its prominent representations that it was safe for children at or above the 30-pound weight range. Based on the representations on the product packaging and online, she further believed that the Big Kid booster seats had undergone rigorous safety testing for side impact collisions.

49. Plaintiff Hash's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing and that the safe use weight range was at or above 30 pounds.

50. Had Plaintiff Hash known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her booster seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

5. Florida Plaintiffs

a. Karyn Aly

51. Plaintiff Karyn Aly is a citizen of Florida residing in Orlando, Florida.

52. On or about August 12, 2018, Plaintiff Aly purchased an Evenflo Big Kid LX AMP high back booster seat from Amazon. Plaintiff Aly's daughter had seen this booster seat in a

friend's car and told Plaintiff Aly that she wanted the same seat. Prior to purchase, Plaintiff Aly read the advertising and marketing materials for the Big Kid Booster seat that were displayed on the Amazon website. Plaintiff Aly considered it important that the seat indicated it was "side impact tested" and the appearance of the seat with the side wings made it appear to her to be safe. Plaintiff Aly particularly noted the advertised safety features and that it was advertised as "side impact tested" which she reasonably understood to mean that the booster seat had been tested and was safe for children in the event of a side impact collision.

53. Based upon the packaging of the Big Kid booster seat and the marketing and advertising materials that she reviewed on the Amazon website, Plaintiff Aly believed that the Big Kid booster seat was a safe and appropriate booster seat for her daughter.

54. Had Plaintiff Aly known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Debora de Souza Correa Talutto

55. Plaintiff Debora de Souza Correa Talutto is a citizen of Florida residing in Lake Mary, Florida.

56. On or about April 30, 2018, Plaintiff Talutto purchased two Big Kid LX AMP High Back booster seats from Amazon.com. Plaintiff Talutto carefully reviewed the product information on Amazon and provided by Evenflo in its marketing materials and on its packaging. In particular, since Plaintiff Talutto's son at the time was just over 30 pounds, the safe weight range provided by Evenflo was important and a material consideration in her purchase decision. In addition, the fact that Evenflo described and labeled the booster seats as "Side impact tested" caused her to believe that the car seats would be safe, particularly in the event of a collision or side impact collision.

57. Had Plaintiff Talutto known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased these seats, would have paid less for them, or instead would have purchased one of many safer available alternatives.

6. Georgia Plaintiff

a. Cathy Malone

58. Plaintiff Cathy Malone is a citizen of Georgia residing in Buford, Georgia.

59. In March 2019, Plaintiff Malone purchased an Evenflo Big Kid Booster seat at a Walmart store in Buford, Georgia. Prior to purchase, Plaintiff Malone read the advertising and marketing materials for the Big Kid Booster seat that were displayed on the Walmart website and were also prominent on the box that her booster seat was packaged in. Plaintiff Malone particularly noted the advertised safety features and weight-appropriateness of the seat for her grandson, including that it was advertised as "side impact tested" which she reasonably understood to mean that the booster seat had been tested and was safe for children in the event of a side impact collision.

60. Based upon the packaging of the Big Kid booster seat and the marketing and advertising materials that she reviewed on the Walmart website, Plaintiff Malone believed that the Big Kid booster seat was a safe and appropriate booster seat for her grandson.

61. Had Plaintiff Malone known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

7. Illinois Plaintiff

a. Penny Biegeleisen

62. Plaintiff Penny Biegeleisen is a citizen of Illinois residing in Irvington, Illinois.

63. Since 2015, Plaintiff Biegeleisen has purchased five Evenflo Big Kid booster seats for her grandchildren at a Walmart store located in Centralia, Illinois, and online from Walmart.

Plaintiff Biegeleisen paid particular attention to the packaging and marketing of the booster seats she purchased to ensure they would be safe for her grandchildren to use.

64. Had Plaintiff Biegeleisen known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her seats, would have paid substantially less for them, or would have purchased a safer available alternative.

8. Indiana Plaintiffs

a. Jessica Greenshner

65. Plaintiff Jessica Greenshner is a citizen of Indiana residing in Fishers, Indiana.

66. On or about January 5, 2019, Plaintiff Greenshner purchased a Big Kid booster seat for her child who was 5 years of age at the time of purchase, at Amazon.com. Plaintiff Greenshner recalls reviewing information stating the seat was designed to keep children between 30 and 110 pounds safe, and safe in the event of a side impact crash, that the seat exceeded NHTSA recommendations, that it was rigorously tested, and that the boost in height decreased the risk of injury. These statements and the package labeling reasonably led Plaintiff Greenshner to believe that the Big Kid booster seat she purchased would be safe for her child to use.

67. Had Plaintiff Greenshner known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Becky Brown

68. Plaintiff Becky Brown is a citizen of Indiana residing in Danville, Indiana.

69. In June 2019, Plaintiff Brown purchased an Evenflo Big Kid booster seat at a big box store in Avon, Indiana.

70. Prior to purchase, Plaintiff Brown compared the various car seats available in the store.

71. At the time of her purchase, Plaintiff Brown's grandson had just reached 30 pounds in weight. Plaintiff purchased the Big Kid model because of its prominent representations that it was safe for children at or above 30 pounds.

72. Plaintiff Brown's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations that the safe use weight range was at or above 30 pounds.

73. Had Plaintiff Brown known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her booster seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

9. Iowa Plaintiff

a. Anna Gathings

74. Plaintiff Anna Gathings is an Iowa citizen residing in Davenport, Iowa.

75. In 2020, Plaintiff Gathings purchased an Evenflo Big Kid booster seat for her child at a Walmart located in Davenport, Iowa.

76. Prior to purchase, Plaintiff Gathings researched various seats online (including seats made by Graco and other companies), and ultimately purchased the Big Kid model not only because it could accommodate her child as she grew, but also because of its advertised side impact protection.

77. Had Plaintiff Gathings known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

10. Kentucky Plaintiff

a. Joseph Wilder

78. Plaintiff Joseph Wilder is a Kentucky citizen residing in Independence, Kentucky.

79. In July 2018, Plaintiff Wilder purchased two Evenflo Big Kid LX booster seats for his son at a Walmart in Fort Wright, Kentucky. At the time, Plaintiff Wilder's son weighed approximately 38 pounds.

80. Plaintiff Wilder purchased the Evenflo Big Kid LX car seats after reading the packaging which included representations that the Big Kid LX was safe for children who weighed as little as 30 pounds, that "SAFETY IS OUR #1 PRIORITY," and that it was "Side Impact Tested." Plaintiff Wilder reasonably relied on these statements to reach the conclusion that the Big Kid booster seat would be safe for his son in the event of a collision, and especially safe in the event of a side impact collision.

81. Had Plaintiff Wilder known about the defective nature of Evenflo's Big Kid booster seats, he would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

11. Louisiana Plaintiff

a. Talise Alexie

82. Plaintiff Talise Alexie is a citizen of Louisiana residing in Slidell, St. Tammany Parish, Louisiana.

83. In April 2016, Plaintiff Alexie purchased an Evenflo Big Kid Booster Seat for $35.83 for her five year-old daughter who weighed less than 40 pounds.

84. As a reasonable consumer, Plaintiff Alexie relied on the weight range provided by Evenflo in concluding that the booster seat would be safe for her daughter. Plaintiff Alexie also perceived Defendant's representations regarding side impact collision testing as an indication that the Booster Seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

85. Plaintiff Alexie's decision to purchase the Booster Seat was directly impacted by Defendant's representations regarding the safe weight range and its supposedly rigorous side impact collision testing.

86. Had Plaintiff Alexie known of the significant safety risks posed by Defendant's Booster Seat, and the low threshold for Defendant giving its own Booster Seat a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

12. Maine Plaintiff

a. Jeffrey Lindsey

87. Jeffrey Lindsey is a citizen of Maine, residing in Bangor, Maine.

88. On or about December 22, 2019, Plaintiff Lindsey purchased an Evenflo Big Kid booster seat from Amazon.

89. Plaintiff Lindsey purchased the seat for use by his daughter, who was under 40 pounds at that time. Plaintiff Lindsey carefully researched the various car seat offerings on line and purchased the Big Kid booster seat specifically because: (1) his daughter fell within the published weight range of 30–110 pounds; and (2) the Big Kid booster seat was expressly advertised as having been side impact tested and thus safe for kids, like his daughter, in the event of a collision.

90. Plaintiff Lindsey's decision to purchase the Big Kid booster seats was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing and that the safe use weight range was at or above 30 pounds.

91. Had Plaintiff Lindsey known about the defective nature of Evenflo's Big Kid booster seats, he would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

13. Massachusetts Plaintiff

a. Edith Brodeur

92. Plaintiff Edith Brodeur is a citizen of Massachusetts, residing in West Springfield, Hampden County, Massachusetts.

93. In or around 2016, Plaintiff purchased an Evenflo Big Kid booster seat for use by her granddaughter.

94. Safety of the booster seat was the most important factor for Plaintiff Brodeur in making her purchase decision.

95. As a reasonable consumer, Plaintiff Brodeur perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government, and she believed that the seat was safe for use by children under 40 pounds, because the labeling said so.

96. Plaintiff Brodeur's decision to purchase the Big Kid booster seats was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing and that the safe use weight range was at or above 30 pounds.

97. Had Plaintiff Brodeur known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own Booster Seat a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

14. Michigan Plaintiffs

a. Marcella Reynolds

98. Plaintiff Marcella Reynolds is a Michigan citizen residing in Lansing, Michigan.

99. In 2018, Plaintiff Reynolds purchased an Evenflo Big Kid booster seat for her grandson at a Walmart in Eastwood Towne Center, which is located in Lansing, Michigan.

100. Prior to purchase, Plaintiff Reynolds researched various seats online (including seats made by Graco and other companies), and ultimately purchased the Big Kid model not only because it could accommodate her grandson as he grew, but also because of its advertised side impact protection.

101. Had Plaintiff Reynolds known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Theresa Holliday

102. Plaintiff Theresa Holliday is a Michigan citizen residing in Detroit, Michigan.

103. In 2019, Plaintiff Holliday purchased an Evenflo Big Kid booster seat for her daughter at a Walmart store located in Michigan. Plaintiff Holliday recalls seeing Evenflo's safety representations on the seat's box at the time of purchase and relied on these representations in making her purchase decision. Plaintiff Holliday also purchased the seat because it was marketed for children weighing thirty pounds or more. At the time of purchase, Plaintiff Holliday's daughter weighed approximately thirty-three pounds.

104. Had Plaintiff Holliday known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

c. Amy Sapeika

105. Plaintiff Amy Sapeika is a Michigan citizen residing in Bloomfield Hills, Michigan.

106. On or about April 3, 2014, Plaintiff Sapeika purchased a new Evenflo Big Kid booster seat from Amazon and successively used it for her two eldest children.

107. Safety, including side impact protection, was a particular concern for Plaintiff Sapeika because her children were small for their ages.

108. Plaintiff Sapeika relied upon the description of the "Big Kid" booster seat displayed on Amazon's website where she purchased the car seat.

109. At the time she first used the "Big Kid" booster seat for each child, they weighed less than 40 pounds.

110. Based upon her belief that the "Big Kid" booster seat provided adequate safety, including side impact protection, for her children, she encouraged her mother to buy two more "Big Kid" booster seats to use when she visited her parents in California with her children.

111. Plaintiff Sapeika would not have purchased the "Big Kid" booster seat if she had known it would not safely protect her child, and certainly would not have paid what she did for the booster seat, or would have purchased one of many safer alternatives.

15. Minnesota Plaintiffs

a. Joshua Kukowski

112. Plaintiff Joshua Kukowski is a citizen of Minnesota residing in Waconia, Minnesota.

113. In 2016, Plaintiff Kukowski purchased a Big Kid booster seat from the Walmart store in Waconia, Minnesota. Plaintiff Kukowski bought the booster seat at least in part because Evenflo advertised it as safe for kids as small as 30 pounds and as passing side impact testing, an important consideration because of Plaintiff Kukowski's concern for the safety of his child.

114. Had Plaintiff Kukowski known about the defective nature of Evenflo's Big Kid booster seats, he would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Kari Forhan

115. Kari Forhan is a citizen of Minnesota residing in Winona, Minnesota.

116. In late 2018 or early 2019, Plaintiff Forhan purchased an Evenflo Big Kid booster seat from Target.

117. Prior to purchase, Plaintiff Forhan compared the various car seats available for sale at Target.

118. Plaintiff Forhan purchased the Big Kid model because she thought it would keep her child safe.

119. Plaintiff Forhan's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding its safety.

120. Had Plaintiff Forhan known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her booster seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

16. Missouri Plaintiff

a. Emily Naughton

121. Plaintiff Emily Naughton is a citizen of Missouri residing in Franklin County, Missouri.

122. In October 2018, Plaintiff Naughton purchased an Evenflo Big Kid booster seat at a Walmart in Washington, Missouri, for $34.88 for use by her four year-old child. When Plaintiff Naughton installed the Big Kid booster seat, she was concerned because it seemed cheaply made.

123. As a reasonable consumer, Plaintiff Naughton paid attention to Evenflo's labeling, which indicated the Big Kid booster seat was safe for children as light as 30 pounds. Plaintiff Naughton perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

124. Plaintiff Naughton's decision to purchase the Booster Seat was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing.

125. Had Plaintiff Naughton known of the significant safety risks posed by Defendant's Booster Seat, and the low threshold for Defendant giving its own Booster Seat a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

17. New Jersey Plaintiff

a. Karen Sanchez

126. Plaintiff Karen Sanchez is a New Jersey citizen residing in Cape May Courthouse, New Jersey.

127. In August 2018, Plaintiff Sanchez purchased an Evenflo Big Kid Sport (Model No. 36511910) from her local Walmart store. Evenflo's affirmative representations concerning the Big Kid booster seat's supposed safety and quality were material to Plaintiff Sanchez, and she relied on those representations in connection with her decision to purchase the booster seat. Plaintiff Sanchez also purchased the seat because it was marketed for children weighing 30 pounds or more and at the time of purchase, Plaintiff's children were five and three, and she wanted a booster that both could use.

128. Had Plaintiff Sanchez known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

18. New York Plaintiffs

a. Danielle Sarratori

129. Plaintiff Danielle Sarratori is a New York citizen residing in Waterloo, New York.

130. In 2019, Plaintiff Sarratori purchased four Evenflo Big Kid booster seats for her children—two at a Walmart store located in Waterloo, New York and two more online through Amazon. Evenflo's affirmative representations concerning the Big Kid booster seat's supposed safety and quality were material to Sarratori, and she relied on those representations in connection with her purchases. Plaintiff Sarratori also purchased the seats because they were marketed for children weighing thirty pounds or more. At the time of her purchases, Plaintiff Sarratori's children weighed less than forty pounds.

131. Had Plaintiff Sarratori known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her seat or would have paid substantially less for it.

b. David Schnitzer

132. Plaintiff David Schnitzer is a New York citizen residing in Wantagh, Nassau County, New York.

133. In October 2015, Plaintiff Schnitzer purchased an Evenflo Big Kid booster seat for $39.99 for use by his five year-old son who weighed less than 40 pounds.

134. In purchasing the Evenflo Big Kid booster seat, Plaintiff Schnitzer relied upon Evenflo's statement that the booster seat was safe for children weighing 30 to 110 pounds and on its representation that the booster seat had been side impact tested.

135. As a reasonable consumer, Plaintiff Schnitzer perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

136. Plaintiff Schnitzer's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding the safe weight range and Defendant's supposedly rigorous side impact collision testing.

137. Had Plaintiff Schnitzer known of the significant safety risks posed by Defendant's Big Kid booster seat, and the low threshold for Defendant giving its own booster seat a passing grade regarding side impact testing, he would not have purchased this seat.

19. North Carolina Plaintiffs

a. Carla Matthews

138. Plaintiff Carla Matthews is a North Carolina citizen residing in Candler, North Carolina.

139. In 2012, Plaintiff Matthews purchased six Big Kid booster seats for her three youngest children—then between the ages of five and six—at a Babies R Us in Asheville, North Carolina. Plaintiff Matthews recalls reviewing information stating the seat was designed to keep children between 30 and 110 pounds safe in a side impact crash, that the seat exceeded NHTSA recommendations, that it was rigorously tested, and that the boost in height decreased the risk of injury.

140. In July 2013, Plaintiff Matthews was in a side impact crash: a man pulled out of a gas station and hit the front wheel and fender of Plaintiff Matthews' vehicle. At the time, Plaintiff Matthews' twins were in the car. Plaintiff Matthews recalls that, when her vehicle was struck, her twins' heads moved in a manner similar to that depicted in this complaint (see *infra*). Both were sore afterwards, and Plaintiff Matthews called a nurse urgent care line in order to ask whether there were symptoms to which she should be attentive.

141. Had Plaintiff Matthews known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seat, or would have paid less for it.

b. Sudhakar Ramasamy

142. Plaintiff Sudhakar Ramasamy is a North Carolina citizen residing in Apex, Wake County, North Carolina.

143. In September 2019, Plaintiff Ramasamy purchased an Evenflo Big Kid Sport High Back booster seat at a Walmart in Cary, North Carolina, for $29.88 for use by his five-year-old daughter who weighed less than 40 pounds.

144. Plaintiff Ramasamy purchased the Big Kid booster seat because he believed that the booster seat was well built and safe and relied upon the fact that the website for the Big Kid booster seat represented that it had been side impact tested and indicated the booster seat was safe for children as light as 30 pounds.

145. As a reasonable consumer, Plaintiff Ramasamy perceived Defendant's representations regarding side impact collision testing as an indication that the Booster Seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

146. Plaintiff Ramasamy's decision to purchase the booster seat was directly impacted by Defendant's representations regarding the safe weight range and its supposedly rigorous side impact collision testing.

147. Had Plaintiff Ramasamy known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own booster seat a passing grade regarding side impact testing, he would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

20. Ohio Plaintiff

a. Cassandra Honaker

148. Cassandra Honaker is a citizen of Ohio residing in Marietta, Ohio.

149. In June 2018, Plaintiff Honaker purchased an Evenflo Big Kid booster seat from Walmart.

150. Prior to purchase, Plaintiff Honaker researched various car seats online and in-person at Walmart by comparing all of the available products.

151. Based on the representations on the product packaging and online, Plaintiff Honaker believed that the Big Kid booster seats had undergone rigorous safety testing for side impact collisions.

152. Plaintiff Honaker's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing.

153. Had Plaintiff Honaker known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased her booster seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

21. Oklahoma Plaintiff

a. Linda Mitchell

154. Plaintiff Linda Mitchell is a citizen of Oklahoma residing in Stigler, Oklahoma.

155. In 2018, Plaintiff Mitchell purchased four Big Kid booster seats for her four grandchildren—then between the ages of three and six—at a Walmart located in Stigler, Oklahoma.

156. Prior to her purchase, Plaintiff Mitchell researched the Evenflo Big Kid booster seat and various other seats online, and ultimately purchased the Big Kid booster seats not only because it was a respected brand, but also because of its advertised side impact protection. Plaintiff Mitchell recalls seeing representations that the Big Kid booster seats were safe for children weighing as little as 30 pounds.

157. Had Plaintiff Mitchell known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seats, would have paid less for them, or would instead have purchased one of many safer available alternatives.

22. Pennsylvania Plaintiffs

a. Hailey Lechner

158. Plaintiff Hailey Lechner is a Pennsylvania citizen residing in Pulaski, Pennsylvania.

159. Plaintiff Lechner purchased a Big Kid booster seat for her daughter in 2017 at a KMart located in New Castle, Pennsylvania. Plaintiff Lechner recalls seeing Evenflo's "side impact tested" labeling on the seat's box at the time of purchase, and relied on these representations in making her purchase decision. Plaintiff Lechner also purchased the seat because it was marketed for children weighing 30 pounds or more. At the time, Plaintiff Lechner's daughter weighed approximately 30 pounds.

160. Plaintiff Lechner recalls that her daughter never appeared to sit in the seat properly, and that the seat seemed cheaply made. In 2017, Plaintiff Lechner was in a car accident that resulted in her car being totaled. Following the crash, Plaintiff Lechner disposed of her Evenflo seat and purchased a higher quality one, for which she was reimbursed by her insurance company.

161. Had Plaintiff Lechner known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Lauren Mahler

162. Plaintiff Lauren Mahler is a Pennsylvania citizen residing in Clarks Summit, Pennsylvania.

163. In 2018, Plaintiff Mahler purchased an Evenflo Big Kid booster seat for her granddaughter at a Walmart in Dickson City, Pennsylvania.

164. Plaintiff Mahler bought the booster seat at least in part because Evenflo advertised it as passing side impact testing, an important consideration for her because of her concern for the safety of her granddaughter.

165. Had Plaintiff Mahler known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

23. South Carolina Plaintiffs

a. Tarnisha Alston

166. Plaintiff Tarnisha Alston is a citizen of South Carolina residing in Yemassee County, South Carolina.

167. In December 2018, Plaintiff Alston purchased an Evenflo Big Kid booster seat at Walmart in Beaufort, South Carolina, for $52.00 for her four-year-old daughter.

168. Plaintiff Alston purchased the Big Kid booster seat because she believed that it would provide car safety for her daughter, but when she installed it, the booster seat did not seem to be well made.

169. As a reasonable consumer, Plaintiff Alston perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

170. Plaintiff Alston's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding its supposedly rigorous side impact collision testing.

171. Had Plaintiff Alston known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own booster seats a passing grade

regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

b. Rachel Huber

172. Plaintiff Rachel Huber is a citizen of South Carolina residing in Myrtle Beach, South Carolina.

173. In December 2016, Plaintiff Huber purchased an Evenflo Big Kid booster seat from a Walmart store in Watertown, Wisconsin. Plaintiff Huber was particularly impressed with the product advertisements and packaging, which indicated that the Big Kid booster seat was a safe, side impact tested car seat. Because of these representations, Plaintiff Huber reasonably believed that the Big Kid booster seat would be safe for her children, especially in the event of a side impact collision.

174. Had Plaintiff Huber known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

24. Tennessee Plaintiff

a. Ashley Miller

175. Plaintiff Ashley Miller is a Tennessee citizen residing in Portland, Tennessee.

176. In early 2020, Plaintiff Miller purchased an Evenflo Big Kid booster seat for her son at a Walmart store in Gallatin, Tennessee. Plaintiff Miller recalls seeing Evenflo's "side impact tested" labeling and safety ratings on the seat's box at the time of purchase and relied on these representations in making her purchase decision. Plaintiff Miller also purchased the seat because it was marketed for children weighing thirty pounds or more. At the time of purchase, Plaintiff Miller's son weighed approximately 38 pounds.

177. Had Plaintiff Miller known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

25. Texas Plaintiff

a. Lindsey Brown

178. Plaintiff Lindsey Brown is a Texas citizen residing in Brookshire, Texas.

179. Plaintiff Lindsey Brown purchased an Evenflo Big Kid model booster seat for her son in 2018 from a Walmart in Katy, Texas. Prior to her purchase, Plaintiff Lindsey Brown researched various other seats, including models made by Graco, by reading Amazon reviews and ratings and talking to friends, including one friend who had the same Evenflo car seat.

180. At the time of purchase, Plaintiff Lindsey Brown assumed that booster seats sold in the United States were subject to certain safety guidelines and would be safe for use by her son. Plaintiff Lindsey Brown also looked at the box of the Big Kid seat she purchased to make sure her son was within the weight specifications—and even weighed him before going car seat shopping.

181. Had Plaintiff Lindsey Brown known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

26. Washington Plaintiff

a. Lindsey Reed

182. Plaintiff Lindsey Reed is a citizen of Washington residing in Spokane, Washington.

183. In October 2019, Plaintiff Reed purchased an Evenflo Big Kid AMP High Back booster seat on Amazon for $44.99 for use by her son who weighed less than 40 pounds.

184. Plaintiff Reed relied upon the fact that the listing on Amazon said that the Big Kid booster seat was safe for children weighing 30 to 110 pounds, but when she installed the booster seat, she was concerned whether it would be safe for children as little as 30 pounds.

185. Plaintiff Reed's son was injured in a car accident while using the Evenflo Big Kid booster seat.

186. As a reasonable consumer, Plaintiff Reed believed Evenflo's representations concerning the safe weight range of the Big Kid booster seat and she perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

187. Plaintiff Reed's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding safety and its supposedly rigorous side impact collision testing.

188. Had Plaintiff Reed known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own booster seat a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

27. West Virginia Plaintiffs

a. Janette D. Smarr

189. Plaintiff Janette D. Smarr is a West Virginia citizen residing in Parkersburg, West Virginia.

190. Plaintiff Smarr purchased two Evenflo Big Kid model booster seats for her twins in 2019 from a Walmart located at 2900 Pike Street, Parkersburg, West Virginia. Prior to her

purchase, Plaintiff Smarr researched by reading product reviews about the safety of the Evenflo Big Kid booster seats, including that the seats were safe for children weighing less than 40 pounds.

191. At the time of purchase, Plaintiff Smarr assumed that booster seats sold in the United States were subject to certain safety guidelines, and would be safe for use by her twins. The information on the packaging of the seats she purchased indicated that the seats had passed rigorous safety tests, including "side impact" testing.

192. Had Plaintiff Smarr known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seats, would have paid less for them, or instead would have purchased one of many safer available alternatives.

b. Kristin Atwell

193. Plaintiff Kristin Atwell is a West Virginia citizen residing in Huntington, West Virginia.

194. Plaintiff Atwell purchased an Evenflo Big Kid model booster seat for her son on or about May 12, 2020, from a Target in Barboursville, West Virginia. Prior to her purchase, Plaintiff Atwell researched by reading product reviews about the safety of the Evenflo Big Kid booster seats, including that the seats were safe for children weighing less than 40 pounds.

195. Prior to purchasing the Big Kid booster seat for her four-year-old son, Plaintiff Atwell researched booster seats extensively because she needed a booster seat that was safe for children under 40 pounds. The Evenflo Big Kid booster seat was the only booster seat that she could find that stated the seat was safe for children as light as 30 pounds. This claim was critically important to Plaintiff Atwell because she wanted to make sure that the booster seat she purchased would be safe for her son to use. He was approximately 34 pounds at the time she purchased the booster seat.

196. Had Plaintiff Atwell known about the defective nature of Evenflo's Big Kid booster seats, she would not have purchased the seats, would have paid less for them, or instead would have purchased one of many safer available alternatives.

28. Wisconsin Plaintiff

a. Najah Rose

197. Plaintiff Najah Rose is a citizen of Wisconsin residing in Oak Creek, Wisconsin.

198. In March 2017, Plaintiff Rose purchased an Evenflo Big Kid booster seat to use for her granddaughter who weighed less than 40 pounds.

199. When Plaintiff Rose installed the booster seat, she questioned how safe it would actually be given how it was made.

200. As a reasonable consumer, Plaintiff Rose believed Evenflo's representations regarding the safe weight range for the booster seat. Plaintiff Rose perceived Defendant's representations regarding side impact collision testing as an indication that the Big Kid booster seat had succeeded under rigorous safety testing standards beyond those required by the government when, in fact, it did not.

201. Plaintiff Rose's decision to purchase the Big Kid booster seat was directly impacted by Defendant's representations regarding its safety and its supposedly rigorous side impact collision testing.

202. Had Plaintiff Rose known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own booster seats a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives.

B. Defendant

203. Defendant Evenflo Company, Inc., is a Delaware corporation, and is a wholly-owned subsidiary of Goodbaby International Holdings Limited. Evenflo is headquartered in Canton, Massachusetts.

204. In this Complaint, when reference is made to any act, deed or conduct of Evenflo, the allegation means that it engaged in the act, deed, or conduct by or through one or more of its officers, directors, agents, employees, or representatives who was actively engaged in the management, direction, control, or transaction of the ordinary business and affairs of Evenflo.

III. JURISDICTION AND VENUE

205. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(d)(2), as amended by the Class Action Fairness Act of 2005, because the amount in controversy exceeds $5,000,000, exclusive of interests and costs, and because this is a class action in which the members of the classes and Defendant are citizens of different states.

206. Venue is proper in this judicial district under 28 U.S.C. § 1391 because Defendant is a resident of Canton, Massachusetts, which is located in this judicial district. Moreover, a substantial part of the events and omissions giving rise to the claims occurred in this district.

IV. FACTUAL ALLEGATIONS

A. The Development of Car Seats

207. The first child restraint systems were introduced in 1968, and the first child passenger safety law was passed in Tennessee ten years later.[2]

[2] https://www.sun-sentinel.com/entertainment/sfp-then-and-now-25-years-of-car-seat-safety-20150828-story.html (last visited March 18, 2020).

208. In the late 1970s, the U.S. public's increasing awareness of the high rates of morbidity and mortality for child passengers resulted in rapid proliferation of state laws on the issue.[3]

209. Between 1977 and 1985, all fifty states adopted one or more laws aimed at reducing harm to infants and child passengers by requiring the use of some sort of child restraint device.[4]

210. In the early 1980s, states required crash testing for car seats.[5]

211. Beginning in the 1990s, the National Highway Traffic Safety Association ("NHTSA"), as well as professional associations like the American Academy of Pediatrics ("AAP"), have developed child passenger safety standards and guidelines that cover a wider range of child passenger safety issues and better protect children from injuries.[6] Among other things, they emphasized the importance of three types of safety practices in protecting child passengers: (1) device-based restraints tailored to the age/size of individual child passengers; (2) rear seating; and (3) seatbelt wearing of minors who have outgrown child restraint devices but are still in need of supervision to comply with seatbelt requirements.[7]

212. As early as 1992, Evenflo was well-aware that booster seats were not safe for children under 40 pounds and should not be used by them. In a memorandum dated November 5,

[3] Child Passenger Safety Laws in the United States, 1978–2010: Policy Diffusion in the Absence of Strong Federal Intervention, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3899584/ (last visited March 18, 2020).

[4] *See Id.*

[5] https://www.sun-sentinel.com/entertainment/sfp-then-and-now-25-years-of-car-seat-safety-20150828-story.html (last visited March 18, 2020).

[6] Child Passenger Safety Laws in the United States, 1978–2010: Policy Diffusion in the Absence of Strong Federal Intervention, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3899584/ (last visited March 18, 2020).

[7] *See Id.*

1992, and circulated to 24 different Evenflo employees, the author attached and praised a NHTSA flyer that was pending approval. That flyer stated with respect to booster seats: "A toddler over one year of age, weighing 20 to 40 pounds, is not big enough for a booster seat in the car. He needs the extra protection for his upper body and head that a harness with hip and shoulder straps can give." The Evenflo employee who circulated the memorandum suggested that the flyer should even be inserted in the packaging for Evenflo's harness car seats.[8]

213. In the early 2000s, the CDC Task Force strongly recommended that states adopt laws mandating the use of age and size appropriate child restraints. *Id.* Subsequently, the NHTSA and AAP guidelines were updated with similar emphasis. *Id.*

214. The first booster seat law was implemented in 2000, when Massachusetts, and then California, implemented laws requiring booster seats for children over 40 pounds.[9]

B. The Market for Children's Car Safety Seats

215. Though models vary, the market for children's car safety seats is generally grouped around the three basic designs that track, sequentially, with children's growing weights and heights: rear-facing seats, forward-facing seats with harnesses, and belt-positioning booster seats.

216. According to the American Academy of Pediatrics ("AAP"), the most recent evidence-based, best practices for optimizing passenger safety include:

a. All infants and toddlers should ride in a rear-facing car safety seat as long as possible, until they reach the highest weight or height allowed by their car seat manufacturer. Most convertible seats have limits that will permit children to ride rear-facing for 2 years or more.

[8] *See* Evenflo Company, Inc.'s Motions in Limine, Exs. 5 and 6, *Somoza v. Abbot and Evenflo Company, Inc.*, No. 2015-CA-001596, 4th Judicial Circuit (Duval County, FL), Filing No. 63607028 (Nov. 1, 2017).

[9] https://www.sun-sentinel.com/entertainment/sfp-then-and-now-25-years-of-car-seat-safety-20150828-story.html (last visited March 18, 2020).

b. All children who have outgrown the rear-facing weight or height limit for their seat should use a forward-facing seat with a harness for as long as possible, up to the highest weight or height allowed by the manufacturer.

c. All children whose weight or height exceed the forward-facing limit for their car seat should use a belt-positioning booster seat until the vehicle lap and shoulder seat belt fits properly, typically when they have reached 4 feet, 9 inches in height and are between 8 and 12 years of age.[10]

217. While car seat recommendations have changed, the AAP has long embraced one central principle: parents should not move children from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat. Specifically, since the early 2000s, the AAP has advised that children who weigh 40 pounds or less—at the time, the weight limit of most harnessed seats—are best protected in a seat with its own internal harness. Today, almost all harnessed seats can accommodate children up to 65 pounds and as tall as 4 feet, 1 inch, and some fit children up to 90 pounds.

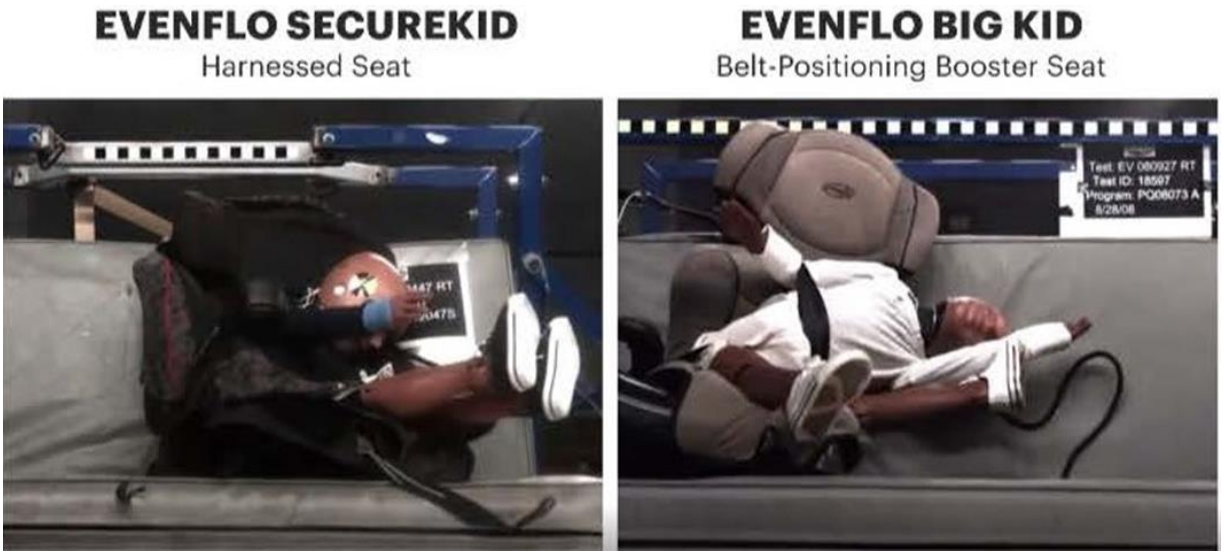
218. And even this 40-pound threshold is no longer considered ideal. Since 2011, the AAP has recommended (consistent with the above) that children stay in harnessed seats "as long as possible" —that is, in many cases, until they are 65 pounds (and in some cases up to 90 pounds).

219. These thresholds are crucial because, according to scientific consensus—and as Evenflo has known since at least 1992[11]—booster seats do not adequately protect toddlers. To deliver its full safety benefit in a crash, an adult seat belt must remain on the strong parts of a child's body—i.e., across the middle of the shoulder and the upper thighs. Furthermore, even if young children are tall enough for a belt to reach their shoulders, they rarely sit upright for long and often wriggle out of position.

[10] *See* Dennis R. Durbin et al., *Child Passenger Safety*, 142(5) PEDIATRICS (2018), available at https://pediatrics.aappublications.org/content/142/5/e20182460.

[11] *See, supra*, ¶ 208.

220. By contrast, a tightly adjusted five-point harness secures a child's shoulders and hips, and goes between the legs. Harnesses secure children's bodies so that they are less likely to be ejected, and they disperse crash forces over a wider area. This difference is illustrated by the following video stills, which are taken from comparison tests of the Evenflo "SecureKid," a seat that can accommodate a child up to 65 pounds with an internal harness, and the Evenflo Big Kid:



221. In the test of the SecureKid, the dummy's head and torso remained entirely within the seat's confines. By contrast, in the test of the Big Kid, the seat belt slipped off the dummy's shoulder, and the dummy's head and torso flailed far outside the seat.

222. Although this Big Kid test "passed" Evenflo's side impact testing, Evenflo's director of manufacturing engineering has previously admitted that it placed the dummy's neck in severe extension, and thus more at risk for injurious head contact.

223. Data bears out what the above image makes plain: compared with seat belts, child restraints, when not misused, are associated with a 28% reduction in risk of death adjusting for seating position, vehicle type, model year, driver and passenger ages, and driver survival status.[12]

C. Development, Testing, and Marketing of the Big Kid Booster Seat

224. Evenflo introduced the Big Kid booster seat in the early 2000s in an effort to compete in the developing booster seat category, which was prompted by certain states requiring school-age children to use such seats until they could fit in regular seat belts.[13] Evenflo's internal records indicate that the Big Kid booster seat was specifically developed for the purpose of "regaining control in the market" from Graco, which had recently released a popular model called the "TurboBooster."[14]

225. At the time of the Big Kid's development, Evenflo's team proposed creating a booster seat with similar features to Graco's TurboBooster, but priced to sell for about $10 less—or between $40 and $50, and marketed the Big Kid booster seat as safe for babies as young as 1 year old with a minimum weight of 30 pounds and no minimum height. Though some car seats sell for well more than this, Evenflo sought to develop a product that would sell briskly at large retailers (e.g., Walmart, Target, Costco, Babies R Us, Amazon). Evenflo succeeded. Within a few years, an internal design review deemed the Big Kid "the reliable workhouse in the Evenflo platform stable."[15]

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[12] *See* Michael R. Elliott et al., *Effectiveness of child safety seats vs seat belts in reducing risk for death in children in passenger vehicle crashes,* 160(6) ARCH PEDIATR. ADOLESC. MED. 617–621 (2006), available at https://www.ncbi.nlm.nih.gov/pubmed/16754824.

[13] https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety (last visited March 18, 2020).

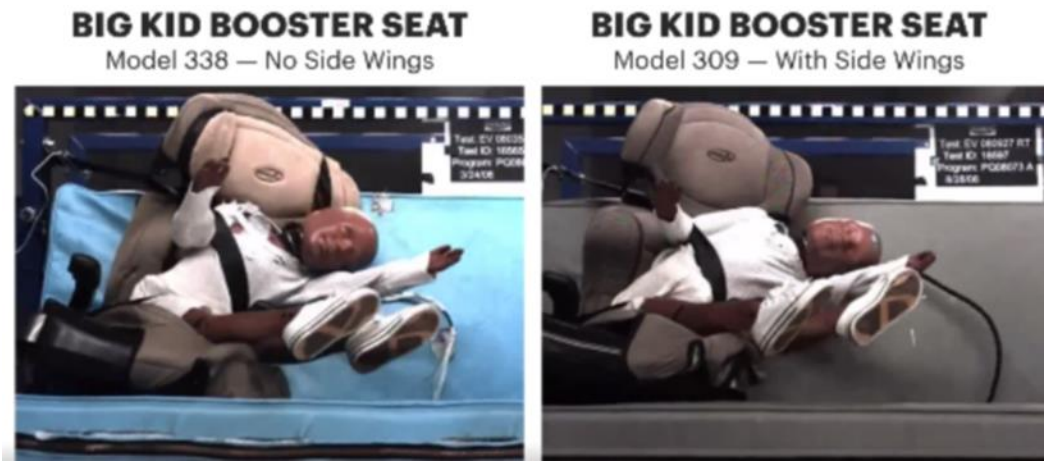
[14] *See id.*

[15] *See id.*

226. But in spite of this success, as of 2008, Graco was still outselling Evenflo. So, that year, Evenflo launched a new Big Kid booster seat with so-called "side wings"—that is, curved extensions on either side of the headrest. Below are the Big Kid (left) and TurboBooster (right):

Big Kid TurboBooster

227. The addition of these "wings" was cynical: Evenflo's engineers believed the Big Kid's relative "on-shelf perception" was diminished because Graco's seat looked like it had more side support, and thus the Big Kid required an aesthetic upgrade to stay competitive. An Evenflo document makes this explicit: it states that one purpose of the new side wings was "increased perceived side protection" among consumers. Consistent with this, Evenflo's own side-impact testing showed no difference in safety between the two models:



1. Evenflo develops a fraudulent test to burnish its marketing.

228. As part of its quest to gain an upper hand on Graco—and to enhance the perceived safety of the Big Kid—Evenflo also began to "test" the side impact crashworthiness of its new Big Kid prior to its 2008 release.

229. But in the absence of a federal standard, Evenflo had a unique opportunity: it could develop its own test, then use "passage" of that test to simultaneously distinguish its new product from the competition and influence consumers to buy the product.

230. Evenflo has represented publicly that its side-impact testing is "rigorous" and analogous to "government" tests. For example, according to a blog post authored by Sarah Haverstick, a "Safety Advocate" and "Child Passenger Safety Technician" at Evenflo, "the engineers at Evenflo have designed the Evenflo side-impact test protocol" as a "rigorous test [that] simulates the government side impact tests conducted for automobiles":

Making the Transition – How to Choose a Booster Seat

There are so many booster seat options on the market it can be hard to know where to start when shopping for this important piece of safety equipment. Here are some tips to make the experience a little easier.

First - don't transition your child too early. At a minimum, your child should be 4 years old to use a booster seat. Your child must be mature enough to sit in the booster seat with the seat belt in the proper position – without putting it under their arm, behind their back or slouching.

Next – make sure your child actually fits in the booster. Belt positioning booster seats are all about proper seat belt fit. Booster seats are designed to make your child a little taller so they can use the lap/shoulder seat belt, which is made to fit an adult. The lap belt should be low and snug across the hips (not across the belly) and the shoulder belt should cross the chest and shoulder (not the neck and face). Every booster seat fits in every vehicle differently, so ideally, ask the store if you can bring it out to your car to test for fit with your child.

Once you have proper belt fit – there are many other features you can look for:

Extended Use
Combination car seats are forward-facing only car seats that allow you to use a harness for your child and then remove the harness to use the seat as a booster. Upper weight limits on the harness will vary. Using a car seat with a higher weight rating for the harness (over 40 pounds) will help delay your child's transition into a booster seat.

High Back Booster vs. No Back Booster
You will need a high back booster if your vehicle does not have a headrest for the seating position that your child will be using (fairly uncommon with most newer vehicles, but more common in older vehicles or pickup trucks). Otherwise, high back boosters are a great option when first transitioning a child to a booster, and are also helpful if your child is prone to napping in the car. No back boosters are great options for travel, or to have on hand in case you frequently car pool with other booster-age kids, since they are compact and easy to store.

Lower Anchors
Combination seats will often allow the use of the lower anchors and tether when the seat is used in booster mode. When used with a booster, lower anchors are not designed to help with crash safety for the child (the seat belt protects the child in a crash – which is why it is important that it fits right). However, the lower anchors do keep the booster seat in the same place. This is helpful when your independent child wants to climb in and buckle the seat belt on their own. The lower anchors are also helpful in keeping the booster seat tied down when not in use so it does not become a projectile in a crash. That way you do not need to remember to buckle the seat in every time it is not in use.

Side Impact Testing
Currently, there is no federal standard for side impact testing of car seats and booster seats. However, the engineers at Evenflo have designed the Evenflo Side Impact Test protocol. This rigorous test simulates the government side impact tests conducted for automobiles.

Cool factor!
This might not sound as important – but as safety advocates, we know that booster seats have been proven to be more effective than seat belts alone for kids ages 4 through 8. But, we also know that older kids do not want to look (or feel) like babies in the car. To encourage kids to be excited about using boosters, Evenflo has added fun colors, cup holders and even lights and speakers in some booster seat models. If possible, bring your child with you when you are shopping for their new seat. Allowing them to help with the decision may make them more interested in using the seat.

231. This material claim is misleading at best. Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it.

232. In stark contrast, the National Highway Traffic Safety Administration's 5-Star Safety Ratings program evaluates vehicles based on their performance during two side impact crash scenarios.[16] In the first, designed to simulate an intersection-type collision, a 3,015 pound moving barrier is crashed at 38.5 miles per hour into a standing vehicle containing two dummies.[17] In the second, designed to simulate a crash into a telephone pole, a vehicle angled at 75 degrees (and containing the same two dummies) is pulled sideways at 20 miles per hour into a 25 cm diameter pole at the driver's seating location. Following both tests, injuries to the dummies' heads, chest, lower spine, abdomen, and pelvis are evaluated.

233. This difference between the rigorous NHTSA 5-Star test and Evenflo's "bench" test is nowhere apparent in Evenflo's marketing materials, nor is it explained on Evenflo's website. To the contrary, a section of Evenflo's website devoted to "Safety Technology"[18] states:

> [A]t Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. We also continually enhance our products with new technologies that distribute crash forces away from your child during a crash. Some of those technologies include . . .
>
> - Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side [sic] impact standards.

[16] A description of this rating system can be found on NHTSA's website, *see* https://www.nhtsa.gov/ratings.

[17] In these tests, the first dummy is an average-size adult male in the driver's seat, and the second is a small-size adult female in the rear driver's side passenger seat.

[18] Evenflo, "Safety Technology," https://www.evenflo.com/safety-learning/safety-tech.html (last accessed Feb. 9, 2020).

234. The same page includes the following descriptions of Evenflo's side impact testing:

Evenflo Side Impact Testing

Evenflo Side impact testing simulates a crash in which the vehicle carrying the car seat is struck on the side by another vehicle. An example of a real life side impact collision is when a car crossing an intersection is struck on the side by another car that ran a stop sign.

Why is it important to car seat safety?

Approximately one out of four vehicle crashes have a side impact component. According to the National Highway Traffic Safety Administration (NHTSA), impacts to the side of the vehicle rank almost equal to frontal crashes as a source of fatalities and serious injuries to children ages 0 to 12.

How are car seats tested now?

Federal car seat safety standards require a frontal impact test with a 30 mph velocity change. This approximates the crash forces generated in a collision between a vehicle traveling 60 mph and a parked car of similar mass, or the energy produced in a fall from a three story building. There are currently no provisions in the U.S. and Canadian standards for side impact testing. NHTSA is in the process of developing a child side impact test standard.

What is the Evenflo Side Impact Testing?

At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo Side Impact test protocol. The Evenflo Side Impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5-star government side impact tests conducted for automobiles.

All Evenflo car seats meet or exceed all applicable federal safety standards and Evenflo's side impact standards.

For car seat safety that you can depend on, trust Evenflo. Shop our collection of side impact tested car seats today.

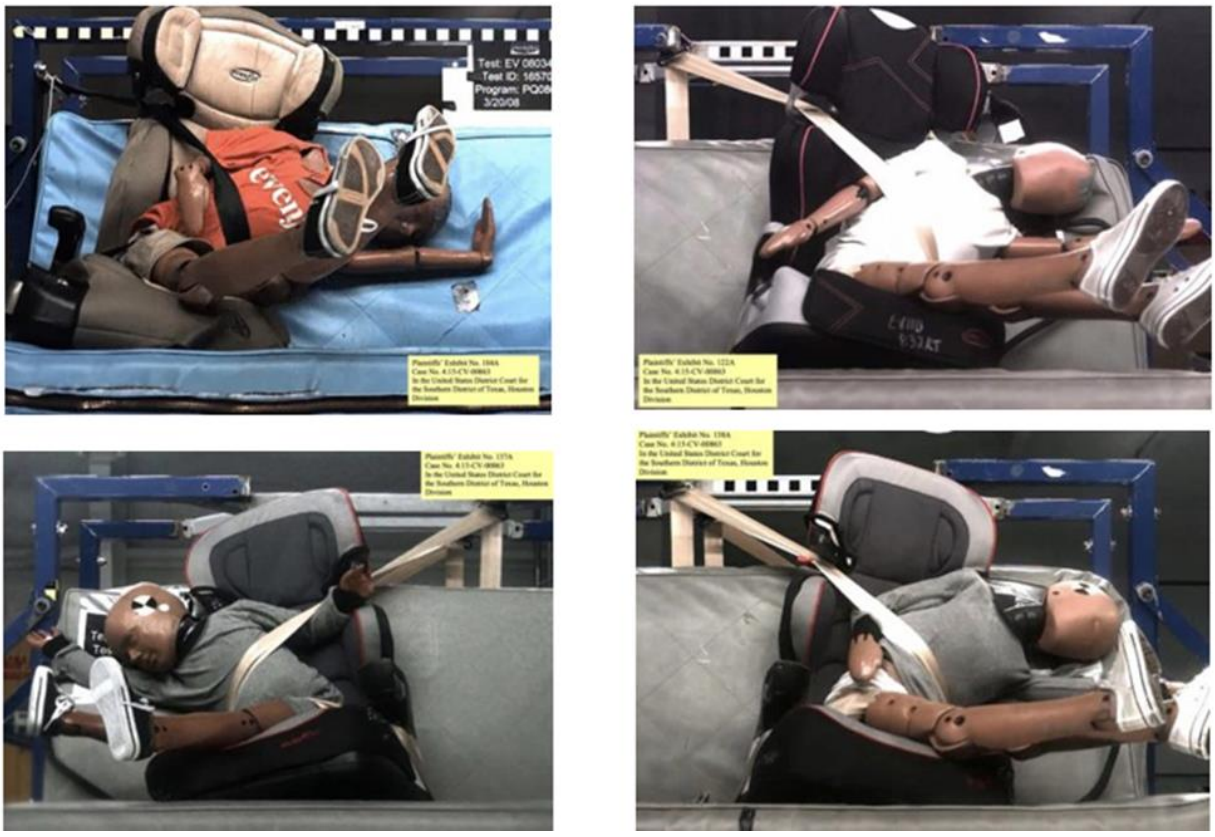
235. Furthermore, not only is Evenflo's side-impact test less rigorous than the federal government's test. It is, for all intents and purposes, impossible to fail.

236. Records of Evenflo's internal side impact tests of various models indicate that, following each test, an Evenflo technician (1) answers whether the test showed "dummy retention," which is indicated by checking either "yes" or "no" on a form, then (2) sends her report to an engineer who, in turn, (3) decides whether the Big Kid model passes or fails.

237. But an Evenflo senior test technician has admitted that, for purposes of these forms, "dummy retention" means the following: "did [the dummy] stay in the seat or did it fall out of the seat and end up on the floor?"

238. In other words, there are only two ways a booster seat fails Evenflo's "rigorous" side impact test: (1) if a child-sized dummy escapes its restraint entirely, and thus ends up on the floor; or (2) the booster seat itself breaks into pieces.

239. The same technician has stated that, in 13 years, he did not once perform a "failed" side-impact test on a booster seat. He also testified that the following images—all of which are from "passed" Evenflo side impact tests, and use a dummy based on a three-year-old child—would have been marked that "yes" they passed:



240. These images show the seat belt slipping off the dummy's shoulders and instead tightening around its abdomen and ribs. This kind of violent movement at high speed can cause serious damage to a child's internal organs, head, neck and spine, including paralysis or death.

241. Evenflo was aware of these risks. A safety engineer at Evenflo has admitted under oath that, when real children move in this way, they are at risk for injurious head contact.

242. In other words, the same proprietary side impact tests deemed successful by Evenflo's engineers demonstrate, unequivocally, that Big Kid booster seats place many children at risk of serious injury or death.

243. But Evenflo kept these tests secret.[19]

2. Despite conclusive evidence that its products are dangerous for children within the weight range it specifies, Evenflo markets its new Big Kid model as "side impact tested" and safe for children under 40 pounds.

244. Upon learning from its own pre-release tests that its Big Kid booster seats place many children at serious risk in side impact collisions, Evenflo could have redesigned them. Or, it could have engaged in further testing to determine the minimum age and weight at which a child can safely use a Big Kid booster seat (i.e., the point at which the seatbelt no longer slips from a child's shoulders in a side impact collision), and revised its packaging and marketing accordingly. As noted above, current evidence-based best practices dictate that parents should not move children from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat. And at a minimum, pediatricians recommend that no child should use a booster seat until he or she weighs at least 40 pounds—though even this standard has now been replaced by recommendations suggesting keeping children in harnessed seats until 65 pounds, or even 90 pounds.

245. And Evenflo knew, unequivocally, that children under 40 pounds should not use booster seats. At least as early as 1992 it had internally circulated NHTSA informational flyers that made clear children 20-40 pounds should use harnessed seats with shoulder and hip restraints.[20]

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[19] The above description of Evenflo's testing is based on an exposé by the nonprofit organization ProPublica, which published an investigation into Evenflo's testing and marking of the Big Kid booster seat on February 6, 2020. *See* Daniela Porat and Patricia Callahan, *Evenflo, Maker of the "Big Kid" Big Kid booster seat, Put Profits Over Child Safety*, PROPUBLICA (Feb. 6, 2020), available at https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety. Prior to the ProPublica story, consumers had no way of obtaining photos, video, or any other data from Evenflo's side impact testing, which was only produced in the course of ongoing, separate litigation against the company.

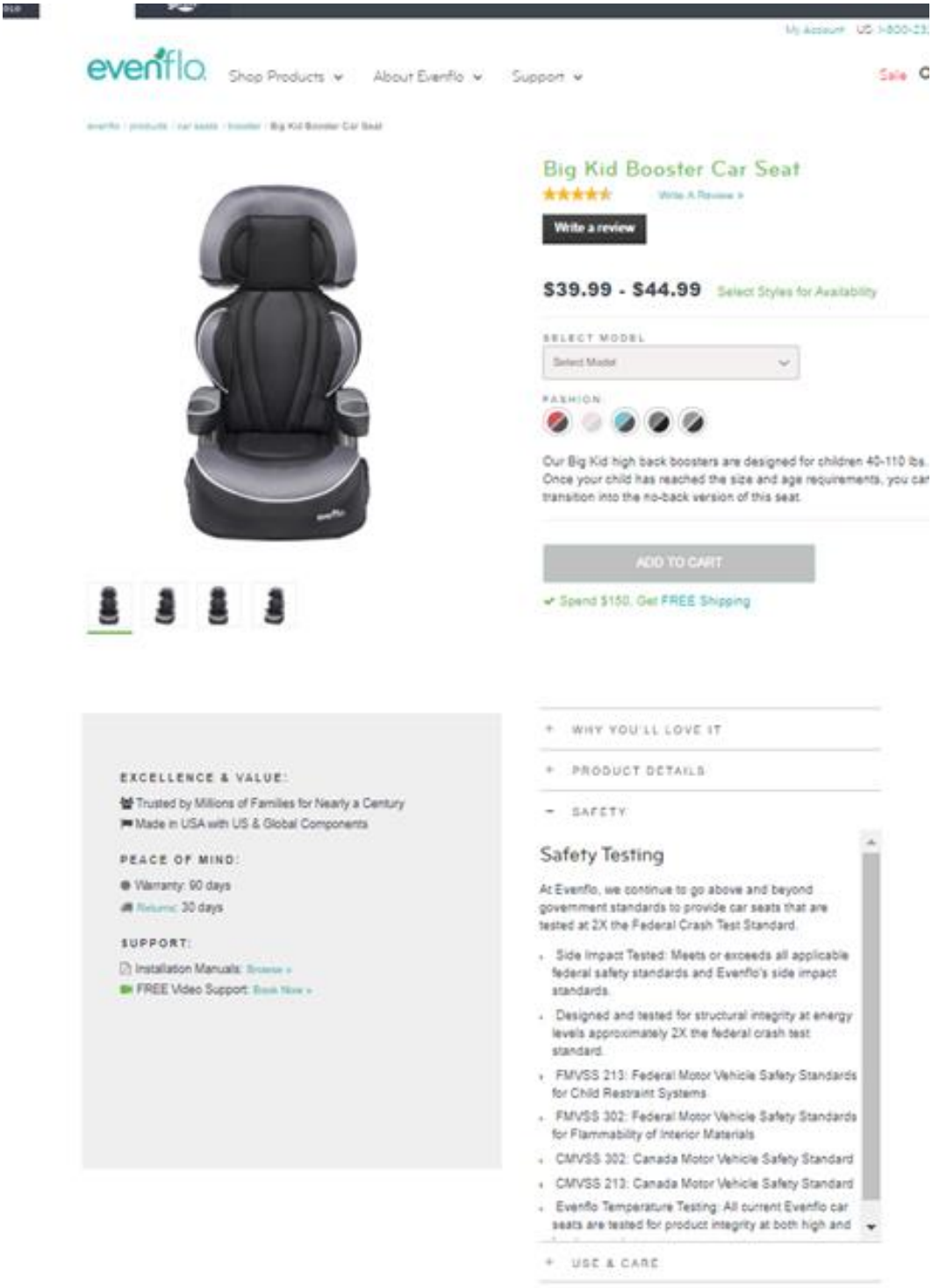
[20] *See, supra*, ¶ 208.

246. And not only that: beginning in 2008, Evenflo began aggressively marketing its Big Kid booster seats as "side impact tested" to both businesses and consumers. For example, Evenflo sent marketing materials to Walmart, Target, and Babies R Us that emphasized in large bold letters that its new Big Kid booster seat was "side impact tested." Other marketing materials stated: "Knowing that one in four automobile accidents are side impact collisions, we believe it's important to go beyond the current government standards when designing the next generation of Evenflo car seats, including the Big Kid LX."

247. Evenflo took—and continues to take—a similarly aggressive tack with consumers. As noted above, the company prominently advertises its Big Kid models as "side impact tested." The following screen shots are from several websites on which the Big Kid is available for sale, including Evenflo's own website:[21]

[21] Although some these advertisements state that the seat is safe for children weighing between 40-110 pounds, this range is a recent change from Evenflo advertisements assuring consumers that the seat is safe for children weighing as little as 30 pounds.

Evenflo's website:



Amazon:

Product description

Color:**Denver**

Product Description

The Evenflo big kid AMP belt-positioning booster car seat gets your child excited about sitting in a booster seat. With 6 height positions, the back adjusts as your child grows, keeping the side and head support in the proper position. It also transitions into a no-back booster. Your child will love the comfortable padding around the head and body. Elastic cup holders are perfect for a juice box or a quick snack. With Backrest : Height recommendation : 112 to 145 cm (44 to 57 in.) and tops of the child's ears are at or below the top of the booster seat headrest . At least 4 years old Without Backrest : Weight recommendation : 112 to 145 cm (44 to 57 in.) and tops of the child's ears are at or below the top of the vehicle seat headrest . At least 4 years old

Safety Testing:

At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard.

- **Side Impact Tested**: Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards.
- Designed and tested for structural integrity at energy levels approximately **2X the federal crash test standard**.
- **FMVSS 213**: Federal Motor Vehicle Safety Standards for Child Restraint Systems
- **FMVSS 302**: Federal Motor Vehicle Safety Standards for Flammability of Interior Materials
- **CMVSS 302**: Canada Motor Vehicle Safety Standard
- **CMVSS 213**: Canada Motor Vehicle Safety Standard
- **Evenflo Temperature Testing**: All current Evenflo car seats are tested for product integrity at both high and low temperatures.

Walmart:

About This Item

We aim to show you accurate product information. Manufacturers, suppliers and others provide what you see here, and we have not verified it. See our disclaimer

The Evenflo Big Kid Sport Booster Car Seat gets your child excited about sitting in a booster seat! With 6 height positions, the back adjusts as your child grows, keeping the side and head support in the proper position. It also transitions into a no-back booster. Your child will love the comfortable padding around the head and body. The dual cup holders will keep drinks and snacks close. **Evenflo Big Kid Sport High Back Booster Seat, Peony Playground:**

- 2 Seats In 1 ? removable back for easy transition to a no-back booster
- Easy one-hand, 6-position height adjustment to accommodate growing children longer
- 2 cup holders for drinks
- Machine-washable pad keeps seat looking clean
- Side Impact Tested: meets or exceeds all applicable Federal Safety Standards and Evenflo's Side Impact Test Standard
- Designed and tested for structural integrity at energy levels; approximately 2X the federal crash test standard
- Energy absorbing foam liner provides added safety and comfort
- For use as high back booster (with backrest)
- Weight: 40 - 100 lbs
- Height: 44 - 57"
- Age: child is at least 4 years old or older
- Child's ears are below top of child restraint headrest
- For Use as No Back Booster (without backrest)
- Weight: 40 - 100 lbs
- Height: 44 - 57"
- Age: child is at least 4 years old or older

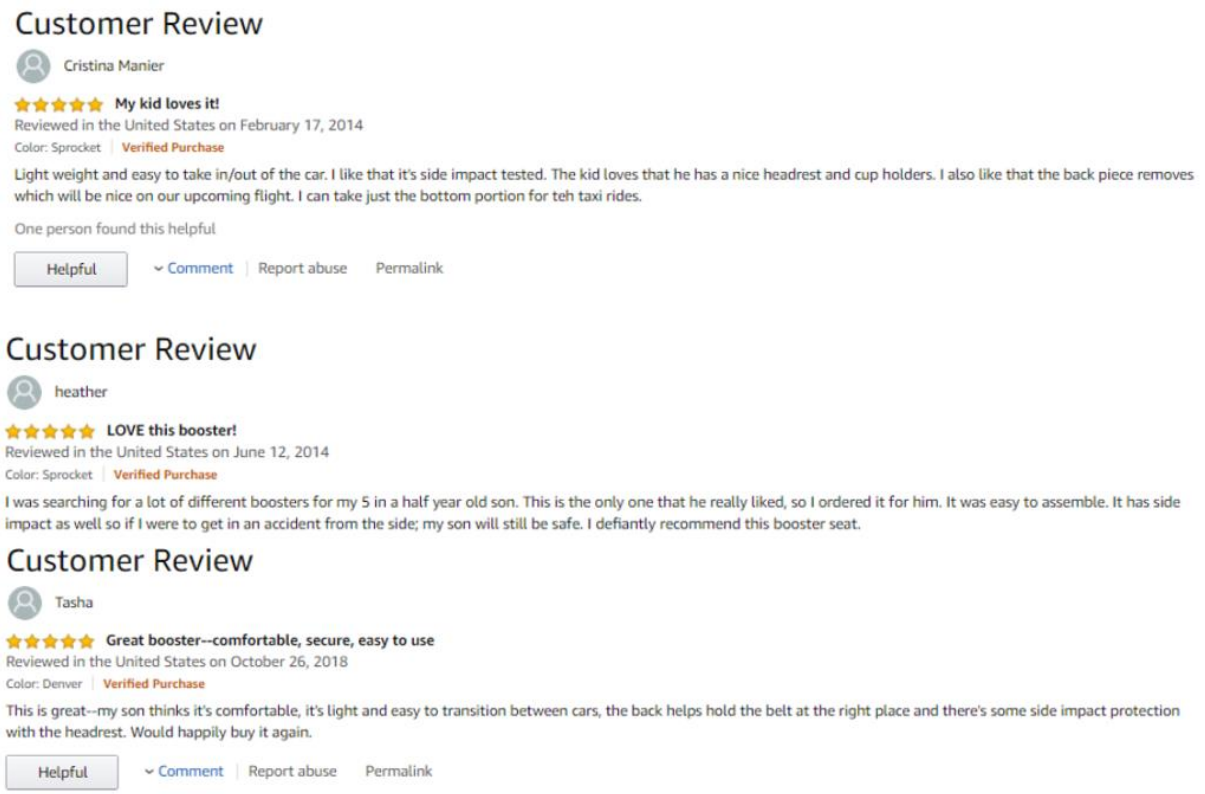
Questions about product recalls?

Items that are a part of a recall are removed from the Walmart.com site, and are no longer available for purchase. These items include Walmart.com items only, not those of Marketplace sellers. Customers who have purchased a recalled item will be notified by email or by letter sent to the address given at the time of purchase. For complete recall information, go to Walmart Recalls.

248. The "side impact tested" label appears on the Big Kid's packaging:

249. Evenflo is so committed to its "side impact testing" that it even stiches "side impact tested" labels into the Big Kid seats themselves:

250. Customer reviews for several Big Kid models confirm that parents and guardians rely on Evenflo's material misrepresentations.



Customer Review

Cristina Manier

My kid loves it!

Reviewed in the United States on February 17, 2014

Color: Sprocket | Verified Purchase

Light weight and easy to take in/out of the car. I like that it's side impact tested. The kid loves that he has a nice headrest and cup holders. I also like that the back piece removes which will be nice on our upcoming flight. I can take just the bottom portion for teh taxi rides.

One person found this helpful

Helpful · Comment | Report abuse Permalink

Customer Review

heather

LOVE this booster!

Reviewed in the United States on June 12, 2014

Color: Sprocket | Verified Purchase

I was searching for a lot of different boosters for my 5 in a half year old son. This is the only one that he really liked, so I ordered it for him. It was easy to assemble. It has side impact as well so if I were to get in an accident from the side; my son will still be safe. I defiantly recommend this booster seat.

Customer Review

Tasha

Great booster--comfortable, secure, easy to use

Reviewed in the United States on October 26, 2018

Color: Denver | Verified Purchase

This is great--my son thinks it's comfortable, it's light and easy to transition between cars, the back helps hold the belt at the right place and there's some side impact protection with the headrest. Would happily buy it again.

Helpful · Comment | Report abuse Permalink

D. At the same time it was manufacturing dubious side-impact test results and touting its products' passage of those tests, Evenflo was disregarding scientific consensus—and its own engineers' recommendations—by encouraging parents to put children below 40 pounds in booster seats.

251. As noted above, the AAP has, since the early 2000s, advised that children who weigh 40 pounds or less are best protected in a seat with its own internal harness—which was then the weight limit of most harnessed seats. And NHTSA, as early as 1992, had provided similar guidance, which Evenflo employees had reviewed and discussed including in their harness seat packaging. Today, almost all harnessed seats can accommodate children up to 65 pounds and as tall as 4 feet, 1 inch, and some fit children up to 90 pounds. Since 2011, the AAP has recommended that children stay in harnessed seats "as long as possible" (i.e., up to manufacturers' weight limits).[22]

[22] For example, the company Britax offers a convertible harness/booster seat, the "Frontier ClickTight," that can accommodate children up to 90 pounds in harness mode. *See*

252. Consistent with this recommendation, many booster seat manufacturers in the United States now specify that, at a minimum, children should weigh at least 40 pounds before using their products. But others, including Evenflo, have long dragged their feet and (until recently) continued to market booster seats for children who weigh as little as 30 pounds.

253. It was only following a recent journalistic exposé by the nonprofit organization ProPublica[23]—published on February 6, 2020—that Evenflo revised its website to state that the minimum weight for Big Kid booster seats is 40 pounds. According to Evenflo's general counsel, in May 2016, the company changed some, but not all, of its U.S. booster seats to a 40-pound minimum so that the company could sell them in Canada, which does not allow the sale of boosters to children under 40 pounds.[24] But the company otherwise left its minimum weight recommendation of 30 pounds intact to supposedly "provide options for parents whose children were too tall" for harnessed seats.

254. In other words, before early 2020, the 30-pound standard often prevailed in Evenflo's sales materials, product descriptions, and product manuals for the Big Kid booster. For example, a screenshot of Evenflo's product page for the "Big Kid Amp Highback 2-in-1 Belt-Positioning Booster Car Seat" from July 21, 2019[25] lists a minimum weight of 30 pounds:

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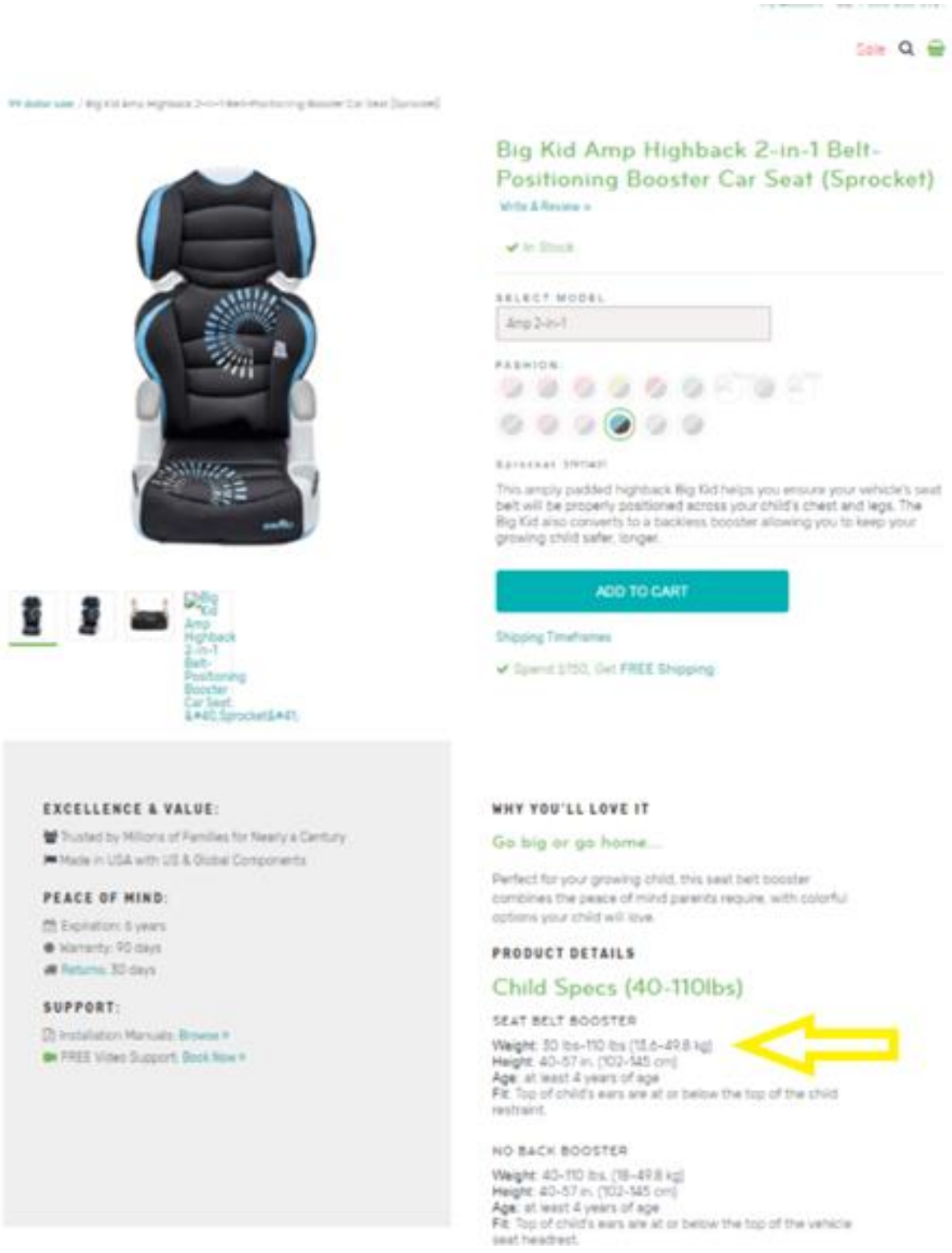
https://us.britax.com/frontier-clicktight-forward-facing-only-seats/. Consistent with the AAP's recommendations, Britax advises customers that it "strongly recommends that children should be secured with a harness system until they exceed the weight or height limits specified."

[23] *See supra* note 7.

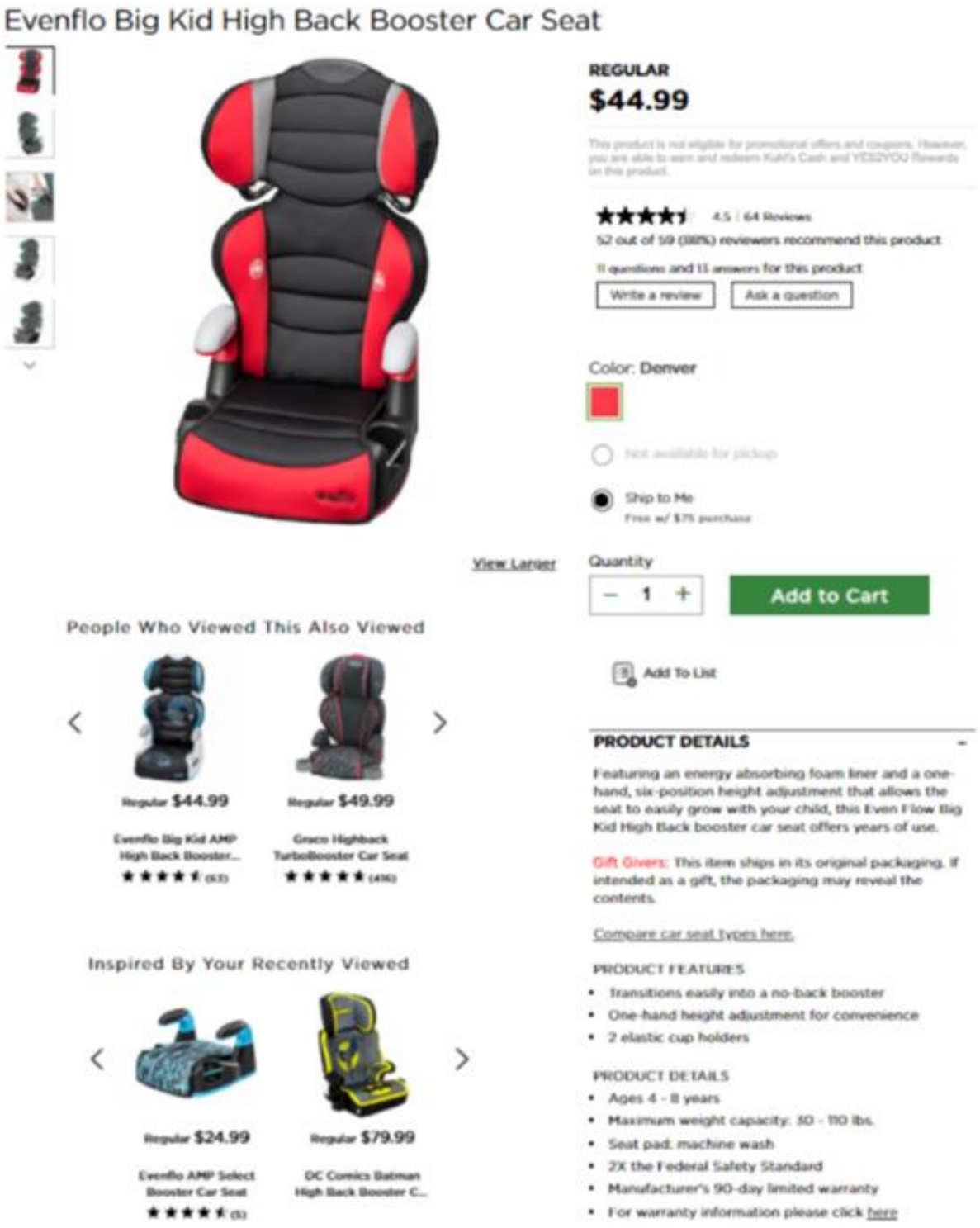
[24] In fact, Big Kid boosters sold in Canada warn parents and guardians that children less than 40 pounds are at risk of "SERIOUS INJURY or DEATH" if placed in these seats.

[25] This product listing was retrieved from the Wayback Machine, a digital archive, and can be found at the following URL: http://web.archive.org/web/20190721134649/https://www.evenflo.com/car-seats/big-kid/31911431.html.

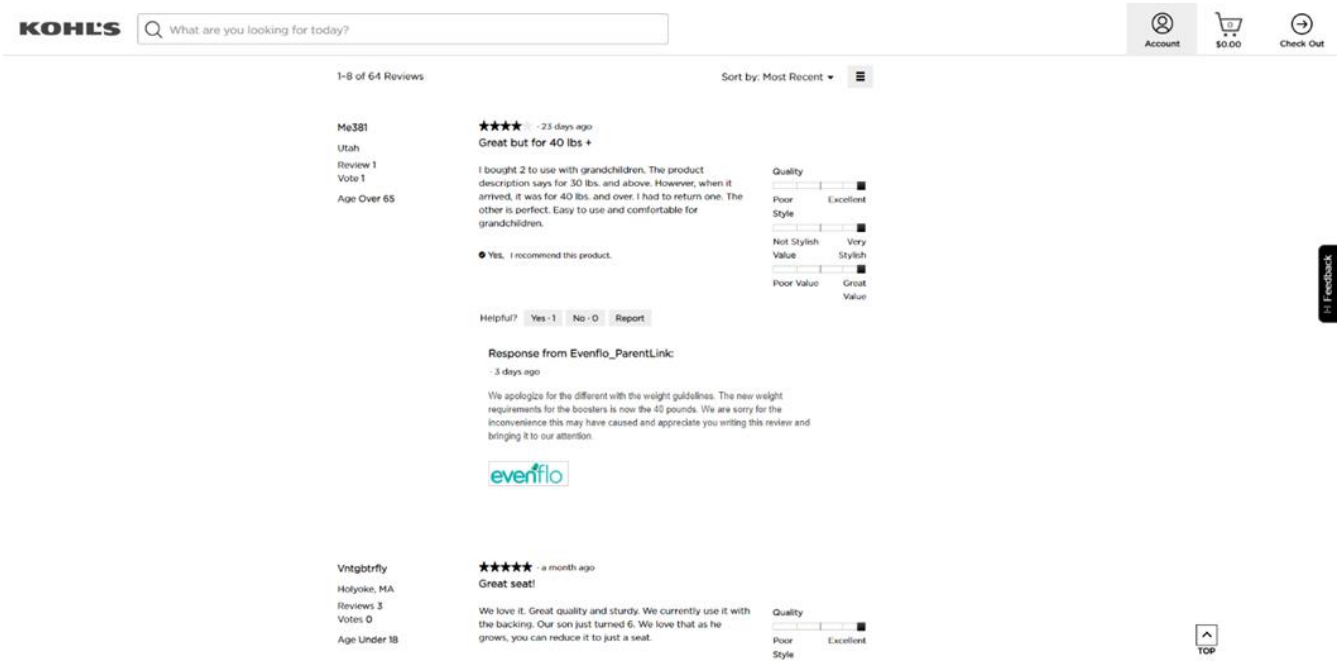


255. Since ProPublica's reporting began, Evenflo's sudden updating of this standard has been so hasty and erratic that many of its Big Kid booster seats continue to be advertised as

appropriate for children weighing as little as 30 pounds. For example, as of February 9, 2020, the "Big Kid High Back Booster Car Seat" was displayed on Kohl's webpage as appropriate for children weighing between 30 and 110 pounds:



256. The same page also includes the following clarification (dated February 6, 2020) from an account that appears to be associated with Evenflo—presumably posted in haste on the same day the ProPublica exposé was published:



257. Meanwhile, according to ProPublica's reporting, Big Kid booster seats ordered directly from Evenflo's website as recently as January 2020 came with boxes that did not specify an age for use, and bore labels stating that they were safe for children weighing as little as 30 pounds.

258. As with Evenflo's "side impact tested" labeling, the company's longstanding decision to cling to the 30-pound minimum—in the face of scientific consensus to the contrary—had (and has) a cynical purpose: to sell more booster seats. For in marketing the Big Kid booster seat, Evenflo knows that parents often face complaints from children who see harnessed seats as babyish. Furthermore, parents have an incentive to choose booster seats because they are generally cheaper, less complicated to use, and easier to move.

259. For this reason, Evenflo has historically resisted change at every turn—once again, in a bid to outcompete Graco and sell as many seats as possible.

260. For example, when Evenflo first launched the Big Kid booster seat in the early 2000s, it marketed it as safe for children as young as one year old so long as they weighed 30 pounds—without a minimum height. At the time, Graco labeled its competing booster seat as safe for children who weighed at least 30 pounds and were at least three years old.

261. Evenflo's engineers have since conceded that neither one-year-olds nor two-year-olds should be placed in Big Kid booster seats, consistent with scientific consensus. In a 2016 deposition, Joshua Donay, an Evenflo project engineer who worked on the Big Kid, stated that he would "not put a one-year-old in any belt-positioning booster, Big Kid, Graco, you name it," and "would keep them in an infant seat." In a deposition in a different case, Evenflo's top booster seat engineer, Eric Dahle, acknowledged that two-year-olds should not be placed in Big Kid booster seats.

262. But it was not until 2007 that Evenflo increased the minimum age on the Big Kid to three, and also added a minimum height requirement (38 inches). At the time, Evenflo warned consumers that failure to follow these instructions could "result in your child striking the vehicle's interior during a sudden stop or crash, potentially resulting in serious injury or death."

263. In spite of this significant revision, Evenflo made no effort to notify past purchasers, issue corrective advertising or to undertake any other remedial action, thus exposing millions of children under three and/or 38 inches to risk of serious injury or death.

264. Evenflo's battle to maintain the 30-pound weight threshold was even harder fought.

265. As noted above, in 2011, the AAP made the widely publicized safety announcement that parents should keep their children in rear-facing child safety seats for as long as possible

before transitioning them to forward-facing harnessed seats, and that switching children to booster seats at 40 pounds was no longer recommended. NHTSA updated its guidelines shortly thereafter to reflect the AAP's recommendations:[26]

266. As reported by ProPublica, in early 2012, Dahle—Evenflo's top booster seat engineer—delivered a PowerPoint presentation to his colleagues in which he stated that three- and four-year-old children are at an "increased risk of injury" in booster seats because, as a result of

[26] *See* NHTSA, "NHTSA Releases New Child Seat Guidelines" (March 21, 2011), available at https://one.nhtsa.gov/portal/site/NHTSA/menuitem.554fad9f184c9fb0cc7ee21056b67789/?vgnextoid=47818846139ce210VgnVCM10000066ca7898RCRD&vgnextchannel=c9f64dc9e66d5210VgnVCM100000656b7798RCRD&vgnextfmt=default.

their immaturity, they often do not sit properly. Dahle wrote that "[k]eeping the seat at 30 lbs encourages parents to transition them earlier because they can, and the booster is a less expensive option," and that Evenflo should discourage early transitions to booster seats in favor of keeping children in harnessed seats longer: "[a harnessed seat] is the better option. We should encourage that behavior by modifying the weight rating to 40 lbs. To overcome the misuse, we should follow the NHTSA Guidelines and increase the age rating to 4 yrs old also."

267. Dahle also sent his colleagues a 2010 NHTSA report on booster seat effectiveness,[27] specifically noting two of the study's findings: (1) that three- and four-year-old children had a reduced risk of injury in crashes when they were using harnessed seats rather than boosters, and that early graduation to boosters may "present safety risks"; and (2) children should remain in harnessed seats until they are four or weigh 40 pounds, and that harnessed seats may offer more side support and "better containment" for smaller children in crashes.

268. But in a meeting several days later, McKay Featherstone, an Evenflo senior marketing director, "vetoed" Dahle's weight recommendations, though the company did agree to

[27] A copy of NHTSA's July 2010 report, "Big Kid booster seat Effectiveness Estimates Based on CDS and State Data," can be found at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811338.

The report is based on data from the National Automotive Sample System - Crashworthiness Data System (NASS CDS) from 1998–2008, as well as 17 combined years of state data from Kansas, Washington, and Nebraska, and estimated the effects of early graduation from child restraint seats to booster seats and of early graduation from booster seats to lap and shoulder belts. Among the report's principal findings was that "among three- and four-year-olds there is evidence of increased risk of injury when restrained in booster seats rather than with the recommended child restraints." The report notes that "[t]his increase depends on injury severity, and may be as large as 27 percent for non-disabling to fatal injuries."

The report also recommends that "[f]orward-facing (convertible or combination) child seats [be used] for children age 1 to 4, or until they reach 40 lbs." It explains: "[e]arly graduation from child restraint seats (CRS) to booster seats may also present safety risks. Child restraint seats may offer more lateral support and better containment for smaller children."

raise the minimum age for Big Kid booster seats to four years old. When the subject of increasing the weight limit came up again later that year—this time raised by another employee—Featherstone (by then promoted to vice president of marketing and product development) wrote in an email:

> Gregg, why are we even talking about this? It has always been this way in Canada so I don't understand why it is now a big problem that requires a $30k investment or us to change product. I have looked at 40 lbs for the US numerous times and will not approve this.

269. Furthermore, even after Evenflo increased the Big Kid's age limit to four years old, it continued selling the old model with manuals dated 2008—which stated that the seat was safe for three-year-olds.

270. Incredibly, in a 2019 deposition, Jon Conaway, Evenflo's senior product manager for car seats, stated that he was unaware of any internal debate over weight limits. He also denied knowledge of NHTSA's updated 2011 recommendations, claiming that he first became aware of them during the deposition itself—i.e., when they were read to him by plaintiff's counsel in 2019.

E. Evenflo had ample opportunities during the Class Period to provide Nationwide Class members complete and truthful information concerning the safe weight range for its Big Kid booster seats and the true nature of its "side impact testing," but it did not do so, instead continuing its omissions and deceptions in order to bolster its sales.

271. From well before and throughout the Class Period, Evenflo has advertised its Big Kid booster seats throughout the United States with pervasive material messages keyed on their safety, safe weight range and their (now known to be fraudulent) side-impact testing regimen. At any time and in any of these advertisements, Evenflo could have provided complete and accurate information about the safety of the Big Kid booster seats. But Evenflo did not do so.

272. For example, the following table sets forth advertisements and marketing messages Evenflo created and transmitted by Evenflo through various channels to Nationwide Class

members throughout the United States. These advertisements could and should have included complete and truthful information about the safe weight range for the Big Kid booster seats and they could and should have explained that Evenflo's "side impact testing" was not anything like that required by NHTSA for automobiles and virtually every Big Kid booster seat passed this test even when those very tests showed that an actual child occupant would have been severely injured if the test was an actual side impact collision with a real child in the car seat.

Date	**Source**	**Representation**
2008	Facebook Post from "A Mother's Promise" Facebook Group (created by Evenflo)	"With innovations like mandatory Side-impact testing for all our car seats, our rigorous standards often surpass those of the government and have led the way for the rest of the industry."
2008	Evenflo website	"The Big Kid Booster is for use forward facing with children that are 30-100 lbs and up to 57" tall."
2008	Evenflo website	"The Big Kid Booster is for use forward facing with children that are 30-100 lbs and up to 57" tall."
2008	Evenflo website	"At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo side-impact test protocol. The Evenflo side-impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5 star government side impact tests conducted for automobiles."
2009	Evenflo website	"The Big Kid Booster is for use forward facing with children that are 30-100 lbs and up to 57" tall."
2009	Evenflo website	"The Big Kid Booster is for use forward facing with children that are 30-100 lbs and up to 57" tall."
2010	Evenflo website	"30-100 lbs." "All Evenflo car seats are Side Impact Tested." (font color in original)
2010	Evenflo website	"30-100 lbs." "All Evenflo car seats are Side Impact Tested." (font color in original)

2011	Evenflo website	"[W]eight range from 30-100 lbs" "Side Impact Tested! Evenflo booster car seats meet or exceed all applicable Federal Safety Standards and Evenflo's side-impact test Standard" (font color in original)
2012	Evenflo website	"Side Impact Tested! Meets or exceeds all applicable Federal Safety Standards AND Evenflo's side-impact test Standard" (font color in original) "The Amp Booster With Backrest is for use with children 30 – 110 lbs"
2012	Evenflo website	"Side Impact Tested! Meets or exceeds all applicable Federal Safety Standards AND Evenflo's side-impact test Standard" (font color in original)
2012	Evenflo website (Side impact)	"At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo side-impact test protocol. The Evenflo side-impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5 star government side impact tests conducted for automobiles."
2013	Evenflo Twitter account	"Big Kid Sport Boosters feature superior protection & comfort, growing with your Big Kid! Weight range from 30-100 lbs"
2014	Evenflo website	"With a weight range from 30-110 lbs, 6-position height adjustments and a 2 in 1 design, our booster car seats will be able to grow along with your child. With an Evenflo booster car seat, you can rest assured your little one will be safe and sound."
2015	Evenflo website	"**For Use With the Backrest Child Must Meet All These Requirements** • Weight: 30 - 110 lbs (13,6 – 49,8 kg)"
2015	Evenflo website	"**Side Impact Tested!** Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards."
2015	Evenflo website	"**For Use With the Backrest Child Must Meet All These Requirements** • Weight: 30 - 110 lbs (13,6 – 49,8 kg)"
2015	Evenflo website (DLX safety testing)	"**Side Impact Tested!** Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards."

2016	Evenflo website	**“**At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. • **Side Impact Tested:** Meets or exceeds all applicable federal safety standards and Evenflo’s side impact standards.”
2017	Evenflo website	“Our AMP high back boosters are designed for children 30-110 lbs. Once your child has reached 40 lbs, it is usually safe to "amp it up" into the no-back version of this seat.” **“**At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. • **Side Impact Tested:** Meets or exceeds all applicable federal safety standards and Evenflo’s side impact standards.”
2018	Evenflo website	“Our Big Kid high back boosters are designed for children 30-110 lbs. Once your child has reached the size and age requirements, you can transition into the no-back version of this seat.” **“Safety Testing** At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. **Side Impact Tested:** Meets or exceeds all applicable federal safety standards and Evenflo’s side impact standards.”

2019	Evenflo website	"Our AMP high back boosters are designed for children 30-110 lbs. Once your child has reached the size and age requirements, you can transition into the no-back version of this seat." **"Safety Testing** At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. **Side Impact Tested:** Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards."
Unknown	Evenflo Big Kid Video Advertisement (source unknown)	"Tested above and beyond industry standards" (with a bar chart showing "Federal Crash Test Standards" and "Side Impact Tested")
Unknown	Evenflo Website: Blog Post	"[Th]e engineers at Evenflo have designed the Evenflo side-impact test protocol" as a "rigorous test [that] simulates the government side impact tests conducted for automobiles." *See* CAC ¶ 210
Unknown	Evenflo website	"[A]t Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. We also continually enhance our products with new technologies that distribute crash forces away from your child during a crash. Some of those technologies include . . . • Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side [sic] impact standards." *See* CAC ¶¶ 213-14
Unknown	Evenflo website	**"Safety Testing** At Eveno, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. **Side Impact Tested:** Meets or exceeds all applicable federal safety standards and Evenflo's side impact standards." *See* CAC ¶ 226

Unknown	Evenflo packaging	"Side impact tested" "30-110 lbs" CAC ¶ 227
Unknown	Evenflo Big Kid seat labeling	"Side impact tested" CAC ¶ 228
2019	Evenflo website	"Weight: 30-110 lbs" CAC ¶ 233
2020	Kohl's website	"30 – 110 lbs" CAC ¶ 234

F. In response to ProPublica's reporting, Congress has launched an investigation into Evenflo's conduct, and two senators have called on NHTSA to finalize car seat test rules

273. On February 12, 2020, in response to ProPublica's reporting, the United States House of Representatives' Subcommittee on Economic and Consumer Policy sent a letter to Jon Chamberlain, Evenflo's CEO, requesting documents and information on Evenflo's Big Kid model booster seats.[28]

274. The letter, authored by representatives Raja Krishnamoorthi and Katie Porter, notes that Evenflo's marketing of its seats as "side impact tested" "appears to be inconsistent with the video evidence of side impact testing," and that Evenflo's internal tests "appear to show that side impacts could put children sitting in the 'Big Kid' seat in grave danger." Krishnamoorthi and Porter also write: "Videos of Evenflo's side impact tests for the 'Big Kid' seat show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown

[28] A true and correct copy of the letter is available at: https://www.documentcloud.org/documents/6774691-2020-02-12-RK-to-Chamberlain-Evenflo-Re-Big-Kid.html.

to the side. This video evidence appears to present a high risk of serious injuries to the head, neck, and spine."

275. The letter demands that Evenflo produce the following by February 24, 2020:

1. All impact test videos, including side-impact test videos;
2. All documents referring or relating to the following:
    a. Labeling concerning the age, weight, and height of children for whom the seat is intended, including on marketing materials, packaging, instructional materials, or the seat itself;
    b. Labeling of safety-related terms, including "Side Impact Tested," On marketing materials, packaging, instructional materials, or the seat itself;
    c. Labeling of potential risks, including "Serious Injury or Death," on marketing materials, packaging, instructional materials, or the seat itself;
    d. Safety and risk standards used by Evenflo in connection with side impact testing, including what constituted a "passing" result; and
    e. Actual results and records of impact and other safety testing;
3. All communications with the US federal agencies referring or relating to safety standards; and
4. All communications with Canadian regulators relating to any recall.

276. On February 14, 2020, two days after Reps. Krishnamoorthi and Porter sent the above letter to Evenflo, Senator Tammy Duckworth, the Ranking Member of the Senate Commerce, Science and Transportation Subcommittee on Transportation and Safety, and Senator Maria Cantwell, the Ranking Member of the Senate Commerce, Science and Transportation Committee, sent a letter to NHTSA Acting Administrator James C. Owens "demanding answers about reported negligence by a booster seat manufacturer [named] Evenflo."[29] Among other

[29] Press Release, Sen. Tammy Duckworth (Feb. 14, 2020), available at https://www.duckworth.senate.gov/news/press-releases/duckworth-cantwell-demand-answers-following-reports-that-major-child-car-seat-manufacturer-lied-about-safety-testing-and-requirements-resulting-in-fatalities. A true and correct copy of the above-referenced letter accompanies Sen. Duckworth's press release.

things, the letter requests that NHTSA "act swiftly to finalize a long overdue rule establishing effective side impact performance requirements for all child restraint systems," and states that:

> There are real world consequences to [NHTSA's] inaction. For example, ProPublica reported the details of potential negligence of a booster seat manufacturer, Evenflo, in developing and marketing its "Big Kid" booster car seat product that may fail to protect children in side impact crashes, which accounted for an estimated 25 percent of vehicle collision fatalities for children under the age of 15 in 2018.
>
> Evenflo suggests that their car seat products meet or exceed all applicable Federal safety standards for side impact testing, a claim that appears misleading. Evenflo also asserts that their products meet the company's own side impact standards. However, alleged videos of side-impact testing calls into question the level of protection these standards provide.

277. Sens. Duckworth and Cantwell's letter also requests responses to the following questions by March 4, 2020:

> 1. On what date and in what manner did NHTSA first learn about concerns related to the safety performance of Evenflo booster seats in side impact collisions?
>
> 2. Evenflo's website states that it provides car seats that are "Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side impact standards." Please identify which applicable Federal Motor Vehicle Safety Standard (FMVSS) addressing side impact performance requirements Evenflo is citing, and confirm whether Evenflo consulted with NHTSA in establishing the company's side impact standards.
>
> 3. Has Evenflo's "Big Kid" booster car seat ever failed NHTSA compliance testing under FMVSS 213?
>
> 4. What actions has, or will, NHTSA take in coordination with the Federal Trade Commission and the Consumer Product Safety Commission to crack down on false and deceptive advertising by makers of child safety seats and booster seats?
>
> 5. When will NHTSA publish a final rule creating a Federal Motor Vehicle Safety Standard that establishes effective side impact performance requirements for all child restraint systems?

G. Had Evenflo disclosed the results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat—particularly those whose children weigh less than 40 pounds.

278. Had Evenflo disclosed the results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat. As noted above, these tests demonstrate, unequivocally, that Big Kid booster seats place many children at risk of serious injury or death. Evenflo's engineers have admitted that they knew this.

279. But rather than accept mainstream science—including both the AAP's and NHTSA's recommendations regarding child safety—Evenflo has spent more than a decade maximizing its profits by waging a disinformation campaign against parents and guardians, relentlessly telling them that Big Kid booster seats are "side impact tested." Meanwhile, Evenflo has fought any attempt to upgrade the weight limit for these seats to 40 pounds.

280. Evenflo has apparently done no scientific testing to determine at what height or weight, if any, it is actually safe to use a Big Kid booster seat. Though Evenflo could have treated its testing as an opportunity to answer this question—consistent with its stated commitment to making safety a "number one priority for our customers"—it has yet to do so.

281. The result of this conduct is that, in reliance on Evenflo's material misrepresentations and omissions regarding the safety of their seats, millions of parents and guardians have purchased Big Kid booster seats in the mistaken belief that their children will be protected during side impact crashes. This means that, every day, millions of children are placed in Evenflo seats for which they are too young or too small. It is likely that many have been, and will be, injured as a result.

282. Unquestionably, consumers who purchased the Big Kid booster seats did not get the benefit of the bargain they struck. They paid for a booster seat under the mistaken belief regarding the material safety issues that it was actually "side impact tested," and that it was safe

for children as small as 40 or even 30 pounds in the event of a side impact collision. But they did not get that. They got a booster seat that, while touted as the product of a relentless drive for safety, was actually the product of a relentless and callous drive for profits—even at the risk of injury and death to children.

283. Evenflo must be brought to task for its reprehensible behavior. Though it will never be able to make amends for untold number of children who have been injured or killed in its fraudulently marketed Big Kid booster seats, Evenflo should, at the very least, be forced to recall each and every Big Kid booster seat still in use and refund its purchase price.

V. TOLLING OF THE STATUTE OF LIMITATIONS

A. Discovery Rule Tolling

284. Within the period of any applicable statutes of limitation, Plaintiffs and members of the proposed Classes could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seat models are unsafe in side impact crash tests.

285. Plaintiffs and the other Class members did not discover, and did not know of, facts that would have caused a reasonable person to suspect that Evenflo's Big Kid booster seat models are unsafe for children under 40 pounds and unsafe in side impact crash tests, or that Evenflo's marketing of these seats as safe and "side impact tested" was false and/or misleading. The information revealing Big Kid booster seat models to be unsafe was within Evenflo's sole possession, and was not known to the public until February 6, 2020, when ProPublica published the exposé discussed above. To the extent some of the information reported by ProPublica was previously disclosed as part of litigation, it was either sealed by court order or behind a paywall—specifically, CM/ECF's fee-based access system—and difficult for laypeople to find or access.

286. Plaintiffs and Class members could not have reasonably discovered the true extent of Evenflo's deception with regard to the safety of its Big Kid booster seats until ProPublica published its exposé.

287. For these reasons, all applicable statutes of limitation have been tolled by operation of the discovery rule.

B. Fraudulent Concealment Tolling

288. All applicable statutes of limitation have also been tolled by Evenflo's fraudulent concealment throughout the period relevant to this action of its internal testing.

289. Instead of disclosing to consumers that, according to its own testing, children placed in Big Kid booster seats are at risk of serious injury or death, especially in side impact crashes, Evenflo continued to manufacture and sell these seats without disclosing this information. Instead, it affirmatively misrepresented the seats as safe for children as light as 30 pounds and "side impact tested."

C. Estoppel

290. Evenflo was under a continuous duty to disclose to Plaintiffs and the other Class members the risks of placing children in its Big Kid booster seats.

291. Evenflo knowingly, affirmatively, and actively concealed or recklessly disregarded the true risks of placing children in these seats, and meanwhile affirmatively misrepresented them as safe for children as small as 30 pounds and "side impact tested."

292. Based on the foregoing, Evenflo is estopped from relying on any statutes of limitations in defense of this action.

VI. CLASS ALLEGATIONS

293. Plaintiffs bring this action on behalf of themselves and as a class action pursuant to the provisions of Rules 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of the following class (the "Nationwide Class") and subclasses (the "State Subclasses"):

The Nationwide Class

All persons in the United States, including the District of Columbia and Puerto Rico, who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Alabama Subclass

All persons in the State of Alabama who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Alaska Subclass

All persons in the State of Alaska who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Arizona Subclass

All persons in the State of Arizona who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Arkansas Subclass

All persons in the State of Arkansas who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The California Subclass

All persons in the State of California who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Colorado Subclass

All persons in the State of Colorado who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Connecticut Subclass

All persons in the State of Connecticut who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Delaware Subclass

All persons in the State of Delaware who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The District of Columbia Subclass

All persons in the District of Columbia who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Florida Subclass

All persons in the State of Florida who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Georgia Subclass

All persons in the State of Georgia who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Hawaii Subclass

All persons in the State of Hawaii who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Idaho Subclass

All persons in the State of Idaho who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Illinois Subclass

All persons in the State of Illinois who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Indiana Subclass

All persons in the State of Indiana who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Iowa Subclass

All persons in the State of Iowa who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Kansas Subclass

All persons in the State of Kansas who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Kentucky Subclass

All persons in the Commonwealth of Kentucky who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Louisiana Subclass

All persons in the State of Louisiana who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Maine Subclass

All persons in the State of Maine who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Maryland Subclass

All persons in the State of Maryland who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Massachusetts Subclass

All persons in the Commonwealth of Massachusetts who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Michigan Subclass

All persons in the State of Michigan who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Minnesota Subclass

All persons in the State of Minnesota who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Mississippi Subclass

All persons in the State of Mississippi who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Missouri Subclass

All persons in the State of Missouri who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Montana Subclass

All persons in the State of Montana who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Nebraska Subclass

All persons in the State of Nebraska who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Nevada Subclass

All persons in the State of Nevada who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The New Hampshire Subclass

All persons in the State of New Hampshire who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The New Jersey Subclass

All persons in the State of New Jersey who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The New Mexico Subclass

All persons in the State of New Mexico who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The New York Subclass

All persons in the State of New York who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The North Carolina Subclass

All persons in the State of North Carolina who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The North Dakota Subclass

All persons in the State of North Dakota who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Ohio Subclass

All persons in the State of Ohio who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Oklahoma Subclass

All persons in the State of Oklahoma who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Oregon Subclass

All persons in the State of Oregon who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Pennsylvania Subclass

All persons in the Commonwealth of Pennsylvania who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Puerto Rico Subclass

All persons in Puerto Rico who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Rhode Island Subclass

All persons in the State of Rhode Island who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The South Carolina Subclass

All persons in the State of South Carolina who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The South Dakota Subclass

All persons in the State of South Dakota who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Tennessee Subclass

All persons in the State of Tennessee who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Texas Subclass

All persons in the State of Texas who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Utah Subclass

All persons in the State of Utah who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Vermont Subclass

All persons in the State of Vermont who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Virginia Subclass

All persons in the Commonwealth of Virginia who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Washington Subclass

All persons in the State of Washington who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The West Virginia Subclass

All persons in the State of West Virginia who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Wisconsin Subclass

All persons in the State of Wisconsin who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

The Wyoming Subclass

All persons in the State of Wyoming who purchased an Evenflo "Big Kid" booster seat between 2008 and the present.

294. Excluded from the Class is the Defendant and any entity in which the Defendant has a controlling interest, as well as any of the Defendant's legal representatives, officers, directors, assignees, and successors.

295. Members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. During the Class Period, millions of Big Kid models were sold to millions of individual customers. Class members are readily identifiable from information and records in the possession of Evenflo and third-party merchants like Amazon, Target, Walmart, Kmart, Costco, and Babies R Us.

296. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all Class members were damaged by the same wrongful conduct: as a result of Evenflo's failure to disclose the risks associated with using Big Kid booster seat models, as well as its false and misleading claims that these models were "side impact tested," Plaintiffs and Class members were misled into purchasing these seats—which they otherwise would not have purchased.

297. Plaintiffs will fairly and adequately protect and represent the interests of the Class. The interests of Plaintiffs are coincident with, and not antagonistic to, those of the other members of the Class.

298. Plaintiffs' counsel are experienced in the prosecution of class-action litigation and have particular experience with class-action litigation involving defective products.

299. Questions of law and fact common to the members of the Class predominate over questions that may affect only individual Class members because Evenflo has acted on grounds generally applicable to the entire Class, thereby making damages with respect to the Class as a whole appropriate. Such generally applicable conduct is inherent in Evenflo's wrongful actions.

300. Questions of law and fact common to the Class include, but are not limited to:

A. Whether the Big Kid booster seat models sold to class members by Evenflo are unsafe for children under 40 pounds;

B. Whether the Big Kid booster seat models sold to class members by Evenflo are unsafe in side impact crashes;

C. Whether Evenflo knew, or had reason to know, that its Big Kid booster seat models were unsafe for children under 40 pounds;

D. Whether Evenflo knew, or had reason to know, that its Big Kid booster seat models were unsafe in side impact crashes;

E. Whether Evenflo acted to conceal from consumers evidence, including proprietary test data, demonstrating that its Big Kid booster seat models are unsafe for children under 40 pounds;

F. Whether Evenflo acted to conceal from consumers evidence, including proprietary test data, demonstrating that its Big Kid booster seat models are unsafe in side impact crashes;

G. Whether Evenflo affirmatively misrepresented the safety of its Big Kid booster seat models as safe for children under 40 pounds;

H. Whether Evenflo affirmatively misrepresented the safety of its Big Kid booster seat models as "side impact tested";

I. Whether Evenflo omitted material information concerning the safety of its Big Kid booster seats from its marketing and advertising;

J. Whether Evenflo's conduct was knowing and willful;

K. Whether Evenflo's failure to disclose the safety risks posed by use of its Big Kid booster seat in its product packaging and labeling (or elsewhere) was unfair, deceptive, fraudulent, or unconscionable;

L. Whether Evenflo is liable to Plaintiffs and Class members for damages under the causes of action alleged herein;

M. Whether an injunction should be issued requiring Evenflo to: (i) recall all Big Kid model booster seats still in use; (ii) cease selling Big Kid model booster seats; and/or (iii) add labeling to all future Big Kid model booster seats warning consumers of the dangers associated with their use;

N. Whether Plaintiffs and Class members are entitled to attorneys' fees, prejudgment interest, and costs, and if so, in what amount.

301. Plaintiffs and Class members have all suffered harm and damages as a result of Evenflo's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of this controversy under Rule 23(b)(3). Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism—including providing injured persons or entities a method for obtaining redress on claims that could not practicably be pursued individually—substantially outweigh potential difficulties in management of this class action. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitive and will have no effective remedy at law. The class treatment of common questions of law and fact also is superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication. Additionally, Evenflo has acted and failed to act on grounds generally applicable to Plaintiffs and the Class and that require court imposition of uniform relief to ensure compatible standards of conduct toward the Class, thereby making appropriate equitable relief to the Class as a whole within the meaning of Rules 23(b)(1) and (b)(2).

302. Plaintiffs know of no special difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

VII. CAUSES OF ACTION

A. Claims Brought on Behalf of the Nationwide Class, or in the Alternative, the State Subclasses

COUNT I:
FRAUDULENT CONCEALMENT

303. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

304. Plaintiffs bring this Count on behalf of themselves and the Nationwide Class or, in the alternative, on behalf of the State Subclasses.

305. Plaintiffs assert claims under the law of fraudulent concealment of the fifty states, the District of Columbia, and Puerto Rico, which is materially the same under the laws of each state, the District of Columbia, and Puerto Rico.

306. Evenflo had an independent duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and wellbeing at serious risk. Plaintiffs and Nationwide Class members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

307. Evenflo's failure to disclose was intentional and reflects a reckless disregard for the truth. Evenflo knew about the safety risks posed by its Big Kid booster seats, but intentionally failed to disclose that material fact to consumers and, as set forth herein, continues to conceal that fact through untrue and misleading statements to the public.

308. Plaintiffs and the Nationwide Class members were induced to act by Evenflo's fraudulent concealment of material facts regarding the safety of its Big Kid booster seats. Had Plaintiffs and the Nationwide Class been told of the defective nature of Evenflo's seats, they would not have purchased such products or would have paid less for them.

309. Plaintiffs and the Nationwide Class members had a reasonable expectation that the defective products they were purchasing for infants and children were safe. Evenflo reasonably could have anticipated and intended that Plaintiffs and the Nationwide Class purchased such products in part based upon such expectations and assumptions, and intended them to do so.

310. Evenflo's false representations and omissions were material to consumers because they concerned the safety of the Big Kid booster seats, which played a significant role in the value of the Big Kid booster seats.

311. Evenflo's suppression and omission of material facts associated with the safety risks of Big Kid booster seats occurred repeatedly in its trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

312. In failing to disclose the safety risks of Big Kid booster seats, Evenflo concealed material facts and breached its duty to Plaintiffs and the Nationwide Class not to do so.

313. In addition to failing to disclose information it had a duty to disclose, as described above, Evenflo actively concealed material information regarding the safety risks posed by its Big Kid booster seats.

314. Evenflo has still not made full and adequate disclosures and continues to defraud Plaintiffs and Class members by concealing material information regarding the defect in the Big Kid booster seats.

315. Plaintiffs and Class members were unaware of the omitted material facts referenced herein, and they would not have acted as they did if they had known of the concealed and suppressed facts, in that they would not have purchased or paid as much for the Big Kid booster seats, or would have taken other affirmative steps in light of the information concealed from them.

Plaintiffs' and Class members' actions were justified. Evenflo was in exclusive control of the material facts, and such facts were not generally known to the public, Plaintiffs, or Nationwide Class members.

316. Because of the concealment and/or suppression of facts, Plaintiffs and Class members sustained damage because they purchased products that they otherwise would not have purchased and/or overpaid for the Big Kid booster seats as a result of Evenflo's concealment of the true safety and quality of the Big Kid booster seats. Had Plaintiffs and Nationwide Class members been aware of the true nature of the Big Kid booster seats, and Evenflo's disregard for the truth, Plaintiffs and Class members would have paid less for their Big Kid booster seats or would not have purchased them at all.

317. As a direct and proximate result of Evenflo's acts of concealment and suppression, Plaintiffs and the Nationwide Class have suffered and will continue to suffer actual economic damages as detailed above.

318. Evenflo's acts were done wantonly, maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' and Nationwide Class members' rights, the safety and well-being of Plaintiffs' and Nationwide Class members' young children and the representations that Evenflo made to them, in order to enrich Evenflo. Evenflo's conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

COUNT II:
UNJUST ENRICHMENT

319. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

320. Plaintiffs assert this Count on behalf of themselves and the Nationwide Class or, in the alternative, on behalf of the State Subclasses.

321. Plaintiffs assert claims under the law of unjust enrichment of the fifty states, the District of Columbia, and Puerto Rico, which are materially the same.

322. Plaintiffs and the members of the Nationwide Class purchased Evenflo's Big Kid booster seats that they would otherwise have not purchased, or for which they would have paid less money, had they known of the safety risks of using the booster seats and that Evenflo's representations that the Big Kid booster seats were "Side Impact Tested" and suitable for children as small as 30 pounds were false and/or misleading.

323. Evenflo was unjustly enriched at the expense of and to the detriment of Plaintiffs and Nationwide Class members, who unknowingly paid money and overpaid for the Big Kid booster seats that were falsely marketed and presented safety risks. Evenflo was also unjustly enriched because it made material misrepresentations and failed to disclose material facts and Plaintiffs and the Nationwide Class members would have otherwise not bought the Big Kid booster seats or would have paid less for them absent the misrepresentations and if Evenflo had disclosed all safety risks and material facts.

324. Specifically, Evenflo receives and appreciates a direct financial benefit from the sale of its products to end consumers. Evenflo sells its products directly to end consumers, as well as selling its products to distributors, retailers and other intermediaries, who then sell products to end consumers. The sale of Evenflo's products to end consumers results in revenues which are either paid directly to Evenflo or used by the intermediaries to pay Evenflo for its products. That is, Evenflo's success as a business is directly associated with the volume of the sale of its products to end consumers, such as Plaintiffs and the Nationwide Class.

325. Plaintiffs and members of the Nationwide Class therefore seek both restitution of the monies they paid and overpaid and/or non-restitutionary disgorgement of Evenflo's profits.

COUNT III:
NEGLIGENT MISREPRESENTATION

326. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

327. Plaintiffs assert this Count on behalf of themselves and the Nationwide Class or, in the alternative, on behalf of the State Subclasses.

328. Plaintiffs assert claims under the law of negligent misrepresentation of the fifty states, the District of Columbia, and Puerto Rico, which are materially the same.

329. Evenflo negligently misrepresented and omitted material facts including the standard, quality, or grade of the Big Kid booster seats and exposed children to safety risks. As a direct result of Evenflo's negligent conduct, Plaintiffs and members of the Nationwide Class have suffered actual damages.

330. The fact that the Big Kid booster seats are unsafe for their advertised and marketed weight range and unsafe in a side impact collision is material because Plaintiffs and members of the Nationwide Class had a reasonable expectation that the Big Kid booster seats would protect their children from injury, especially in the event of a side impact collision, for which Evenflo claimed that its seats had been "side impact tested." No reasonable consumer would expect that booster seats advertised for children as light as 30 pounds would be unsafe for such children and no reasonable consumer would expect that booster seats labeled and marketed as "side impact tested" would have undergone only a pretextual "side impact test" that had no relationship to whether the seats would actually be safe and that, in fact, did not provide children with protection in the event of a side impact collision.

331. Plaintiffs and members of the Nationwide Class would not have purchased the Big Kid booster seats or would have paid less for them but for Evenflo's negligent false representations and omissions of material facts regarding the Big Kid booster seats. Plaintiffs and members of the Nationwide Class justifiably relied upon Evenflo's negligent false representations and omissions of material facts.

332. As a direct and proximate result of Evenflo's negligent false representations and omissions of material facts regarding the Big Kid booster seats, Plaintiffs and members of the Nationwide Class have suffered an ascertainable loss and actual damages in an amount to be determined at trial.

B. Claims Brought on Behalf of the Alabama Subclass

COUNT IV:
VIOLATION OF THE ALABAMA DECEPTIVE TRADE PRACTICES ACT
(ALA. CODE. § 18-19-1, *ET SEQ*.)

333. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

334. This claim under the Alabama Deceptive Trade Practices Act ("ADTPA") is brought by Plaintiff Natalie Davis ("Alabama Plaintiff" for purposes of this count) against Evenflo on behalf of herself and the Alabama Subclass.

335. Evenflo is a "person" as defined by Ala. Code § 8-19-3(5).

336. Alabama Plaintiff and Alabama Subclass members are "consumers" as defined by Ala. Code § 8-19-3(2).

337. Evenflo is engaged in "trade" or "commerce" as those terms are defined Ala. Code § 8-19-3(8).

338. Evenflo received notice pursuant to Ala. Code § 8-19-10(e) concerning its wrongful conduct as alleged herein by Alabama Plaintiff and Alabama Subclass members. Sending pre-suit notice pursuant to Ala. Code § 8-19-10(e), however, is an exercise in futility for Alabama Plaintiff because Evenflo has already been informed of the allegedly unfair and deceptive conduct as described herein by the numerous consumer class action complaints filed against it.

339. Evenflo advertised and sold the Big Kid booster seats in Alabama and engaged in trade or commerce directly or indirectly affecting the people of Alabama.

340. The ADTPA declares "deceptive acts or practices in the conduct of any trade or commerce" to be unlawful, Ala. Code § 8-19-5, including but not limited to "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have," "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another," "[a]dvertising goods or services with intent not to sell them as advertised," id. §§ 8-19-5(5), (7), (9).

341. Evenflo engaged in deceptive trade practices that violated the ADTPA by knowingly making misleading statements about the safety of its Big Kid booster seats and knowingly failing to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes.

342. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's

test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which presents a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least 40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

343. Evenflo intentionally and knowingly misrepresented and failed to disclose material facts it had a duty to disclose regarding its Big Kid booster seats with the intent to mislead Alabama Plaintiff and the Alabama Subclass.

344. Evenflo knew or should have known that its conduct violated the ADTPA.

345. Evenflo owed Alabama Plaintiff and the Alabama Subclass members a duty to disclose material facts about the safety risks posed by its Big Kid booster seats, because Evenflo:

a) Possessed exclusive knowledge about its testing of these seats;

b) Intentionally concealed the foregoing from Alabama Plaintiff and the Alabama Subclass; and/or

c) Made incomplete and misleading representations that its Big Kid seats were "Side Impact Tested," while purposefully withholding material facts from Alabama Plaintiff and the Alabama Subclass that contradicted these representations.

346. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and wellbeing at serious risk in side-impact car crashes.

347. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid booster seats were material to Alabama Plaintiff and the Alabama Subclass. Alabama Plaintiff and Alabama Class members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

348. Alabama Plaintiff and members of the Alabama Subclass could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seats are unsafe in side impact crash tests. Alabama Plaintiff and Alabama Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

349. Had Evenflo disclosed to Alabama Plaintiff and Alabama Subclass members material facts, including but not limited to, the safety risks posed by its Big Kid booster seats, Alabama Plaintiff and the Alabama Subclass members would not have purchased Big Kid booster seats or would have paid less. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe.

350. Evenflo's unfair and deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Alabama Plaintiff and the Alabama Subclass members, about the true safety risks posed by its Big Kid booster seats.

351. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive acts and practices under the ADTPA.

352. As a direct and proximate result of Evenflo's unfair and deceptive acts and practices, Alabama Plaintiff and absent Alabama Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

353. Evenflo's violations present a continuing risk to Alabama Plaintiff, the Alabama Subclass and/or the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

354. Alabama Plaintiff and Alabama Subclass members seek all monetary and non-monetary relief allowed by law, including the greater of actual damages or statutory damages of $100 each, treble damages, injunctive relief, reasonable attorney's fees and costs, under Ala. Code §§ 8-19-10 (a)(1), (2), (3), and as permitted under the ADTPA and applicable law.

COUNT V:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(ALA. CODE. § 7-2-314)

355. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

356. This claim is brought by Plaintiff Natalie Davis ("Alabama Plaintiff" for purposes of this count) against Evenflo on behalf of herself and the Alabama Subclass.

357. Alabama law states that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Ala. Code § 7-2-314(1).

358. Evenflo is and was at all relevant times a merchant as defined by Ala. Code § 7-2-104(1).

359. Alabama Plaintiff and members of the Alabama Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

360. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

361. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present an undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

362. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

363. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties

would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

364. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Alabama Plaintiff and members of the Alabama Subclass have been damaged in an amount to be proven at trial.

365. Alabama Plaintiff and members of the Alabama Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

C. Claims Brought on Behalf of the Alaska Subclass

COUNT VI:
VIOLATION OF THE ALASKA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT
(ALASKA STAT. § 45.50.471, *ET SEQ.*)

366. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

367. This claim is brought by Plaintiff Jilli Hiriam ("Alaska Plaintiff" for purposes of this count) against Evenflo on behalf of herself and the Alaska Subclass.

368. The Alaska Unfair Trade Practices and Consumer Protection Act ("Alaska CPL") prohibits unfair or deceptive acts or practices, including, but not limited to: representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have; representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another; advertising goods or services with the intent not to sell them as advertised; engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives, or damages a buyer in connection with the sale or advertisement of goods or services; using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or

omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been mislead, deceived, or damaged. Alaska Stat. § 45.50.471(b).

369. Evenflo, Alaska Plaintiff, and Alaska Class members are "persons" within the meaning of Alaska Stat. § 45.50.531(a).

370. All of the acts complained of herein were perpetrated by Evenflo in the course of trade or commerce within the meaning of Alaska Stat. § 45.50.471(a). The acts complained of herein occurred in of the course of Evenflo advertising, offering for sale, selling, and distributing an item or items of value.

371. As described herein, Evenflo willfully failed to disclose, concealed, omitted, and/or suppressed information relating to the safety risks posed by its Big Kid booster seats, with the intent that others relied upon such failure to disclose, concealment, omission, and/or suppression of information. Evenflo's failure of disclosure, concealment, and suppression concerned material facts, which put children's health and wellbeing at serious risk in side-impact car crashes.

372. As described herein, Evenflo engaged in deceptive and unfair practices by employing deception, deceptive acts or practices, fraud, and/or misrepresentations relating to the safety of its Big Kid booster seats, with the intent that others relied upon such deception, deceptive acts or practices, fraud, and/or misrepresentations. Evenflo's deception, deceptive acts or practices, fraud and misrepresentations concerned material facts, which put children's health and wellbeing at serious risk in side-impact car crashes.

373. As described herein, in connection with the sale or advertisement of goods or services, Evenflo engaged in unfair trade practice through other conduct creating a likelihood of

confusion or of misunderstanding and which misled, deceived, and damaged buyers of the Big Kid booster seal.

374. As described herein, Evenflo's acts and practices, including Evenflo's advertising and safety representations relating to the certifications, approval, characteristics, uses, benefits, standard, and/or quality of its Big Kid model booster seats were deceptive, misleading, and inaccurate.

375. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Alaska Plaintiff and the Alaska Subclass members, about the true safety risks posed by its Big Kid booster seats.

376. Evenflo intentionally and knowingly misrepresented material facts regarding its Big Kid model booster seats with intent to mislead Alaska Plaintiff and the Alaska Subclass.

377. Evenflo knew or should have known that its conduct violated the Alaska CPL.

378. Evenflo owed Alaska Plaintiff and the Alaska Subclass a duty to disclose the truth about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Alaska Plaintiff and the Alaska Subclass;

c. Made incomplete and misleading representations that its Big Kid model seats were safe for children weighing under forty pounds, while purposefully withholding material facts from Alaska Plaintiff and the Alaska Subclass that contradicted these representations; and/or

d. Made incomplete and misleading representations that its Big Kid model seats were "side impact tested," while purposefully withholding material

facts from Alaska Plaintiff and the Alaska Subclass that contradicted these representations.

379. Evenflo's acts and practices described herein, including Evenflo's advertising and safety representations relating to the safety of and the "side impact test[ing]" of its Big Kid model booster seat, were deceptive and capable of being interpreted in a misleading way.

380. Evenflo's acts and practices described herein, including Evenflo's advertising and safety representations relating to the safety of its Big Kid model booster seat for children weighing under forty pounds, were deceptive and capable of being interpreted in a misleading way.

381. Evenflo's omissions and misrepresentations about the safety of its Big Kid model booster seats were material to Alaska Plaintiff and the Alaska Subclass.

382. Evenflo's acts and practices described herein, including Evenflo's advertising and safety representations relating to the safety of and the "side impact test[ing]" of its Big Kid model seat, were unfair because:

a. they offended public policy, including the public policy to protect children and honestly and candidly represent safety characteristics and limitations;

b. were immoral, unethical, oppressive, and unscrupulous given the importance to society of protecting children and the decision to misrepresent or conceal the actual safety of its Big Kid model seat; and/or

c. caused substantial injury to consumers in the form of overpayments for products that are not safe and do not perform as advertised, which outweighs any potential utility of Evenflo's conduct.

383. Alaska Plaintiff and the Alaska Subclass suffered ascertainable loss caused by Evenflo's unfair practices, deception, misrepresentations, and its concealment of and failure to

disclose material information. Alaska Plaintiff and the Alaska Subclass members would not have purchased Big Kid model booster seats but for Evenflo's violations of the Alaska CPL or would have paid substantially less for them.

384. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive practices under the Alaska CPL. As a direct and proximate result of Evenflo's violations of the Alaska CPL, Alaska Plaintiff and the Alaska Subclass have suffered injury-in-fact and/or actual damage.

385. Evenflo's violations present a continuing risk to Alaska Plaintiff as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

386. Evenflo is liable to Alaska Plaintiff and the Alaska Subclass for three times their actual damages or $500, whichever is greater, and attorneys' fees and costs. Alaska Stat. §§ 45.50.531(a), 45.50.537(a). Alaska Plaintiff and the Alaska Subclass are also entitled to an award of punitive damages given that Evenflo's conduct was outrageous, malicious, done with bad motives, and evidenced reckless indifference to the interests of another person. Alaska Stat. § 09.17.020.

COUNT VII:
BREACH OF IMPLIED WARRANTY
(ALASKA STAT. § 45..02.314)

387. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

388. This claim is brought by Plaintiff Jilli Hiriam ("Alaska Plaintiff" for purposes of this count) against Evenflo on behalf of herself and the Alaska Subclass.

389. Evenflo is and was at all relevant times a merchant as defined by Alaska Stat. § 45.02.104.

390. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Alaska Stat. § 45.02.314

391. Alaska Plaintiff and members of the Alaska Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

392. The Big Kid booster seats are and were at all relevant times goods within the meaning of Alaska Stat. § 45.02.105.

393. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

394. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

395. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties

would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

396. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Alaska Plaintiff and members of the Alaska Subclass have been damaged in an amount to be proven at trial.

397. Alaska Plaintiff and members of the Alaska Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

D. Claims Brought on Behalf of the California Subclass

COUNT VIII:
VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.*)

398. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

399. This claim is brought by Plaintiffs Mike Xavier, Desinae Williams, Keith Epperson, Mona-Alicia Sanchez, Heather Hampton, and Elise Howland ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the California Subclass members.

400. California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200, *et seq*., proscribes acts of unfair competition, including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."

401. Evenflo's conduct, as described herein, was and is in violation of the UCL. Evenflo's conduct violates the UCL in at least the following ways:

i. By knowingly and intentionally concealing from Plaintiffs and the other California Subclass members that the Big Kid booster seats were not safe for children as light as 30 pounds, and were not legitimately "side impact tested" and were not, in fact, safe for children subjected to a side impact

collision, while obtaining money from Plaintiffs and the California Subclass;

ii. By marketing Big Kid booster seats as safe for children as light as 30 pounds and further marketing them as "side impact tested" when Evenflo knew that its testing program was pretextual and did not indicate that the Big Kid booster seats were actually safe in the event of a side impact collision;

iii. By purposefully designing and marketing the Big Kid booster seats to appear to be safe and designed to lessen the harmful effect of a side impact collision when Evenflo knew the design offered no actual enhanced protection in a side impact collision and would fail to operate safely and in a manner that owners would reasonably expect.

402. Evenflo's misrepresentations and omissions alleged herein caused Plaintiffs and the other California Subclass members to make their purchases of Big Kid booster seats. Absent those misrepresentations and omissions, Plaintiffs and the other California Subclass members would not have purchased Big Kid booster seats, would not have purchased the booster seats at the prices they paid, and/or would have purchased different booster seats that were actually safe for their children at the advertised weight and safe in the event of a side impact collision.

403. Accordingly, Plaintiffs and the other California Subclass members have suffered injury in fact including lost money or property as a result of Evenflo's misrepresentations and omissions.

404. Plaintiffs seek to enjoin further unlawful, unfair, and/or fraudulent acts or practices by Evenflo under CAL. BUS. & PROF. CODE § 17200.

405. Plaintiffs request that this Court enter such orders or judgments as may be necessary to enjoin Evenflo from continuing its unfair, unlawful, and/or deceptive practices and to restore to Plaintiffs and members of the California Subclass any money it acquired by unfair competition, including restitution and/or restitutionary disgorgement, as provided in CAL. BUS. & PROF. CODE § 17203 and CAL. BUS. & PROF. CODE § 3345; and for such other relief set forth below.

COUNT IX:
VIOLATION OF CALIFORNIA LEGAL REMEDIES ACT
(CAL. CIV. CODE §§ 1750–85)

406. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

407. This claim is brought by Plaintiffs Mike Xavier, Desinae Williams, Keith Epperson, Mona-Alicia Sanchez, Heather Hampton and Elise Howland ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the California Subclass members.

408. The California Legal Remedies Act prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770. The prohibited unfair or deceptive acts or practices include, among others, (a) "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have," *id.* § 1770(a)(5), and (b) "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another," *id.* § 1770(a)(7).

409. Evenflo is a "person" under the Legal Remedies Act. *Id.* § 1761(c).

410. Plaintiffs and California Subclass members each purchased one or more Evenflo "Big Kid" booster seats and are "consumers" under the Legal Remedies Act. *Id.* § 1761(d).

411. As alleged in this Complaint, Evenflo's failure to disclose—by labeling or otherwise—the safety risks presented by its Big Kid booster seats, together with its deceptive

labeling of these seats as "side impact tested," constitute both "unfair" and "deceptive" acts in violation of the Legal Remedies Act.

412. As described herein, Evenflo's conduct was and is a violation of the Legal Remedies Act. Evenflo's conduct violates at least the following provisions of the Act:

a. California Civil Code § 1770(a)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.

b. California Civil Code 1770(a)(7): Representing that goods or services are of a particular standard, quality, or grade if they are of another.

413. Evenflo misrepresented and omitted material facts regarding its Big Kid booster seats—specifically regarding their side impact crashworthiness—with an intent to mislead Plaintiffs and California Subclass members.

414. In purchasing Big Kid booster seats from Evenflo, Plaintiffs and California Subclass members were deceived by Evenflo's failure to disclose that these seats expose children to significant safety risks, including the risk of serious injury or death, in side-impact car crashes.

415. Plaintiffs and California Subclass members had no way of knowing Evenflo's representations regarding its Big Kid booster seats were false, misleading, and incomplete.

416. As alleged herein, Evenflo engaged in a pattern of deception and deliberate public disinformation in the face of a known defect with its Big Kid booster seats. Plaintiffs and California Subclass members did not, and could not, unravel Evenflo's deception on their own.

417. Evenflo knew or should have known that its conduct violated the California Legal Remedies Act.

418. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and wellbeing at serious risk in side-impact car crashes. Plaintiffs and California Subclass members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

419. Evenflo's conduct proximately caused injury to Plaintiffs and California Subclass members who purchased Big Kid booster seats.

420. Plaintiffs and California Subclass members were injured and suffered ascertainable loss, injury in fact, and/or actual damages as a proximate result of Evenflo's conduct in that Plaintiffs would not have purchased Evenflo's Big Kid booster seats or would have paid less for the seats had they known that use of the seats put their children at serious safety risk.

421. Evenflo's unlawful acts and practices complained of herein affect the public interest.

422. The facts concealed and omitted by Evenflo from Plaintiffs and California Subclass members are material in that a reasonable consumer would have considered them to be important in deciding whether to purchase a Big Kid booster seat. Had Plaintiffs and the other California Subclass members known about the defective nature of these seats, they would not have purchased them or would have paid less for them.

423. Plaintiffs' and the other California Subclass members' injuries were proximately caused by Evenflo's unlawful and deceptive business practices.

424. Plaintiffs and California Subclass members seek an order under the Legal Remedies Act enjoining Evenflo from engaging in the methods, acts, or practices alleged herein, and requiring Evenflo to either (i) recall all Big Kid model booster seats still in use; (ii) cease selling

Big Kid model booster seats; and/or (iii) add labeling to all future Big Kid model booster seats warning consumers of the dangers associated with their use.

425. On February 19, 2020, Plaintiffs sent a notice letter under California Civil Code § 1782 to Evenflo.

426. Evenflo did not rectify its conduct within 30 days of receiving Plaintiffs' notice: Therefore, Plaintiffs request the following forms of relief pursuant to Cal. Civ. Code § 1782:

i. Actual damages;

ii. Restitution of money to Plaintiffs and Class members, and the general public;

iii. Punitive damages;

iv. An additional award of up to $5,000 to each plaintiff and any Class member who is a "senior citizen";

v. Attorneys' fees and costs; and

vi. Other relief that this Court deems proper.

COUNT X:
VIOLATION OF CALIFORNIA
FALSE ADVERTISING LAW
(CAL. BUS. & PROF. CODE §§ 17500, *ET SEQ.*)

427. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

428. This claim is brought by Plaintiffs Mike Xavier, Desinae Williams, Keith Epperson, Mona-Alicia Sanchez, Heather Hampton, and Elise Howland ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the California Subclass members.

429. California Bus. & Prof. Code § 17500 states: "It is unlawful for any … corporation … with intent directly or indirectly to dispose of real or personal property … to induce the public

to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated … from this state before the public in any state, in any newspaper or other publication, or any advertising device, … or in any other manner or means whatever, including over the Internet, any statement … which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

430. Evenflo caused to be made or disseminated through California and the United States, through advertising, marketing and other publications, statements that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to Evenflo, to be untrue and misleading to consumers, including Plaintiffs and the other California Subclass members.

431. Evenflo has violated § 17500 because the misrepresentations and omissions regarding the safe weight range and side impact crash tested nature of the Big Kid Booster seats, as set forth in this Complaint, were material and likely to deceive a reasonable consumer.

432. Plaintiffs and the other California Subclass members have suffered an injury in fact, including the loss of money or property, as a result of Evenflo's unfair, unlawful, and/or deceptive practices. In purchasing their Big Kid booster seats, Plaintiffs and the other California Subclass members relied on the misrepresentations and/or omissions of Evenflo with respect to the safety, safe weight range and testing of the Big Kid booster seats. Evenflo's representations turned out not to be true because Evenflo knew well that its booster seats were not safe for children as light as 30 pounds and their "side impact tested" claims referred to a pretextual testing system that had no relationship to whether the seats were actually safe for children in the event of a side impact collision. Had Plaintiffs and the other California Subclass members known this, they would not have purchased the Big Kid booster seats or would have paid less for them. Accordingly, Plaintiffs

and the other California Subclass members overpaid for their Big Kid booster seats and did not receive the benefit of their bargain.

433. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Evenflo's business. Evenflo's wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

434. Plaintiffs, individually and on behalf of the other California Subclass members, request that this Court enter such orders or judgments as may be necessary to enjoin Evenflo from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiffs and the other California Subclass members any money Evenflo acquired by unfair competition, including restitution and/or restitutionary disgorgement, and for such other relief set forth below.

COUNT XI:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY -- SONG-BEVERLY CONSUMER WARRANTY ACT
(CAL. CIVIL CODE § 1790, *ET SEQ.*)

435. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

436. This claim is brought by Plaintiffs Mike Xavier, Desinae Williams, Keith Epperson, Mona-Alicia Sanchez, Heather Hampton, and Elise Howland ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the California Subclass members.

437. The Big Kid booster seats are and were at all relevant times consumer goods within the meaning of Cal. Civ. Code § 1791(a).

438. California Plaintiffs are and were at all relevant times buyers within the meaning of Cal. Civ. Code § 1791(b).

439. Evenflo is and was at all relevant times a manufacturer as defined by Cal. Civ. Code § 1791(j). At the time of purchase Evenflo was in the business of selling consumer goods for sale to consumers.

440. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Cal. Civ. Code §§ 1791.1 & 1792.

441. California Plaintiff and members of the California Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

442. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

443. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

444. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties

would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

445. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, California Plaintiff and members of the California Subclass have been damaged in an amount to be proven at trial.

446. California Plaintiff and members of the California Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

COUNT XII:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY – CALIFORNIA UNIFORM COMMERCIAL CODE
(CAL. COMM. CODE § 2314)

447. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

448. This claim is brought by Plaintiffs Mike Xavier, Desinae Williams, Keith Epperson, Mona-Alicia Sanchez, Heather Hampton, and Elise Howland ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the California Subclass members.

449. Evenflo is and was at all relevant times a merchant as defined by Cal. Comm. Code § 2104.

450. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to California Comm. Code § 2314.

451. California Plaintiff and members of the California Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller

of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

452. The Big Kid booster seats are and were at all relevant times goods within the meaning of Cal. Comm. Code § 2105.

453. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

454. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

455. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

456. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, California Plaintiff and members of the California Subclass have been damaged in an amount to be proven at trial.

457. California Plaintiff and members of the California Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

E. Claims Brought on Behalf of the Colorado Subclass

COUNT XIII:
VIOLATION OF COLORADO CONSUMER PROTECTION LAW
(COLO. REV. STAT. § 6-1-101, *ET SEQ.*)

458. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

459. Plaintiff Casey Hash ("Colorado Plaintiff" for purposes of this claim) brings this Count on behalf of the Colorado Subclass.

460. Colorado's Consumer Protection Act (the "Colorado CPA") prohibits a person from engaging in a "deceptive trade practice," which includes knowingly making "a false representation as to the source, sponsorship, approval, or certification of goods," or "a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods." Colo. Rev. Stat. § 6-1-105(1)(b), (e). The Colorado CPA further prohibits "represent[ing] that goods . . . are of a particular standard, quality, or grade . . . if he knows or should know that they are of another," "advertis[ing] goods . . . with intent not to sell them as advertised," and "fail[ing] to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction." Colo. Rev. Stat. § 6-1-105(1)(g), (i), & (u).

461. Defendant is a "person" under § 6-1-102(6) of the Colorado CPA, Colo. Rev. Stat. § 6-1-101 *et seq.*

462. Colorado Plaintiff and Colorado Subclass members are "consumers" for the purpose of Colo. Rev. Stat. § 6-1-113(1)(a) who purchased one or more Big Kid booster seats.

463. In the course of Evenflo's business, it willfully failed to disclose and actively concealed that the Big Kid booster seats were not safe for children under 40 pounds and that its

"side impact" testing was pretextual and did not actually indicate that the Big Kid booster seats were safe or safer than any competitive booster seat in the event of a side impact collision. A reasonable consumer would expect the booster seats to be safe for the entire indicated weight range and would expect that if the seats are advertised as "side impact tested" that such tests would actually have shown that the booster seats were effective in minimizing injury from side impact collisions. Instead, Evenflo knew that the Big Kid booster seats should not be used by children under 40 pounds and knew that its side-impact testing was pretextual and did not make any determination as to whether the booster seats actually lessoned injury in a side impact collision and, in fact, the Big Kid booster seats were unsafe for children in the event of a side impact collision. Accordingly, Evenflo engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale, marketing and distribution of Big Kid booster seats.

464. In purchasing Big Kid booster seats, Colorado Plaintiff and the other Colorado Subclass members were deceived by Evenflo's failure to disclose that the Big Kid booster seats were unsafe for children under 40 pounds and by Evenflo's deceptive marketing and labeling of its Big Kid booster seats as side impact tested when it knew that its side impact tests were pretextual and did actually indicate that the booster seats would be safe in the event of a side-impact collision and they, in fact, were not safe in such collisions.

465. Colorado Plaintiff and Colorado Subclass members reasonably relied upon Evenflo's false misrepresentations. They had no way of knowing that Evenflo's representations were false and gravely misleading. As alleged herein, Evenflo engaged in extremely sophisticated methods of deception. Plaintiffs and Colorado Subclass members did not, and could not, unravel

Evenflo's deception on their own, as Evenflo kept secret its test results and corporate information indicating that the Big Kid booster seats were not safe as advertised for children under 40 pounds or in the event of side impact collisions, and Colorado Plaintiff and other Colorado Subclass members were not aware of the unsafe nature of the Big Kid booster seats prior to purchase.

466. Evenflo's actions as set forth above occurred in the conduct of trade or commerce.

467. Evenflo's deception, fraud, misrepresentation, concealment, suppression, or omission of material facts were likely to and did in fact deceive reasonable consumers.

468. Evenflo intentionally and knowingly misrepresented material facts regarding the Big Kid booster seats with intent to mislead Colorado Plaintiff and the Colorado Subclass.

469. Evenflo knew or should have known that its conduct violated the Colorado CPA.

470. Evenflo owed Colorado Plaintiff and the Colorado Subclass members a duty to disclose the truth about the safety of Big Kid booster seats because Evenflo:

i. Possessed exclusive knowledge of the design and testing of the Big Kid booster seats;

ii. Intentionally concealed the foregoing from Colorado Plaintiff and Colorado Subclass members; and/or

iii. Made incomplete representations in advertisements, on packaging and point of sale materials and on its website, failing to warn the public or to publicly admit that the Big Kid booster seats were not safe for children under 40 pounds and were not legitimately tested or found to be safe in the event of side impact collision.

471. Evenflo had a duty to disclose the true safety characteristics of the Big Kid booster seats as described herein, because Colorado Plaintiff and the other Colorado Subclass members

relied on Evenflo's material misrepresentations and omissions regarding the features of the Big Kid booster seats, specifically, their safe weight range and testing to ensure safety in a side-impact collision.

472. Colorado Plaintiff and the other Colorado Subclass members were injured and suffered ascertainable loss, injury-in-fact, and/or actual damage as a proximate result of Evenflo's conduct in that Colorado Plaintiff and the other Colorado Subclass members incurred costs, including overpaying for their Big Kid booster seats.

473. Evenflo's violations cause continuing injuries to Plaintiffs and other Colorado Subclass members.

474. The facts concealed and omitted by Evenflo from Colorado Plaintiff and other Colorado Subclass members are material in that a reasonable consumer would have considered them to be important in deciding whether to purchase a Big Kid booster seat or pay a lower price. Had Colorado Plaintiff and the other Colorado Subclass members known about the true nature of the Big Kid booster seats, they would not have purchased them or would not have paid the prices they paid.

475. Colorado Plaintif' and the other Colorado Subclass members' injuries were proximately caused by Evenflo's unlawful and deceptive business practices.

476. Evenflo's widespread false and deceptive advertisement directed to the market generally implicates a significant public impact under Colorado law.[30]

477. Pursuant to Colo. Rev. Stat. § 6-1-113, Colorado Plaintiff and the Colorado Subclass seek monetary relief against Evenflo measured as the greater of (a) actual damages in an

[30] *See Electrology Lab., Inc. v. Kunze,* 169 F. Supp. 3d 1119, 1162 (D. Colo. 2016); *see also Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998).

amount to be determined at trial and the discretionary trebling of such damages, or (b) statutory damages in the amount of $500 for Colorado Plaintiff and each Colorado Subclass member.

478. Colorado Plaintiff and the Colorado Subclass also seek declaratory relief, attorneys' fees, and any other just and proper relief available under the Colorado CPA.

F. Claims Brought on Behalf of the Florida Subclass

COUNT XIV:
FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT
(Fla. Stat. § 501.201, *ET SEQ.*)

479. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

480. This claim is brought by Plaintiffs Karyn Aly and Debora de Souza Correa Talutto ("Florida Plaintiffs") against Evenflo on behalf of themselves and the Florida Subclass.

481. Plaintiffs and Florida Subclass members are "consumers" as defined by Fla. Stat. § 501.203.

482. Evenflo advertised, offered, or sold goods or services in Florida and engaged in trade or commerce directly affecting the people of Florida.

483. Evenflo engaged in unconscionable, unfair, and deceptive acts and practices in the conduct of trade and commerce, in violation of Fla. Stat. § 501.204(1).

484. Evenflo's false representations and omissions as alleged herein were material because they were likely to deceive reasonable consumers.

485. Had Evenflo disclosed to Florida Plaintiffs and Florida Subclass members material facts, including but not limited to: (a) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (b) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (c) that the booster seat passes the company's side-impact

tests even if the child-sized dummy is violently moved or jostled; (d) that Evenflo's side-impact testing is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (e) that internal videos of Evenflo's side impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which present a high risk of serious injuries to the head, neck, and spine; (f) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat; and (g) that no child should use a booster seat until he or she weighs at least 40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds, Florida Plaintiffs and Florida Subclass members would not have purchased the Big Kid booster seats or would have paid less. Florida Plaintiffs and Florida Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

486. As a direct and proximate result of Evenflo's deceptive acts and practices, Florida Plaintiffs and Florida Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

487. Florida Plaintiffs and Florida Subclass members seek all monetary and non-monetary relief allowed by law, including actual or nominal damages under Fla. Stat. § 501.21; declaratory and injunctive relief; reasonable attorneys' fees and costs, under Fla. Stat. § 501.2105(1); and any other relief that is just and proper.

COUNT XV:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(FLA. STAT § 672.314)

488. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

489. This claim is brought by Plaintiffs Karyn Aly and Debora de Souza Correa Talutto ("Florida Plaintiffs") against Evenflo on behalf of themselves and the Florida Subclass.

490. Evenflo is and was at all relevant times a merchant.

491. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Fla. Stat. § 672.314.

492. Florida Plaintiff and members of the Florida Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

493. The Big Kid booster seats are and were at all relevant times goods within the meaning of Fla. Stat. § 672.314.

494. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children

under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

495. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

496. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

497. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Florida Plaintiff and members of the Florida Subclass have been damaged in an amount to be proven at trial.

498. Florida Plaintiff and members of the Florida Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

G. Claims Brought on Behalf of the Georgia Subclass

COUNT XVI:
VIOLATION OF GEORGIA FAIR BUSINESS PRACTICES ACT ("GFBPA")
(O.C.G.A. § 10-1-390, *ET SEQ.*)

499. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

500. This Count is brought by Plaintiff Cathy Malone ("Georgia Plaintiff" for purposes of this count) against Evenflo, on behalf of herself and the Georgia Subclass.

501. Evenflo is a "person" as defined by the GFBPA. O.C.G.A. § 10-1-392(a)(24).

502. Georgia Plaintiff and Georgia Subclass members are "consumers" within the meaning of the GFBPA. O.C.G.A. § 10-1-392(a)(6).

503. The act and practices described herein are "consumer transactions" as defined by the GFBPA. O.C.G.A. § 10-1-392(a)(10).

504. Evenflo received notice pursuant to O.C.G.A. § 10-1-399(b) concerning its wrongful conduct as alleged herein by Georgia Plaintiff and Georgia Subclass members. Sending pre-suit notice pursuant to O.C.G.A. § 10-1-399(b), however, is an exercise in futility for Georgia Plaintiff because Evenflo has already been informed of the allegedly unfair and deceptive conduct as described herein by the numerous consumer class action complaints filed against it.

505. Evenflo advertised and sold the Big Kid booster seats in Georgia and engaged in trade or commerce directly or indirectly affecting the people of Georgia.

506. The GFBPA is to be liberally construed to protect consumers "from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state." O.C.G.A. § 10-1-391(a).

507. The GFBPA declares "[u]nfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce" to be unlawful, O.C.G.A. § 10-1-393(a), including but not limited to "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have," "[r]epresenting that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another," [a]dvertising goods or services with intent not to sell them as advertised." Id. §§ 10-1-393(b)(5), (7) & (9).

508. By failing to disclose the defective nature of the Big Kid booster seats to Georgia Plaintiff and Georgia Subclass members, Evenflo violated the GFBPA, because Evenflo represented that the Big Kid booster seats had characteristics and benefits that they do not have, and represented that the Big Kid booster seats were of a particular standard, quality, or grade (i.e.,

"Side Impact Tested" and safe for children as small as 40 or even 30 pounds, etc.) when they are of another. See O.C.G.A. §§ 10-1-393(b)(5) & (7).

509. Evenflo advertised the Big Kid booster seats (as "Side Impact Tested" and safe for children as small as 40 or even 30 pounds, etc.) with the intent not to sell them as advertised, in violation of § 10-1-393(b)(9).

510. Evenflo engaged in deceptive trade practices that violated the GFBPA by knowingly making misleading statements about the safety of its Big Kid booster seats and knowingly failing to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes.

511. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side-impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which presents a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of

their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least 40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

512. Evenflo intentionally and knowingly misrepresented and failed to disclose material facts it had a duty to disclose regarding its Big Kid booster seats with the intent to mislead Georgia Plaintiff and the Georgia Subclass.

513. Evenflo knew or should have known that its conduct violated the GFBPA.

514. Evenflo owed Georgia Plaintiff and the Georgia Subclass members a duty to disclose material facts about the safety risks posed by its Big Kid booster seats, because Evenflo:

a) Possessed exclusive knowledge about its testing of these seats;

b) Intentionally concealed the foregoing from Georgia Plaintiff and the Georgia Subclass; and/or

c) Made incomplete and misleading representations that its Big Kid seats were "Side Impact Tested," while purposefully withholding material facts from Georgia Plaintiff and the Georgia Subclass that contradicted these representations.

515. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and wellbeing at serious risk in side-impact car crashes.

516. Evenflo's omissions and misrepresentations about the safety of its Big Kid booster seats were material to Georgia Plaintiff and the Georgia Subclass. Georgia Plaintiff and Georgia Class members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

517. Georgia Plaintiff and members of the Georgia Subclass could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seats are unsafe in side impact crash tests. Georgia Plaintiff and Georgia Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

518. Had Evenflo disclosed to Georgia Plaintiff and Georgia Subclass members material facts, including but not limited to, the safety risks posed by its Big Kid booster seats, Georgia Plaintiff and the Georgia Subclass members would not have purchased Big Kid booster seats. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe.

519. Evenflo's unfair and deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Georgia Plaintiff and the Georgia Subclass members, about the true safety risks posed by its Big Kid booster seats.

520. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive acts and practices under the GFBPA.

521. As a direct and proximate result of Evenflo's unfair and deceptive acts and practices, Georgia Plaintiff and absent Georgia Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

522. Evenflo's violations present a continuing risk to Georgia Plaintiff and/or the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

523. Georgia Plaintiff and Georgia Subclass members seek all monetary and non-monetary relief allowed by law, including actual and statutory damages, treble damages, punitive

damages, equitable relief, and reasonable attorneys' fees and costs, under O.C.G.A. § 10-1-399, and as permitted under the GFBPA and applicable law.

COUNT XVII:
VIOLATION OF GEORGIA UNIFORM DECEPTIVE TRADE PRACTICES ACT ("GUDTPA") (O.C.G.A. § 10-1-370, *ET SEQ.*)

524. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

525. This claim is brought by Plaintiff Cathy Malone ("Georgia Plaintiff") against Evenflo on behalf of herself and the Georgia Subclass.

526. Evenflo is a "person" as defined by the GUDTPA under O.C.G.A. § 10-1-371(5).

527. Evenflo advertised and sold the Big Kid booster seats in Georgia and engaged in trade or commerce directly or indirectly affecting the people of Georgia.

528. The GUDTPA prohibits "deceptive trade practices" which include "[r]epresents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have," "[r]epresents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another," "[a]dvertises goods or services with intent not to sell them as advertised," and "[e]ngages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." O.C.G.A. § 10-1-372(5), (7), (9), and (12).

529. By failing to disclose the defective nature of the Big Kid booster seats to Georgia Plaintiff and Georgia Subclass members, Evenflo engaged in deceptive trade practices in violation of the GUDTPA, because Evenflo represented that the Big Kid booster seats had characteristics and benefits that they do not have, and represented that the Big Kid booster seats were of a particular standard, quality, or grade (i.e., "Side Impact Tested" and safe for children as small as 40 or even 30 pounds, etc.) when they are of another. *See* O.C.G.A. §§ 10-1-372(5), (7), (12).

530. Evenflo advertised the Big Kid booster seats (as "Side Impact Tested" and safe for children as small as 40 or even 30 pounds, etc.) with the intent not to sell them as advertised, in violation of § 10-1-372(9).

531. Evenflo engaged in deceptive trade practices that violated the GUDTPA by knowingly making misleading statements about the safety of its Big Kid booster seats and knowingly failing to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes.

532. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which presents a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least

40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

533. Evenflo intentionally and knowingly misrepresented and failed to disclose material facts it had a duty to disclose regarding its Big Kid booster seats with the intent to mislead Georgia Plaintiff and the Georgia Subclass.

534. Evenflo knew or should have known that its conduct violated the GUDTPA.

535. Evenflo owed Georgia Plaintiff and the Georgia Subclass members a duty to disclose material facts about the safety risks posed by its Big Kid booster seats, because Evenflo:

a. Possessed exclusive knowledge about its testing of these seats;

b. Intentionally concealed the foregoing from Georgia Plaintiff and the Georgia Subclass; and/or

c. Made incomplete and misleading representations that its Big Kid seats were "Side Impact Tested," while purposefully withholding material facts from Georgia Plaintiff and the Georgia Subclass that contradicted these representations.

536. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and wellbeing at serious risk in side-impact car crashes.

537. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid booster seats were material to Georgia Plaintiff and the Georgia Subclass. Georgia Plaintiff and Georgia Class members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

538. Georgia Plaintiff and members of the Georgia Subclass could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seats are unsafe in side impact crash tests. Georgia Plaintiff and Georgia Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

539. Had Evenflo disclosed to Georgia Plaintiff and Georgia Subclass members material facts, including but not limited to, the safety risks posed by its Big Kid booster seats, Georgia Plaintiff and the Georgia Subclass members would not have purchased Big Kid booster seats. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe.

540. Evenflo's unfair and deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Georgia Plaintiff and the Georgia Subclass members, about the true safety risks posed by its Big Kid booster seats.

541. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive acts and practices under the GFBPA.

542. As a direct and proximate result of Evenflo's unfair and deceptive acts and practices, Georgia Plaintiff and absent Georgia Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

543. Evenflo's violations present a continuing risk to Georgia Plaintiff and/or the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

544. Georgia Plaintiff and Georgia Subclass members seek an order enjoining Evenflo's unfair and deceptive acts and practices, attorneys' fees and costs, and any other just and proper relief available under the GUDTPA. *See* § 10-1-373.

COUNT XVIII:
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(O.C.G.A. § 11-2-314)

545. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

546. This claim is brought by Plaintiff Cathy Malone ("Georgia Plaintiff") against Evenflo on behalf of herself and the Georgia Subclass.

547. Georgia law states that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." O.C.G.A. § 11-2-314(1).

548. Evenflo is and was at all relevant times a merchant as defined by O.C.G.A. § 11-2-104(1).

549. Georgia Plaintiff and members of the Georgia Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

550. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

551. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present an undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

552. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

553. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

554. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Georgia Plaintiff and members of the Georgia Subclass have been damaged in an amount to be proven at trial.

555. Georgia Plaintiff and members of the Georgia Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

H. Claims Brought on Behalf of the Illinois Subclass

COUNT XIX:
VIOLATIONS OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT
(815 ILL. COMP. STAT. §§ 505, *ET SEQ*.)

556. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

557. Plaintiff Penny Biegeleisen ("Illinois Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Illinois Subclass.

558. Illinois Plaintiff has standing to pursue this claim because she suffered injury in fact and lost money or property as a result of Evenflo's actions as described above. All members of the Illinois Subclass have incurred actual damages and ascertainable loss in the form of the diminished value of their car seats because had they known the truth about the Big Kid booster seats, they would not have purchased them or paid as much for these products.

559. Illinois Plaintiff and the Illinois Subclass members are "consumers" within the meaning of the Illinois Consumer Fraud and Deceptive Business Act ("Illinois CFA"). 815 Ill. Comp. Stat. § 505/1(e).

560. Evenflo is a "person" within the meaning of 815 Ill. Comp. Stat. § 505/1(c).

561. Evenflo's actions as set forth herein occurred in the conduct of trade or commerce within the meaning of 815 Ill. Comp. Stat. § 505/1(f).

562. The Illinois CFA prohibits "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact…in the conduct of trade or commerce…whether any person has in fact been misled, deceived or damaged thereby." 815 Ill. Comp. Stat. § 505/2.

563. In the course of its business, Evenflo concealed, suppressed, and misrepresented material facts concerning the Big Kid booster seats, in violation of 815 Ill. Comp. Stat. § 505/2. It did so by, among other things, representing that Big Kid booster seats were suitable for children weighing as little as 30 pounds and that the products were "side impact tested" and provided side

impact collision protection—but concealing that Big Kid booster seats were unsafe for any purpose for children weighing less than 40 pounds and that Evenflo's internal tests showed that a child in its Big Kid booster seats could be in grave danger in such a crash. Evenflo's representations and omissions were material because they were likely to and did in fact deceive reasonable consumers, including Illinois Plaintiff.

564. Evenflo knew these statements were false and misleading at the time of sale. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of material facts with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Big Kid booster seats.

565. Evenflo's actions as alleged were further "unfair" and "deceptive" because they offend established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to Evenflo's customers. The harm caused by Evenflo's wrongful conduct outweighs any utility of such conduct and has caused—and will continue to cause—substantial injury to Illinois Plaintiff and the Illinois Subclass. Evenflo could and should have chosen one of many reasonably available alternatives, including not selling the Big Kid booster seats, disclosing to prospective buyers that these products were not suitable for use by children weighing less than 40 pounds for any purpose and that Evenflo's own testing showed that child in the Big Kid booster seats could be in grave danger in a side impact collision, and/or not representing that the Big Kid booster seats were suitable for consumer use. Additionally, Evenflo's conduct was "unfair" because it violated the legislatively declared policies reflected by Illinois's strong consumer warranty laws.

566. As a result of Evenflo's conduct in violation of in violation of 815 Ill. Comp. Stat. § 505/2, Illinois Plaintiff and the Illinois Subclass received an inferior product to the product which they were promised. Had Evenflo disclosed the aforementioned material facts concerning the Big Kid booster seat, Illinois Plaintiff and the Illinois Subclass would not have purchased these products or would have paid substantially less.

567. Evenflo owed Illinois Plaintiff and the Illinois Subclass a duty to disclose the true nature of the Big Kid booster seats because Evenflo: (a) possessed exclusive knowledge about the Big Kid booster seats' true nature; (b) intentionally concealed the foregoing from Illinois Plaintiff and the Illinois Subclass; and (c) made incomplete representations about side impact collision protection the Big Kid booster seats provided and these products' suitability for children weighing less than 40 pounds, while purposefully withholding material facts from Illinois Plaintiff and the Illinois Subclass that contradicted these representations. At the time of sale, Evenflo knew about the Big Kid booster seats' unsafe nature and that these products were not suitable for use by children weighing less than 40 pounds. Evenflo acquired additional information concerning the Big Kid booster seats' safety attributes and suitability for use for children weighing less than 40 pounds after these products were sold but continued to conceal such information.

568. Evenflo thus violated the Illinois CFA by, at a minimum, employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression, or omission, in connection with the sale of Big Kid booster seats.

569. Evenflo acted intentionally, knowingly, and maliciously in misrepresenting material facts regarding the Big Kid booster seats with the intent to mislead Illinois Plaintiff and the Illinois Subclass members. Evenflo's knowledge of the Big Kid booster seats' internal safety

crash results put it on notice that these booster seats were not as advertised. Accordingly, Evenflo knew or should have known that its conduct violated the Illinois CFA.

570. As a direct and proximate result of Evenflo's violations of the Illinois CFA, Illinois Plaintiff and the Illinois Subclass have suffered injury-in-fact, actual damage, or both.

571. Evenflo's wrongful conduct constitutes a continuing course of unfair practices because Evenflo continues to represent that the Big Kid booster seats are suitable for children weighing as little as 30 pounds and that the products are "side impact tested" and provide side impact collision protection. Evenflo's violations present a continuing risk to Illinois Plaintiff, the Illinois Subclass members, as well as the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest. Illinois Plaintiff and the Illinois Subclass therefore seek injunctive and equitable relief to remedy Evenflo's deceptive marketing, advertising, and packaging and to recall all Big Kid booster seats.

572. Illinois Plaintiff and the Illinois Subclass further seek monetary damages against Evenflo, measured as actual damages in an amount to be determined at trial, as well as punitive damages because Evenflo acted with fraud or malice, or was grossly negligent, reasonable attorneys' fees, and any other just and proper relief available under 815 Ill. Comp. Stat. § 505/10a(a).

COUNT XX:
VIOLATIONS OF THE ILLINOIS UNIFORM DECEPTIVE TRADE PRACTICES ACT
(815 ILL. COMP. STAT. §§ 510, *ET SEQ.*)

573. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

574. Plaintiff Penny Biegeleisen ("Illinois Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Illinois Subclass.

575. Illinois Plaintiff, Illinois Subclass members, and Evenflo are "persons" within the meaning of the Illinois Uniform Deceptive Trade Practices Act ("Illinois UDTPA"). 815 Ill. Comp. Stat. § 510/1(5).

576. Under the Illinois UDTPA, a company engages in deceptive trade practices when, in the course of its business, it: "represents that goods…have…characteristics,…uses, [or] benefits… that they do not have"; "represents that goods…are of a particular standard, quality, or grade…if they are of another"; "advertises goods…with intent not to sell them as advertised"; or "engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding." 815 Ill Comp. Stat. §§ 510/2(5), (7), (9), and (12).

577. Evenflo willfully violated the preceding sections of the Illinois UDTPA by making the false and misleading representations challenged herein. Illinois Plaintiff and the Illinois Subclass members were likely to be damaged—and were damaged—by Evenflo's conduct in violation of the Illinois UDTPA.

578. Pursuant to 815 Ill. Comp. Stat. § 510/3, Illinois Plaintiff and the Illinois Subclass therefore seek injunctive and equitable relief to remedy Evenflo's deceptive marketing, advertising, and packaging and to recall all Big Kid booster seats, in addition to costs and attorneys' fees.

COUNT XXI:
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(810 I.L.C.S. 5/2-314)

579. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

580. Plaintiff Penny Biegeleisen ("Illinois Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Illinois Subclass.

581. Illinois law states that a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

582. Evenflo is and was at all relevant times a merchant as defined by Illinois law.

583. Illinois Plaintiff and members of the Illinois Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

584. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

585. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present an undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

586. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

587. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties

would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

588. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Illinois Plaintiff and members of the Illinois Subclass have been damaged in an amount to be proven at trial.

589. Illinois Plaintiff and members of the Illinois Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

I. Claims Brought on Behalf of the Indiana Subclass

COUNT XXII:
VIOLATION OF THE INDIANA DECEPTIVE CONSUMER SALES ACT ("IDCSA")
(IND. CODE § 24-5-0.5-1, *ET SEQ.*)

590. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint

591. This count is brought by Plaintiff Jessica Greenshner and Plaintiff Becky Brown ("Indiana Plaintiffs" for purposes of this count), on behalf of themselves and members of the Indiana Subclass.

592. Evenflo is a "person" as defined by Ind. Code § 24-5-0.5-2(a)(2).

593. Evenflo is a "supplier" as defined by Ind. Code § 24-5-0.5-2(a)(3)(A) and regularly engages in or solicits "consumer transactions" within the meaning of Ind. Code § 24-5-0.5-2(a)(1).

594. Evenflo received notice from Plaintiffs pursuant to Ind. Code § 24-5-0.5-5 concerning its wrongful conduct as alleged herein. Moreover, Evenflo was provided notice by the numerous consumer class action complaints filed against it. Therefore, sending pre-suit notice pursuant to Ind. Code § 24-5-0.5-5 is an exercise in futility for Indiana Plaintiffs because Evenflo has not cured its unfair, abusive, and deceptive acts and practices, or its violations of IDCSA were incurable.

595. Evenflo engaged in unfair, abusive, and deceptive acts, omissions, and practices in connection with consumer transactions, in violation of Ind. Code § 24-5-0.5-3.

596. Prohibited deceptive acts in violation of Indiana Code § 24-5-0.5-3, include, but are not limited to: (a) misrepresenting that the subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have; and (b) misrepresenting that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.

597. Evenflo engaged in deceptive practices that violated the IDCSA by knowingly making misleading statements about the safety of its Big Kid booster seats and knowingly failing to disclose the safety risks posed by its Big Kid booster seats, which put children's health and well-being at serious risk in side-impact car crashes.

598. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side impact tests for the Big Kid booster seat show child-sized test dummies bending

violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which presents a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least 40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

599. Evenflo's acts and practices were "unfair" because they caused or were likely to cause substantial injury to consumers, which was not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

600. The injury to consumers from Evenflo's conduct was and is substantial because it was non-trivial and non-speculative and involved a monetary injury. The injury to consumers was substantial not only because it inflicted harm on a significant number of consumers, but also because it inflicted a significant amount of harm on each consumer.

601. Consumers could not have reasonably avoided injury because Evenflo's business acts and practices unreasonably created or took advantage of an obstacle to the free exercise of consumer decision-making. By withholding important information from consumers about safety of Evenflo's Big Kid booster seats, Evenflo created an asymmetry of information between it and consumers that precluded consumers from taking action to avoid or mitigate injury.

602. Evenflo's business practices, in concealing material information or misrepresenting the qualities, characteristics, and performance of its Big Kid booster seats had no countervailing benefit to consumers or to competition.

603. Evenflo's acts and practices were also "abusive" for numerous reasons, including: (a) because they materially interfered with consumers' ability to understand a term or condition in

a consumer transaction, interfering with consumers' decision-making; (b) because they took unreasonable advantage of consumers' lack of understanding about the material risks, costs, or conditions of a consumer transaction; consumers lacked an understanding of the material risks and costs of a variety of their transactions; (c) because they took unreasonable advantage of consumers' inability to protect their own interests; consumers could not protect their interests due to the asymmetry in information between them and Evenflo; and (d) because Evenflo took unreasonable advantage of consumers' reasonable reliance that it was providing truthful and accurate information.

604. Evenflo intentionally and knowingly misrepresented and failed to disclose material facts it had a duty to disclose regarding its Big Kid model booster seats with intent to mislead Indiana Plaintiffs and the Indiana Subclass.

605. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid model booster seats were material to Indiana Plaintiffs and the Indiana Subclass because they were likely to deceive reasonable consumers. Indiana Plaintiffs and Indiana Class members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

606. Evenflo owed Indiana Plaintiffs and the Indiana Subclass a duty to disclose material facts about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a) Possessed exclusive knowledge about its testing of these seats;

b) Intentionally concealed the foregoing from Indiana Plaintiffs and the Indiana Subclass; and/or

c) Made incomplete and misleading representations that its Big Kid model seats were "Side Impact Tested," while purposefully withholding material facts from Indiana Plaintiffs and the Indiana Subclass that contradicted these representations.

607. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and well-being at serious risk in side-impact car crashes.

608. Indiana Plaintiffs and absent Indiana Subclass members had unequal bargaining power with respect to their purchase and/or use of Evenflo's Big Kid booster seats because of Evenflo's omissions and misrepresentations.

609. Indiana Plaintiffs and members of the Indiana Subclass could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seat models are unsafe in side impact crash tests. Indiana Plaintiffs and Indiana Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

610. Had Evenflo disclosed to Indiana Plaintiffs and Indiana Subclass members material facts, including but not limited to, the safety risks posed by its Big Kid booster seats, Indiana Plaintiffs and the Indiana Subclass members would not have purchased Big Kid model booster seats and/or would have paid less. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe.

611. Evenflo's deceptive, unfair, and abusive acts or practices were likely to and did in fact deceive reasonable consumers, including Indiana Plaintiffs and the Indiana Subclass members, about the true safety risks posed by its Big Kid booster seats.

612. Evenflo had an ongoing duty to all Evenflo customers to refrain from deceptive, unfair, and abusive acts and practices under the IDCSA.

613. Evenflo acted intentionally, knowingly, and maliciously to violate IDCSA, and recklessly disregarded Indiana Plaintiffs' and Indiana Subclass members' rights. Evenflo's knowledge about the true safety risks posed by its Big Kid booster seats put it on notice that the Big Kid booster seats were not as it advertised.

614. Evenflo's conduct includes incurable deceptive acts that Evenflo engaged in as part of a scheme, artifice, or device with intent to defraud or mislead, under Ind. Code § 24-5-0.5-2(a)(8).

615. As a direct and proximate result of Evenflo's uncured or incurable unfair, abusive, and deceptive acts or practices, Indiana Plaintiffs and absent Indiana Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

616. Evenflo's violations present a continuing safety risk to Indiana Plaintiffs, the Indiana Subclass and the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

617. Indiana Plaintiffs and Indiana Subclass members seek all monetary and non-monetary relief allowed by law, including the greater of actual damages or $500 for each non-willful violation; the greater of treble damages or $1,000 for each willful violation; restitution; reasonable attorneys' fees and costs; injunctive relief; and punitive damages.

COUNT XXIII:
BREACH OF IMPLIED WARRANTY OF MERCHANTIABILITY
(IND. CODE § 26-1-2-314)

618. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint

619. This count is brought by Plaintiff Jessica Greenshner and Plaintiff Becky Brown ("Indiana Plaintiffs" for purposes of this count), on behalf of themselves and members of the Indiana Subclass.

620. Evenflo is and was at all relevant times a merchant as defined by Ind. Code § 26-1-2-104.

621. A warranty that the Big Kid booster seats were in merchantable condition is implied in a contract for their sale pursuant to Ind. Code § 26-1-2-314.

622. Indiana Plaintiff and members of the Indiana Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers,or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

623. The Big Kid booster seats are and were at all relevant times goods within the meaning of Ind. Code § 26-1-2-105.

624. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter, were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are

not safe for children in the event of a side impact crash and present undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

625. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

626. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

627. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Indiana Plaintiff and members of the Indiana Subclass have been damaged in an amount to be proven at trial.

628. Indiana Plaintiff and members of the Indiana Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

J. Claims Brought on Behalf of the Iowa Subclass

COUNT XXIV:
VIOLATION OF IOWA PRIVATE RIGHT OF ACTION FOR CONSUMER FRAUDS ACT
(IOWA CODE § 714H.1, *ET SEQ*.)

629. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

630. This count is brought by Plaintiff Anna Gathings ("Iowa Plaintiff"), on behalf of herself and members of the Iowa Subclass.

631. The Iowa Private Right of Action for Consumer Frauds Act, Iowa Code § 714H.3, provides in pertinent part:

> A person shall not engage in a practice or act the person knows or reasonably should know is [a] deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with the intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise…

632. Under the Iowa Private Right of Action for Consumer Frauds Act, actual damages "means all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount" and " [a] consumer who suffers an ascertainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages," equitable relief, including a temporary or permanent injunctive relief, and reasonable attorney's fees.

633. Defendant engaged in a deceptive consumer-oriented act by falsely representing on its website, the product container, product manual and/or inserts that the "Big Kid" booster seat was:

a. Safe for children as small as 30 pounds, while sales of the same booster seat in Canada were restricted to use by children at least 40 pounds, and there was evidence that an even greater weight was required for its safe use;

b. "Side impact tested" at standards twice as demanding as the government's standards, whereas there never were any adopted government standard for side impact collisions for booster seats, and Defendant's own testing and evidence from personal injury litigation demonstrated that the "Big Kid" booster seats did not protect occupants from anticipated side impact collisions and exposed vulnerable infants and children to traumatic head, neck, spine and other injuries entailing serious injury or even death.

634. These alleged unfair practices, deceptions, fraud, false pretenses, false promises, or misrepresentations related to a material fact or facts.

635. Iowa Plaintiff and the Iowa Subclass have sustained ascertainable losses of money, and are entitled to actual damages and appropriate injunctive relief, as the result of a prohibited practice or actions. In addition, Iowa Plaintiff and the Iowa Subclass shall show by a preponderance of clear, convincing, and satisfactory evidence that the prohibited practice or act in violation in willful and wanton disregard for the rights or safety of another, entitling them to statutory damages up to three times the amount of actual damages may be awarded to a prevailing consumer.

COUNT XXV:
BREACH OF IMPLED WARRANTY OF MERCHANTABILITY
(IOWA CODE § 554.2314)

636. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

637. This count is brought by Plaintiff Anna Gathings ("Iowa Plaintiff"), on behalf of herself and members of the Iowa Subclass.

638. Pursuant to Iowa Code §554.2314, Defendant owed implied warranties for the "Big Kid" booster seat, including that it is "fit for the ordinary purposes for which such goods are used" and that it "conform[s] to the promises or affirmations of fact made on the container…"

639. Evenflo is in the business of manufacturing, supplying, marketing, advertising, warranting, and selling "Big Kid" booster seats. Evenflo is, and was at all relevant times, a merchant with respect to booster seats. Evenflo impliedly warranted to Iowa Plaintiff and other members of the Iowa Subclass that the "Big Kid" booster seat was of a certain quality and was fit for its ordinary and particular purpose. Evenflo also owed an implied warranty that the "Big Kid" booster seat "conform[ed] to the promises or affirmations of fact made on the container or label…"

640. Evenflo's implied warranties included, but are not limited to, warranties that the "Big Kid" booster seats were safe for children who weigh as little as 30 pounds; were "side impact tested" and provided side-impact protection; and were generally safe and that using the "Big Kid" Booster was "the best way to minimize injuries to your child."

641. Evenflo's "Big Kid" booster seat was unfit for its ordinary use and was not of merchantable quality and/or did not conform to the promises or affirmations of fact. Prior to purchase, Iowa Plaintiff and the other members of the Iowa Subclass could not have discovered that the product was not fit for its ordinary purpose and did not conform to the quality previously represented.

642. Evenflo also breached its implied warranty that the "Big Kid" booster seat was proven safe and met side-impact standards twice as demanding as the federal government's standards when the booster seat was not safe and Evenflo's own tests and evidence produced in personal injury litigation demonstrated that children using the "Big Kid" booster seat were subject to grievous injury and even death in the event of anticipated side-impact collisions.

643. As a direct and proximate result of Evenflo's breach of the warranties of merchantability, Iowa Plaintiff and the members of the Iowa Subclass have been damaged in an amount to be proven at trial.

K. Claims Brought on Behalf of the Kentucky Subclass

COUNT XXVI:
VIOLATION OF THE KENTUCKY CONSUMER PROTECTION ACT
(KY. REV. STAT. § 367.100, *ET SEQ.*)

644. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

645. Plaintiff Joseph Wilder ("Kentucky Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of himself and the Kentucky Subclass.

646. Evenflo's conduct, as alleged herein, constitutes unfair or unconscionable, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce within the scope of violation of Ky. Rev Stat. §§ 367.170(1) and (2).

647. Evenflo's unlawful conduct includes its false and misleading statements, representations, and depictions in its labeling, marketing and advertising for its Big Kid booster seats, as alleged in greater detail above. Such conduct injured Kentucky Plaintiff and each of the other Kentucky Subclass members, in that they paid more for the falsely advertised product they purchased than they would have paid had they known their true value.

648. Kentucky Plaintiff and the other members of the Kentucky Subclass have been injured by Evenflo's unfair or unconscionable, false, misleading, or deceptive acts or practices in conjunction with its marketing and sale of the Big Kid booster seats.

649. Pursuant to Ky. Rev Stat. § 367.220, Kentucky Plaintiff and each of the other members of the Kentucky Subclass are entitled to recover actual damages, punitive damages, plus their reasonable attorneys' fees and the costs of this action.

650. Kentucky Plaintiff and the other members of the Kentucky Subclass are also entitled to injunctive relief in the form of an order directing Defendant to cease its false and misleading labeling and advertising, retrieve existing false and misleading advertising and promotional materials, and publish corrective advertising.

L. Claims Brought on Behalf of the Louisiana Subclass

COUNT XXVII:
VIOLATION OF WARRANTY AGAINST REDHIBITORY DEFECTS
(LA. CIV. CODE § 2520, *ET SEQ.*)

651. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

652. Plaintiff Talise Alexie ("Louisiana Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Louisiana Subclass.

653. Louisiana Plaintiff and Louisiana Subclass Members are and were at all relevant times buyers under La. Civ. Code articles 2520, et seq.

654. Defendant is and was at all relevant times a seller under La. Civ. Code articles 2520, et seq.

655. Defendant engaged in trade or commerce at all relevant times under La. Civ. Code articles 2520, et seq. by designing, manufacturing, distributing, advertising, marketing, labeling, offering for sale, selling, and distributing the Big Kid booster seat at issue.

656. Louisiana Plaintiff and Louisiana Subclass Members purchased Defendant's Big Kid booster seat either directly from Defendant or through retailers, such as Target, Walmart, Kohl's, Buy Buy Baby, and Amazon, among others.

657. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, warranted that the Big Kid booster seat was fit for its intended purpose as stated above.

658. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, warranted through the marketing, packaging, and labeling of the Big Kid booster seat that the product was "side impact tested" and that its side-impact testing "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards," thereby making it safe, when in fact the warranties are meaningless as to the intended safety purposes of the Big Kid booster seat.

659. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, warranted through the marketing, packaging, and labeling of the Big Kid booster seat that the product was appropriate for children weighing 30 to 110 pounds, when in fact it is not intended or appropriate for children under 40 pounds as stated above.

660. Each model of the Big Kid booster seat has an identical or substantially identical warranty that indicated the intended purpose, when the Big Kid booster seats are not fit for those purposes.

661. Defendant made the foregoing representations and warranties to all buyers, which became the basis of the bargain between Louisiana Plaintiff, Louisiana Subclass Members, and Defendant.

662. In fact, Defendant's Big Kid booster seats contain redhibitory defects, as they are not safe in the event of a side impact collision or if the child weighs between 30 and 39 pounds and because each of the above-described warranties is a false and misleading misrepresentation as to the fitness of the Big Kid booster seats for particular uses.

663. Defendant breached these warranties and/or contract obligations by placing the Big Kid booster seats into the stream of commerce and selling them to consumers, when the Big Kid booster seats are unsafe and pose a significant safety risk to children at the time they enter the stream of commerce. The lack of safety inherent in the Big Kid booster seat renders it unfit for its intended use and purpose and substantially and/or completely impairs the use and value of the Big Kid booster seat.

664. Defendant breached its warranties by selling the Big Kid booster seats, which contain redhibitory defects, are unsafe for use, and cannot be used for their ordinary, intended purpose of protecting children in the event of a side impact collision and protecting children weighing as little as 30 pounds. Defendant breached its written warranties to Louisiana Plaintiff and Louisiana Subclass Members in that the Big Kid booster seats are not safe for their intended purpose at the time that they left Defendant's possession or control and were sold to Louisiana

Plaintiff and Louisiana Subclass Members, creating a serious safety risk to Louisiana Plaintiff, Louisiana Subclass Members, and their children.

665. Defendant further breached its warranty to adequately repair or replace the Big Kid booster seat despite its knowledge of the defect, and/or despite its knowledge of alternative designs, materials, and/or options for manufacturing safe Big Kid booster seats.

666. Defendant was provided actual and/or constructive notice of the redhibitory defects and breaches of the above-described warranties through the results of its own internal side-impact testing, as well as through previous lawsuits against Defendant involving serious and permanent injuries sustained by children while using the Big Kid booster seats.

667. Louisiana Plaintiff and Louisiana Subclass Members are entitled to reimbursement for the full cost of the Big Kid booster seats due to the above-described redhibitory defects and Defendant's breach of its warranties. Louisiana Plaintiff and Louisiana Subclass Members are also entitled to recover their attorneys' fees pursuant to the law of redhibition.

668. The aforementioned redhibitory defect renders Defendant's Big Kid booster seat useless or, alternatively, diminishes the usefulness or value of the Seat to the point that Louisiana Plaintiff and Louisiana Subclass Members would have either paid less or not bought the Big Kid booster seat at all.

669. Louisiana Plaintiff and Louisiana Subclass Members were damaged by Defendant's uniform misconduct, as they did not receive the benefit of the bargain, lost the Big Kid booster seat's intended benefits, and suffered damages at the point-of-sale, as they would not have purchased the Big Kid booster seats or would have paid less if they had known the truth about the unreasonable safety risk to children posed by the Big Kid booster seats.

M. Claims Brought on Behalf of the Maine Subclass

COUNT XXVIII:
VIOLATION OF THE MAINE UNFAIR TRADE PRACTICES ACT
(5 M.R.S. § 207, *ET SEQ*.)

670. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

671. This claim is brought by Jeffrey Lindsey ("Maine Plaintiff") against Evenflo, on behalf of himself and the Maine Subclass.

672. The Maine Unfair Trade Practices Act declares that "unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." 5 M.R.S. § 207. The Maine Unfair Trade Practices Act provides a private right of action by "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207…" 5 M.R.S. § 213(a).

673. At all relevant times, Defendant was engaged in trade or commerce within the State of Maine, including the trade or commerce of marketing, selling and causing to be sold the Big Kid booster seats within the State of Maine.

674. At all relevant times, Maine Plaintiff and the Maine Subclass were "persons" as defined in 5 M.R.S. § 206, and they purchased Evenflo Big Kid booster seats primarily for personal, family or household purposes.

675. In the course of its business in trade or commerce, Evenflo willfully failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or

concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its Big Kid model booster seats. Through this conduct Evenflo has engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in violation of 5 M.R.S. § 207.

676. The deceptive, false and misleading labeling and marketing of the Big Kid booster seats as alleged herein were material in that they concerned facts that would have been important to a reasonable consumer in making a decision whether to purchase the Big Kid booster seats.

677. Evenflo intentionally and knowingly misrepresented and omitted material facts regarding its Big Kid model booster seats with intent to mislead Maine Plaintiff and the Maine Subclass.

678. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Maine Plaintiff and the Maine Subclass members, about the true safety risks posed by its Big Kid booster seats.

679. In addition, violations of federal consumer protection statutes, including Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45(a)(1), are also violations of 5 M.S.R. § 207. See 5 M.S.R. § 207(1). Because Defendant has withheld material information from consumers and made unsubstantiated advertising claims regarding the Big Kid Booster Car Seats, as alleged herein, in violation of Section 5 of the FTC Act, the conduct described herein also violates 5 M.S.R. § 207.

680. As a direct and proximate result of Defendant's conduct in connection with the branding, labeling, marketing and selling of the Big Kid Booster Car Seats in Maine as alleged herein, Maine Plaintiff and the Maine Subclass were harmed.

681. As a direct and proximate result of Evenflo's wrongful conduct, Maine Plaintiff and the Maine Subclass members have been damaged by their purchase of Big Kid model booster seats., and Evenflo is liable for its actions in violation of 5 M.R.S. § 207. Accordingly, Maine Plaintiff and the other members of the Maine Subclass were harmed by, and Evenflo is liable for, its actions alleged herein in violation of 5 M.R.S. § 207.

682. The harm suffered could not be reasonably avoided by Maine Plaintiff and the Maine Subclass members, and the harmed suffered by them is not outweighed by any countervailing benefit to the consumers.

683. As a result of the conduct described herein, Evenflo is liable to Maine Plaintiff and the Maine Subclass for actual damages that Plaintiff and the Maine Subclass incurred, restitution or such other equitable relief together with all related court costs, attorneys' fees, and interest.

684. Pursuant to 5 M.R.S. § 213(1-A), Plaintiffs sent a demand letter to Defendant regarding the conduct alleged herein and requested relief. Evenflo did not provide a reasonable offer of settlement under the circumstances.

N. Claims Brought on Behalf of the Massachusetts Subclass

COUNT XXIX:
VIOLATION OF THE MASSACHUSETTS CONSUMER PROTECTION LAW
(MASS. GEN. LAWS, CH. 93A)

685. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

686. Plaintiff Edith Brodeur ("Massachusetts Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Massachusetts Subclass.

687. Defendant was provided with a written demand for relief pursuant to Mass. Gen. Laws, Ch. 93A § 9(3).

688. Massachusetts Plaintiff and Massachusetts Subclass Members were at all relevant times "persons" as defined in Mass. Gen. Law, Ch. 93A.

689. Defendant was at all relevant times engaged in "trade" or "commerce" through its marketing, advertising, distribution, and sale of the Big Kid booster seat at issue, as defined in Mass. Gen. Law, Ch. 93A.

690. The Big Kid booster seats at issue constitute tangible property under Mass. Gen. Law, Ch. 93A.

691. Defendant's foregoing unfair methods of competition and unfair or deceptive acts or practices, including its omissions, were and are committed in its course of trade or commerce, directed at consumers, affect the public interest, and injured Massachusetts Plaintiff and Massachusetts Subclass Members.

692. Defendant's foregoing unfair methods of competition and unfair or deceptive acts or practices, including its omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, or that the Seat will not adequately protect children in the event of a side impact collision, or that the Seat is not safe for children weighing between 30 and 39 pounds. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested," misrepresented that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards," and was safe for children between 30 and 110 pounds.

693. Defendant intended Massachusetts Plaintiff and Massachusetts Subclass Members to rely upon its misrepresentations regarding the safety of its Big Kid booster seat, including that

the Seat is "side impact tested," that it "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards," and that it was safe for children weighing between 30 and 110 pounds.

694. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested," and if the child weighs between 30 and 39 pounds.

695. Defendant did not disclose this information to consumers.

696. Defendant's foregoing unfair methods of competition and unfair or deceptive acts or practices, including its omissions, were and are violations of the Massachusetts Consumer Protection Law, Mass. Gen. Laws, Ch. 93A, in that:

a) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested," when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b) Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by Massachusetts Plaintiff and Massachusetts Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c) Massachusetts Plaintiff and Massachusetts Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the

safety of children posed by the Big Kid booster seat in the event of a side impact collision;

d) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as safe for children weighing between 30 and 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing under 40 pounds;

e) Defendant knew that the unreasonable risk to the safety of children weighing under 40 pounds was unknown to and would not be easily discovered by Massachusetts Plaintiff and Massachusetts Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

f) Massachusetts Plaintiff and Massachusetts Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event the children weighed between 30 and 39 pounds; and

g) Defendant's unfair methods of competition and unfair or deceptive acts or practices, including its omissions, injured Massachusetts Plaintiff and Massachusetts Subclass Members, and had – and still has – the potential to injure members of the public at-large.

697. Massachusetts Plaintiff and Massachusetts Subclass Members suffered damages when they purchased the Big Kid booster seats. Defendant's unfair methods of competition and unfair or deceptive acts or practices, including its omissions, caused actual damages to Massachusetts Plaintiff and the Massachusetts Subclass Members who were unaware that the Big

Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and to children weighing between 30 and 39 pounds, notwithstanding Defendant's representations at the time of purchase.

698. Defendant's unfair methods of competition and unfair or deceptive acts or practices, including its omissions, were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

699. Consumers, including Massachusetts Plaintiff and Massachusetts Subclass Members, would not have purchased the Big Kid booster seats had they known about the unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

700. As a direct and proximate result of Defendant's unfair methods of competition and unfair or deceptive acts or practices, including its omissions, Massachusetts Plaintiff and Massachusetts Subclass Members have been damaged as alleged herein, and are entitled to recover actual damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

701. Defendant had actual and/or constructive notice of its unfair methods of competition and unfair or deceptive acts or practices, including its omissions, through the results of its own internal side-impact testing, as well as through previous lawsuits against Defendant involving serious and permanent injuries sustained by children while using the Big Kid booster seats.

702. The violations of Chapter 93A by Defendant in connection with its marketing and sale of Big Kid booster seats as described herein was done willfully, knowingly, and in bad faith.

As a direct and proximate result of Defendant's conduct in connection with the branding, labeling, marketing and selling of Big Kid booster seats in Massachusetts, Plaintiff Brodeur and the Massachusetts Subclass were harmed.

703. Plaintiff Brodeur and the other Massachusetts Subclass Members have suffered ascertainable losses, which include but are not limited to, the costs they incurred paying for a product which was not the one that had been represented to them, and the fact that the product they received was less valuable than the product represented to them. Accordingly, Plaintiff Brodeur and the other members of the Massachusetts Subclass were harmed by, and Defendant is liable for, Defendant's actions in violation of Chapter 93A.

704. More than thirty days prior to bringing this action, Plaintiff Brodeur sent Defendant a written demand for relief pursuant to Chapter 93A, Section 9, identifying the claims Plaintiff Brodeur asserts on his own behalf and the Massachusetts Subclass, and reasonably describing the unfair acts or practices relied upon and the injuries suffered. Defendant did not respond with a reasonable offer of relief to Plaintiff Brodeur and the Massachusetts Subclass.

705. As a result of the conduct described herein, Defendant violated Chapter 93A and is liable to Plaintiff Brodeur and the Massachusetts Subclass for up to three times the damages that Plaintiff Brodeur and the Massachusetts Subclass incurred, or at the very least the statutory minimum award of $25 for each purchase of a Big Kid boost seat, whichever is greater, together with all related court costs, attorneys' fees, and interest.

706. In addition, Massachusetts Plaintiff and Massachusetts Subclass Members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

O. Claims Brought on Behalf of the Michigan Subclass

COUNT XXX:
VIOLATION OF THE MICHIGAN CONSUMER PROTECTION ACT
(MICH. COMP. LAWS § 445.903, *ET SEQ.*)

707. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

708. This claim is brought by Plaintiffs Marcella Reynolds, Theresa Holliday, and Amy Sapeika ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the Michigan Subclass.

709. The Michigan Consumer Protection Act ("Michigan CPA") prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce," including "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer"; "[m]aking a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is"; or "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." Mich. Comp. Laws § 445.903(1).

710. Plaintiffs and the Michigan Subclass members are "person[s]" within the meaning of the Mich. Comp. Laws § 445.902(1)(d).

711. Evenflo is a "person" engaged in "trade or commerce" within the meaning of the Mich. Comp. Laws § 445.902(1)(d) and (g).

712. In the course of its business, Evenflo willfully failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of

any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its Big Kid model booster seats.

713. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiffs and the Michigan Subclass members, about the true safety risks posed by its Big Kid booster seats.

714. Evenflo intentionally and knowingly misrepresented material facts regarding its Big Kid model booster seats with intent to mislead Plaintiffs and the Michigan Subclass.

715. Evenflo knew or should have known that its conduct violated the Michigan CPA.

716. Evenflo owed Plaintiffs and the Michigan Subclass a duty to disclose the truth about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Plaintiffs and the Michigan Subclass; and/or

c. Made incomplete and misleading representations that its Big Kid model seats were "side impact tested," while purposefully withholding material facts from Plaintiffs and the Michigan Subclass that contradicted these representations.

717. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid model booster seats were material to Plaintiffs and the Michigan Subclass.

718. Plaintiffs and the Michigan Subclass suffered ascertainable loss caused by Evenflo's misrepresentations and its concealment of and failure to disclose material information. Plaintiffs and the Michigan Subclass members would not have purchased Big Kid model booster seats but for Evenflo's violations of the Michigan CPA.

719. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive practices under the Michigan CPA. As a direct and proximate result of Evenflo's violations of the Michigan CPA, Plaintiffs and the Michigan Subclass have suffered injury-in-fact and/or actual damage.

720. Evenflo's violations present a continuing risk to Plaintiffs as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

721. Plaintiffs seek injunctive relief to enjoin Evenflo from continuing its unfair and deceptive acts; monetary relief against Evenflo measured as the greater of (a) actual damages in an amount to be determined at trial and (b) statutory damages in the amount of $250 for each plaintiff; reasonable attorneys' fees; and any other just and proper relief available under Mich. Comp. Laws § 445.911.

722. Plaintiffs also seek punitive damages because Evenflo carried out despicable conduct with willful and conscious disregard of the rights of others. Evenflo's conduct constitutes malice, oppression, and fraud warranting punitive damages.

COUNT XXXI:
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(MICH. COMP. LAWS § 440.2314, *ET SEQ.*)

723. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

724. This claim is brought by Plaintiffs Marcella Reynolds, Theresa Holliday and Amy Sapieka ("Michigan Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and the Michigan Subclass.

725. Michigan law states that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." M.C.L. § 440.2314.

726. Evenflo is and was at all relevant times a merchant as defined by M.C.L. § 440.2104.

727. Michigan Plaintiffs and members of the Michigan Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

728. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

729. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present an undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

730. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

731. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties

would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

732. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Michigan Plaintiffs and members of the Michigan Subclass have been damaged in an amount to be proven at trial.

733. Michigan Plaintiffs and members of the Michigan Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

P. Claims Brought on Behalf of the Minnesota Subclass

COUNT XXXII:
VIOLATION OF MINNESOTA PREVENTION OF CONSUMER FRAUD ACT
(MINN. STAT., § 325F.68, *ET SEQ.*)

734. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

735. This claim is brought by Plaintiff Joshua Kukowski and Plaintiff Kari Forhan ("Minnesota Plaintiffs") against Evenflo on behalf of themselves and the Minnesota Subclass.

736. The Big Kid booster seats are and were at all relevant times "merchandise" under Minn. Stat., § 325F.68, subd. 2.

737. Evenflo is and was at all relevant times a "person" under Minn. Stat., § 325F.68, subd. 3.

738. Evenflo has intentionally engaged in fraud, misrepresentation and deceptive practices in connection with the sale of Big Kid booster seats in violation of the Minnesota Prevention of Consumer Fraud Act, including without limitation Minn. Stat., § 325F.69.

739. Had Evenflo not engaged in the unfair and deceptive conduct described above, Minnesota Plaintiffs and the Minnesota Subclass members would not have purchased Evenflo's Big Kid model booster seats or would have paid less for them.

740. In the course of its business, Evenflo willfully misrepresented and failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful commercial practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission. Minnesota Plaintiffs and the Minnesota Subclass had no way of discerning that Evenflo's representations about Big Kid booster seats were false and misleading. Evenflo knew or should have known that its conduct violated the Minnesota Prevention of Consumer Fraud Act, and Evenflo owed Minnesota Plaintiffs and the Minnesota Subclass a duty to disclose the safety risk of the Big Kid booster seats, both because they had special knowledge of the true safety risks of the booster seats and because, having represented that the seats were side-impact tested and safe, were required also to disclose the actual results of the safety testing.

741. Evenflo's misrepresentations and omissions alleged herein were material to and affected the conduct and decisions of Minnesota Plaintiffs and the Minnesota Subclass members.

742. Evenflo intentionally and knowingly misrepresented and omitted material facts regarding its Big Kid booster seats with intent to mislead Minnesota Plaintiffs and the Minnesota Subclass.

743. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Minnesota Plaintiffs and the Minnesota Subclass members, about the true safety risks posed by its Big Kid booster seats.

744. As a direct and proximate result of Evenflo's violations of the Minnesota Prevention of Consumer Fraud Act, Minnesota Plaintiffs and other members of the Minnesota Subclass have suffered ascertainable losses, which include but are not limited to, the costs they

incurred paying for a product which was not the one that had been represented to them, and the fact that the product they received (unsafe Big Kid booster seats) was less valuable than the product represented to them (safe Big Kid booster seats).

745. Evenflo's unlawful acts and practices complained of herein affect the public interest. As a direct and proximate result of Evenflo's violations of the Minnesota Prevention of Consumer Fraud Act, Minnesota Plaintiffs and the Minnesota Subclass have suffered injury-in-fact and/or actual damage. Pursuant to Minn. Stat. § 8.31 subd. 3a, Minnesota Plaintiffs and the Minnesota Subclass seek actual damages, attorneys' fees, and any other just and proper relief available under the Minnesota Prevention of Consumer Fraud Act.

746. This action will achieve a public benefit. The misrepresentations and omissions by Evenflo were significant and directly contributed to the harm suffered by Minnesota Plaintiffs and the Minnesota Subclass. The misrepresentations and omissions were made to increase profits at the expense of Minnesota Plaintiffs and the Minnesota Subclass. Minnesota Plaintiffs and the Minnesota Subclass seek monetary and injunctive relief.

COUNT XXXIII:
VIOLATION OF MINNESOTA UNIFORM DECEPTIVE PRACTICES ACT
(MINN. STAT., § 325D.43, *ET SEQ*.)

747. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

748. This claim is brought by Plaintiff Joshua Kukowski and Plaintiff Kari Forhan ("Minnesota Plaintiffs") against Evenflo on behalf of themselves and the Minnesota Subclass.

749. Evenflo has engaged deceptive trade practices in connection with the sale of Big Kid booster seats in violation of the Minnesota Uniform Deceptive Practices Act, including without limitation Minn. Stat., § 325D.44(2), (5), (7) and (9).

750. Had Evenflo not engaged in the unfair and deceptive conduct described above, Minnesota Plaintiffs and the Minnesota Subclass members would not have purchased Evenflo's Big Kid model booster seats or would have paid less for them.

751. In the course of its business, Evenflo knowingly misrepresented and failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes, and which facts were obviously material to consumers in that they related to the safety of consumers' children. Evenflo also engaged in unlawful commercial practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission.

752. Evenflo's misrepresentations and omissions alleged herein were material to and affected the conduct and decisions of Minnesota Plaintiffs and the Minnesota Subclass members.

753. Evenflo intentionally and knowingly misrepresented and omitted material facts regarding its Big Kid booster seats with intent to mislead Minnesota Plaintiffs and the Minnesota Subclass.

754. Evenflo's deceptive acts or practices were likely to and did in fact deceive, and are continuing to deceive, reasonable consumers, including Minnesota Plaintiffs and the Minnesota Subclass members, about the true safety risks posed by its Big Kid booster seats.

755. Evenflo's violations of the Minnesota Deceptive Practices Act were and are willful and ongoing. Pursuant to Minn. Stat.§ 325D.45, Minnesota Plaintiffs and the Minnesota Class seek injunctive relief, attorneys' fees, costs and any other just and proper relief available under that Act.

COUNT XXXIV:
VIOLATION OF MINNESOTA UNLAWFUL TRADE PRACTICES ACT
(MINN. STAT., § 325D.09, *ET SEQ*.)

756. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

757. This claim is brought by Plaintiff Joshua Kukowski and Plaintiff Kari Forhan ("Minnesota Plaintiffs") against Evenflo on behalf of themselves and the Minnesota Subclass.

758. Evenflo, in connection with the sale of Big Kid booster seats, has knowingly misrepresented the true quality of Big Kid booster seats in violation of the Minnesota Unlawful Trade Practices Act, including without limitation Minn. Stat., § 325F.69.

759. Had Evenflo not engaged in the unlawful conduct described above, Minnesota Plaintiffs and the Minnesota Subclass members would not have purchased Evenflo's Big Kid model booster seats.

760. In the course of its business, Evenflo knowingly misrepresented and failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes, and which facts were obviously material to consumers in that they related to the safety of consumers' children. Evenflo also engaged in unlawful commercial practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission.

761. Evenflo's misrepresentations and omissions alleged herein were material to and affected the conduct and decisions of Minnesota Plaintiffs and the Minnesota Subclass members.

762. Evenflo intentionally and knowingly misrepresented and omitted material facts regarding its Big Kid model booster seats with intent to mislead Minnesota Plaintiffs and the Minnesota Subclass.

763. Evenflo's unlawful and deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Minnesota Plaintiffs and the Minnesota Subclass members, about the true safety risks posed by its Big Kid booster seats.

764. As a direct and proximate result of Evenflo's violations of the Minnesota Unfair Trade Practices Act, Minnesota Plaintiffs and other members of the Minnesota Subclass have suffered ascertainable losses, which include but are not limited to, the costs they incurred paying for a product which was not the one that had been represented to them, and the fact that the product they received (unsafe Big Kid booster seats) was less valuable than the product represented to them (safe Big Kid booster seats).

765. Evenflo's unlawful acts and practices complained of herein affect the public interest. As a direct and proximate result of Evenflo's violations of the Minnesota Unfair Trade Practices Act, Minnesota Plaintiffs and the Minnesota Subclass have suffered injury-in-fact and/or actual damage. Pursuant to Minn. Stat.§ 8.31 subd. 3a, Minnesota Plaintiffs and the Minnesota Subclass seek actual damages, attorneys' fees, and any other just and proper relief available under the Minnesota Prevention of Consumer Fraud Act.

766. This action will achieve a public benefit. The misrepresentations and omissions by Evenflo were significant and directly contributed to the harm suffered by Minnesota Plaintiffs and the Minnesota Subclass. The misrepresentations and omissions were made to increase profits at the expense of Minnesota Plaintiffs and the Minnesota Subclass. Minnesota Plaintiff seeks monetary and injunctive relief.

COUNT XXXV:
VIOLATION OF MINNESOTA FALSE STATEMENT IN ADVERTISING ACT
(MINN. STAT., § 325F.67, *ET SEQ*.)

767. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

768. This claim is brought by Plaintiff Joshua Kukowski and Plaintiff Kari Forhan ("Minnesota Plaintiffs") against Evenflo on behalf of themselves and the Minnesota Subclass.

769. By misrepresenting, failing to disclose and concealing the safety risks of the Big Kid model booster seats from Minnesota Plaintiffs and Minnesota Subclass Members, Evenflo violated the Minnesota False Statement in Advertising Act, including without limitation Minn. Stat. § 325F.67.

770. Had Evenflo not engaged in the unlawful conduct described above, Minnesota Plaintiffs and the Minnesota Subclass members would not have purchased Evenflo's Big Kid booster seats.

771. In the course of its business, Evenflo knowingly misrepresented and failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes, and which facts were obviously material to consumers in that they related to the safety of consumers' children. Evenflo also engaged in unlawful commercial practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission. Minnesota Plaintiffs and the Minnesota Subclass had no way of discerning that Evenflo's representations about Big Kid booster seats were false and misleading. Evenflo knew or should have known that its conduct violated the Minnesota Prevention of Consumer Fraud Act, and Evenflo owed Minnesota Plaintiffs and the Minnesota Subclass a duty to disclose the safety risk of the Big Kid booster seats, both because they had special knowledge of the true safety risks of the booster seats and because, having represented that the seats were side-impact tested and safe, were required also to disclose the results of the safety testing.

772. Evenflo's misrepresentations and omissions alleged herein were material to and affected the conduct and decisions of Minnesota Plaintiffs and the Minnesota Subclass members.

773. Evenflo intentionally and knowingly misrepresented and omitted material facts regarding its Big Kid model booster seats with intent to mislead Minnesota Plaintiffs and the Minnesota Subclass.

774. Evenflo's unlawful and deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Minnesota Plaintiffs and the Minnesota Subclass members, about the true safety risks posed by its Big Kid booster seats.

775. As a direct and proximate result of Evenflo's violations of the Minnesota False Statement in Advertising Act, Minnesota Plaintiffs and other members of the Minnesota Subclass have suffered ascertainable losses, which include but are not limited to, the costs they incurred paying for a product which was not the one that had been represented to them, and the fact that the product they received (unsafe Big Kid booster seats) was less valuable than the product represented to them (safe Big Kid booster seats).

776. Evenflo's unlawful acts and practices complained of herein affect the public interest. As a direct and proximate result of Evenflo's violations of the Minnesota False Statement in Advertising Act, Minnesota Plaintiffs and the Minnesota Subclass have suffered injury-in-fact and/or actual damage. Pursuant to Minn. Stat. § 8.31 subd. 3a, Minnesota Plaintiffs and the Minnesota Class seek actual damages, attorneys' fees, and any other just and proper relief available under the Minnesota Prevention of Consumer Fraud Act.

777. This action will achieve a public benefit. The misrepresentations and omissions by Evenflo were significant and directly contributed to the harm suffered by Minnesota Plaintiffs and the Minnesota Subclass. The misrepresentations and omissions were made to increase profits at

the expense of Minnesota Plaintiffs and the Minnesota Subclass. Minnesota Plaintiffs seeks monetary and injunctive relief

COUNT XXXVI:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(MINN. STAT., § 3336.2-314)

778. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

779. This claim is brought by Plaintiff Joshua Kukowski and Plaintiff Kari Forhan ("Minnesota Plaintiffs") against Evenflo on behalf of themselves and the Minnesota Subclass.

780. Defendant is and was at all relevant times a "merchant" with respect to children's car seats under Minn. Stat. § 336.2-104(1) and a "seller" of such car seats under Minn. Stat. § 336.2-103(1)(d)..

781. The Big Kid booster seats are and were at all relevant times "goods" within the meaning of Minn. Stat. § 336.2-105(1).

782. The law implies a warranty that the Big Kid booster seats are merchantable, including but not limited to that they would pass without objection in the trade under the contract description and are fit for the ordinary purpose for which such goods are used and conform to the promises or affirmations of fact made on the container or label. Minn. Stat., § 336.2-314.

783. The packaging and labels of the Big Kid booster seats made affirmations of fact and promises that, among other things: (i) the Big Kid booster seats are suitable for children weighing as little as 30 pounds; (ii) the Big Kid booster seats are "side-impact tested" and they provide side-impact protection; (iii) its "rigorous test simulates the government side-impact tests conducted for automobiles" and that its tests even "go beyond the current government standards"; and (iv) using a Big Kid booster seats is "the best way to minimize injuries to your child."

784. As alleged above, the Big Kid booster seats do not conform to the affirmation of fact or promise that Evenflo made in that they do not function properly as a booster seat and are not safe for use, are not suitable for children weighing as little as 30 pounds, do not pass any side-impact testing and do not provide adequate side-impact protection, are not "the best way to minimize injuries" to users' children, and do not otherwise perform as promised or conform to Evenflo's affirmations and promises described above. For these reasons, the Big Kid booster seats also would not pass without objection in the trade under the contract description and are not fit for the ordinary purposes for which such goods are used.

785. Prior to their purchase, Minnesota Plaintiffs and Minnesota Subclass members could not have discovered that the Big Kid booster seats were not fit for its ordinary purpose and did not conform to the affirmations and promises previously represented. Minnesota Plaintiffs and the Minnesota Subclass members would not have purchased Big Kid booster seats if they knew that they were not fit for its ordinary purpose and did not conform to the affirmations and promises previously represented.

786. As a direct and proximate result of Evenflo's breach of said implied warranties of merchantability, Minnesota Plaintiffs and the other Minnesota Subclass members have been damaged in an amount to be determined at trial.

787. Minnesota Plaintiffs and the Minnesota Subclass did not need to send notice to Evenflo of its breaches of its implied warranties because Evenflo was already on notice of the defects alleged herein and Evenflo was already facing lawsuits for the conduct alleged herein.

Q. Claims Brought on Behalf of the Missouri Subclass

COUNT XXXVII:
VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT
(MO. REV. STAT. §§ 407.010, *ET SEQ.*)

788. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

789. This claim is brought by Plaintiff Emily Naughton ("Missouri Plaintiff") against Evenflo on behalf of herself and the Missouri Subclass.

790. Missouri Plaintiff and Missouri Subclass Members were at all relevant times consumers under the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010, et seq. (the "MMPA").

791. Missouri Plaintiff and Missouri Subclass Members purchased Defendant's Big Kid booster seat primarily for personal, family or household purposes.

792. Defendant was at all relevant times engaged in "trade" or "commerce" under the MMPA by way of its manufacturing, distributing, selling, marketing, advertising, labeling and packaging the Big Kid booster seat at issue.

793. Defendant's Big Kid booster seat constitutes "merchandise" under the MMPA.

794. Defendant's foregoing acts and practices, including its deceptive and fraudulent misrepresentations and omissions in the conduct of trade or commerce, were directed at consumers, including Missouri Plaintiff and Missouri Subclass Members.

795. Defendant's foregoing deceptive and fraudulent acts and practices, including its omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, the fact that the Seat will not adequately protect children in the event of a side

impact collision, and the fact the Seat is not safe for children weighing between 30 and 39 pounds. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested" and misrepresented that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards" and is safe for children weighing between 30 and 110 pounds.

796. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested."

797. The Big Kid booster seat poses an unreasonable risk to the safety of children weighing between 30 and 39 pounds.

798. Defendant did not disclose this information to consumers, including Missouri Plaintiff and Missouri Subclass Members.

799. Defendant's foregoing deceptive acts and practices, including its omissions while engaged in business, were and are deceptive acts or practices in violation of §§ 407.020, in that:

a. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested," when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b. Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by Missouri Plaintiff and Missouri Subclass Members, and would

defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c. Missouri Plaintiff and Missouri Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event of a side impact collision.

d. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as safe for children weighing between 30 and 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing less than 40 pounds;

e. Defendant knew that the unreasonable risk to the safety of children weighing under 40 pounds was unknown to and would not be easily discovered by Missouri Plaintiff and Missouri Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats; and

f. Missouri Plaintiff and Missouri Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children weighing between 30 and 39 pounds posed by the Big Kid booster seat.

800. Missouri Plaintiff and Missouri Subclass Members suffered damages when they purchased the Big Kid booster seats. Defendant's unconscionable, deceptive, and/or unfair practices caused actual damages to Missouri Plaintiff and the Missouri Subclass Members who

were unaware that the Big Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and were not safe for children weighing between 30 and 39 pounds, notwithstanding Defendant's representations at the time of purchase.

801. Defendant's foregoing deceptive acts and practices, including its omissions, were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

802. Consumers, including Missouri Plaintiff and Missouri Subclass Members, would not have purchased the Big Kid booster seats had they known about the unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

803. As a direct and proximate result of Defendant's deceptive acts and practices, including its omissions, Missouri Plaintiff and Missouri Subclass Members have been damaged as alleged herein, and are entitled to recover actual damages, punitive damages, and/or restitution to the extent permitted by law, including class action rules, in an amount to be proven at trial.

804. In addition, Missouri Plaintiff and Missouri Subclass Members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

R. Claims Brought on Behalf of the New Jersey Subclass

COUNT XXXVIII:
VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT
(N.J. Stat. Ann. § 56:8-1, *ET SEQ.*)

805. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

806. Plaintiff Karen Sanchez ("New Jersey Plaintiff") brings this claim on behalf of herself and the New Jersey Subclass.

807. Evenflo is a "person," as defined by N.J. Stat. Ann. § 56:8-1(d).

808. Evenflo sells "merchandise," as defined by N.J. Stat. Ann. § 56:8-1(c) & (e).

809. The New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1, et seq., prohibits unconscionable commercial practices, deception, fraud, false pretenses, false promises, misrepresentations, as well as the knowing concealment, suppression, or omission of any material fact with the intent that others rely on the concealment, omission, or fact, in connection with the sale or advertisement of any merchandise. N.J. Stat. § 56:8-2.

810. Evenflo engaged in deceptive and fraudulent conduct, made misrepresentations and knowingly concealed and omitted material facts in connection with the advertising and sale of Big Kid booster seats. The misrepresentations and omissions were material because they were likely to deceive reasonable consumers.

811. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact testing is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which present a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of

their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least 40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

812. Evenflo intended to mislead New Jersey Plaintiff and New Jersey Subclass members and induced them to rely on its deceptive and fraudulent conduct, misrepresentations and omissions of material fact.

813. Evenflo acted intentionally, knowingly, and maliciously to violate New Jersey's Consumer Fraud Act, and recklessly disregarded New Jersey Plaintiff's and New Jersey Subclass members' rights. Evenflo's knowledge of the its internal testing put it on notice that the Big Kid booster seats were not "Side Impact Tested" or safe and suitable for children as small as 30 pounds.

814. As a direct and proximate result of Evenflo's deceptive acts and practices, New Jersey Plaintiff and absent New Jersey Subclass members have suffered ascertainable losses, in the form of out-of-pocket monies paid for a product that was unsafe therefore rendered worthless. New Jersey Plaintiff has not received a refund.

815. New Jersey Plaintiff and New Jersey Subclass members seek all monetary and non-monetary relief allowed by law, including injunctive relief, other equitable relief, actual damages, treble damages, restitution, and attorneys' fees, filing fees, and costs.

COUNT XXXIX:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTIBILITY
(N.J. Stat. Ann. § 12A:2-314)

816. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

817. Plaintiff Karen Sanchez ("New Jersey Plaintiff") brings this claim on behalf of herself and the New Jersey Subclass.

818. New Jersey Plaintiff and members of the New Jersey Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

819. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

820. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter, were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

821. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

822. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

823. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, New Jersey Plaintiff and members of the New Jersey Subclass have been damaged in an amount to be proven at trial.

824. New Jersey Plaintiff and members of the New Jersey Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

S. Claims Brought on Behalf of the New York Subclass

COUNT XXXX:
VIOLATIONS OF THE NEW YORK DECEPTIVE ACTS AND PRACTICES ACT
(N.Y. GEN. BUS. LAW §§ 349, *ET SEQ.*)

825. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

826. Plaintiffs Danielle Sarratori and David Schnitzer ("New York Plaintiffs" for purposes of this count) bring this count against Evenflo on behalf of themselves and the New York Subclass.

827. New York Plaintiffs have standing to pursue this claim because they suffered injury in fact and lost money or property as a result of Evenflo's actions as described above. All members of the New York Subclass have incurred actual damages and ascertainable loss in the form of the diminished value of their car seats because had they known the truth about the Big Kid booster seats, they would not have purchased them or paid as much for these products.

828. New York Plaintiffs and the New York Subclass members are persons within the meaning of the New York Deceptive Acts and Practices Act (the "New York DAPA"). N.Y. Gen. Bus. Law § 349(h).

829. Evenflo's actions as set forth herein occurred in the conduct its business, trade, or commerce within the meaning of N.Y. Gen. Bus. Law § 349(a).

830. The New York DAPA makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce." N.Y. Gen. Bus. Law § 349(a). Evenflo's conduct, as set forth herein, constitutes deceptive acts or practices under this section.

831. In the course of its business, Evenflo concealed, suppressed, and misrepresented material facts concerning the Big Kid booster seats, in violation of N.Y. Gen. Bus. Law § 349(a). It did so by, among other things, representing that Big Kid booster seats were suitable for children weighing as little as 30 pounds and that the products were "side impact tested" and provided side impact collision protection—but concealing that Big Kid booster seats were unsafe for any purpose for children weighing less than 40 pounds and that Evenflo's internal tests showed that a child in its Big Kid booster seats could be in grave danger in such a crash. Evenflo's representations and omissions were material because they were likely to and did in fact deceive reasonable consumers, including New York Plaintiffs.

832. Evenflo knew these statements were false and misleading at the time of sale. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of material facts with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Big Kid booster seats.

833. Evenflo's actions as alleged were further "deceptive" because they offend established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to Evenflo's customers. The harm caused by Evenflo's wrongful conduct outweighs any utility of such conduct and has caused—and will continue to cause—substantial injury to New York Plaintiffs and the New York Subclass. Evenflo could and should have chosen one of many reasonably available alternatives, including not selling the Big Kid booster seats, disclosing to

prospective buyers that these products were not suitable for use by children weighing less than 40 pounds for any purpose and that Evenflo's own testing showed that child in the Big Kid booster seats could be in grave danger in a side impact collision, and/or not representing that the Big Kid booster seats were suitable for consumer use.

834. As a result of Evenflo's conduct in violation of in violation of N.Y. Gen. Bus. Law § 349(a), New York Plaintiffs and the New York Subclass received an inferior product to the product which they were promised. Had Evenflo disclosed the aforementioned material facts concerning the Big Kid booster seat, New York Plaintiffs and the New York Subclass would not have purchased these products or would have paid substantially less.

835. Evenflo owed New York Plaintiffs and the New York Subclass a duty to disclose the true nature of the Big Kid booster seats because Evenflo: (a) possessed exclusive knowledge about the Big Kid booster seats' true nature; (b) intentionally concealed the foregoing from Nw York Plaintiffs and the New York Subclass; and (c) made incomplete representations about side impact collision protection the Big Kid booster seats provided and these products' suitability for children weighing less than 40 pounds, while purposefully withholding material facts from New York Plaintiffs and the New York Subclass that contradicted these representations. At the time of sale, Evenflo knew about the Big Kid booster seats' unsafe nature and that these products were not suitable for use by children weighing less than 40 pounds. Evenflo acquired additional information concerning the Big Kid booster seats' safety attributes and suitability for use for children weighing less than 40 pounds after these products were sold but continued to conceal such information.

836. Evenflo thus violated the New York DAPA by, at a minimum, employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or

omission of any material fact with the intent that others rely upon such concealment, suppression, or omission, in connection with the sale of Big Kid booster seats.

837. Evenflo acted intentionally, knowingly, and maliciously in misrepresenting material facts regarding the Big Kid booster seats with the intent to mislead New York Plaintiffs and the New York Subclass members. Evenflo's knowledge of the Big Kid booster seats' internal safety crash results put it on notice that these booster seats were not as advertised. Accordingly, Evenflo knew or should have known that its conduct violated the New York DAPA.

838. As a direct and proximate result of Evenflo's violations of the New York DAPA, New York Plaintiffs and the New York Subclass have suffered injury-in-fact, actual damage, or both.

839. Evenflo's wrongful conduct constitutes a continuing course of unfair practices because Evenflo continues to represent that the Big Kid booster seats are suitable for children weighing as little as 30 pounds and that the products are "side impact tested" and provide side impact collision protection. Evenflo's violations present a continuing risk to New York Plaintiffs, the New York Subclass members, as well as the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest. New York Plaintiffs and the New York Subclass therefore seek injunctive and equitable relief to remedy Evenflo's deceptive marketing, advertising, and packaging and to recall all Big Kid booster seats.

840. New York Plaintiffs and the New York Subclass further seek monetary damages against Evenflo, measured as actual damages in an amount to be determined at trial or $50 each, whichever is greater, as well as treble damages up to $1,000 each because Evenflo willfully and knowingly violated the New York DAPA. New York Plaintiffs and the New York Subclass also

seek reasonable attorneys' fees and any other just and proper relief available under the New York DAPA.

COUNT XXXXI:
VIOLATIONS OF THE NEW YORK FALSE ADVERTISING LAW
(N.Y. GEN. BUS. LAW §§ 350, *ET SEQ*.)

841. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

842. Plaintiff Danielle Sarratori and David Schnitzer ("New York Plaintiffs" for purposes of this count) brings this count against Evenflo on behalf of herself and the New York Subclass.

843. New York Plaintiffs has standing to pursue this claim because they suffered injury in fact and lost money or property as a result of Evenflo's actions as described above. All members of the New York Subclass have incurred actual damages and ascertainable loss in the form of the diminished value of their car seats because had they known the truth about the Big Kid booster seats, they would not have purchased them or paid as much for these products.

844. Evenflo's actions as set forth herein occurred in the conduct its business, trade, or commerce within the meaning of the New York False Advertising Law ("New York FAL"). N.Y. Gen. Bus. Law § 350.

845. The New York FAL makes unlawful "[f]alse advertising in the conduct of any business, trade or commerce." N.Y. Gen. Bus. Law § 350. False advertising includes "advertising, including labeling, of a commodity…if such advertising is misleading in a material respect," taking into account "the extent to which the advertising fails to reveal facts material in light of ... representations [made] with respect to the commodity…" N.Y. Gen. Bus. Law § 350-a(1).

846. In the course of its business, Evenflo concealed, suppressed, and misrepresented material facts concerning the Big Kid booster seats, in violation of N.Y. Gen. Bus. Law § 350. It

did so by, among other things, representing that Big Kid booster seats were suitable for children weighing as little as 30 pounds and that the products were "side impact tested" and provided side impact collision protection—but concealing that Big Kid booster seats were unsafe for any purpose for children weighing less than 40 pounds and that Evenflo's internal tests showed that a child in its Big Kid booster seats could be in grave danger in such a crash. Evenflo made and disseminated these representations and omissions throughout New York, through advertising, marketing, and other publications and statements. These representations and omissions were material because they were likely to and did in fact deceive reasonable consumers, including New York Plaintiffs.

847. Evenflo knew these statements were false and misleading at the time of sale. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of material facts with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Big Kid booster seats.

848. As a result of Evenflo's conduct in violation of in violation of N.Y. Gen. Bus. Law § 350, New York Plaintiffs and the New York Subclass received an inferior product to the product which they were promised. Had Evenflo disclosed the aforementioned material facts concerning the Big Kid booster seat, New York Plaintiffs and the New York Subclass would not have purchased these products or would have paid substantially less.

849. Evenflo thus violated the New York FAL by, at a minimum, employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression, or omission, in connection with the sale of Big Kid booster seats.

850. Evenflo acted intentionally, knowingly, and maliciously in misrepresenting material facts regarding the Big Kid booster seats with the intent to mislead New York Plaintiffs and the New York Subclass members. Evenflo's knowledge of the Big Kid booster seats' internal safety crash results put it on notice that these booster seats were not as advertised. Accordingly, Evenflo knew or should have known that its conduct violated the New York FAL.

851. Unless restrained by this Court, Evenflo will continue to engage in untrue and misleading advertising in violation N.Y. Gen. Bus. Law § 350.

852. As a direct and proximate result of Evenflo's violations of the New York FAL, New York Plaintiffs and the New York Subclass have suffered injury-in-fact, actual damage, or both.

853. Evenflo's wrongful conduct constitutes a continuing course of unfair practices because Evenflo continues to represent that the Big Kid booster seats are suitable for children weighing as little as 30 pounds and that the products are "side impact tested" and provide side impact collision protection. Evenflo's violations present a continuing risk to New York Plaintiffs, the New York Subclass members, as well as the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest. New York Plaintiffs and the New York Subclass therefore seek injunctive and equitable relief to remedy Evenflo's deceptive marketing, advertising, and packaging and to recall all Big Kid booster seats.

854. New York Plaintiffs and the New York Subclass further seek monetary damages against Evenflo, measured as actual damages in an amount to be determined at trial or statutory damages of $500 each, whichever is greater. Because Evenflo willfully and knowingly violated the New York FAL, New York Plaintiffs and the New York Subclass members are entitled to recover three times actual damages, up to $10,000. New York Plaintiffs and the New York

Subclass also seek reasonable attorneys' fees and any other just and proper relief available under the New York FAL.

COUNT XXXXII:
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(N.Y. UCC § 2-314, *ET SEQ.*)

855. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

856. Plaintiffs Danielle Sarratori and David Schnitzer ("New York Plaintiffs" for purposes of this count) bring this count against Evenflo on behalf of themselves and the New York Subclass.

857. New York law states that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." N.Y. UCC § 2-314(1).

858. Evenflo is and was at all relevant times a merchant as defined by N.Y. UCC § 2-104(1)..

859. New York Plaintiffs and members of the New York Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

860. The Big Kid booster seats are and were at all relevant times goods within the meaning of the Uniform Commercial Code.

861. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a side impact crash. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present an undisclosed safety risks to children. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

862. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

863. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

864. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, New York Plaintiffs and members of the New York Subclass have been damaged in an amount to be proven at trial.

865. New York Plaintiffs and members of the New York Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

T. Claims Brought on Behalf of the North Carolina Subclass

COUNT XXXXIII:
VIOLATION OF THE NORTH CAROLINA UNFAIR & DECEPTIVE TRADE PRACTICES ACT
(N.C. GEN. STAT. §§ 75-1.1, *ET SEQ.*)

866. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

867. Plaintiffs Sudhakar Ramasamy and Carla Matthews ("North Carolina Plaintiffs" for purposes of this count) brings this count against Evenflo on behalf of themselves and the North Carolina Subclass.

868. Defendant's foregoing acts and practices, including its omissions in the conduct of trade or commerce, were directed at consumers.

869. Defendant engaged in "commerce" as defined in N.C. Gen. Stat. § 75-1.1(b).

870. Defendant's foregoing deceptive acts and practices, including its omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, that the Seat will not adequately protect children in the event of a side impact collision, and that the Seat is not safe for children weighing 30 to 39 pounds. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested," misrepresented that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards," and misrepresented that the Seat is safe for children weighing 30 to 110 pounds.

871. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested" and poses an unreasonable risk to the safety of children weighing 30 to 39 pounds.

872. Defendant did not disclose this information to consumers.

873. Defendant willfully failed to disclose the safety risks of Defendant's Big Kid booster seats.

874. Defendant knew or should have known that its conduct violated the North Carolina Act.

875. Defendant's foregoing deceptive acts and practices, including its omissions while engaged in business, were and are deceptive acts or practices in violation of N.C. Gen. Stat. §§ 75-1.1, et seq., in that:

a. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested," when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b. Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by North Carolina Plaintiffs and North Carolina Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c. North Carolina Plaintiffs and North Carolina Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event of a side impact collision;

d. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as safe for children weighing 30 to 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing 30 to 39 pounds;

e. Defendant knew that the unreasonable risk to the safety of children weighing 30 to 39 pounds was unknown to and would not be easily discovered by North Carolina Plaintiffs and North Carolina Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats; and

f. North Carolina Plaintiffs and North Carolina Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children weighing 30 to 39 pounds posed by the Big Kid booster seat.

876. North Carolina Plaintiffs and North Carolina Subclass Members suffered damages when they purchased the Big Kid booster seats. Defendant's unconscionable, deceptive and/or unfair practices caused actual damages to North Carolina Plaintiff and the North Carolina Subclass Members who were unaware that the Big Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and to children weighing 30 to 39 pounds, notwithstanding Defendant's representations at the time of purchase.

877. Defendant's foregoing deceptive acts and practices, including its omissions, were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

878. Consumers, including North Carolina Plaintiffs and North Carolina Subclass Members, would not have purchased the Big Kid booster seats had they known about the unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

879. As a direct and proximate result of Defendant's deceptive acts and practices, including its omissions, North Carolina Plaintiffs and North Carolina Subclass Members have been

damaged as alleged herein, and are entitled to recover actual damages and/or treble damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

880. In addition, North Carolina Plaintiffs and North Carolina Subclass Members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

U. Claims Brought on Behalf of the Ohio Subclass

COUNT XXXXIV:
VIOLATION OF THE OHIO DECEPTIVE TRADE PRACTICES ACT
(OHIO REV. CODE § 4165.01, *ET SEQ.*)

881. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

882. This claim is brought by Plaintiff Cassandra Honaker ("Ohio Plaintiff" for purposes of this count) on behalf of herself and the Ohio Subclass.

883. The Ohio Deceptive Trade Practices Act, Ohio Rev. Code § 4165.01, et seq. (the "OH DTPA"), states in relevant part that "A person who is injured by a person who commits a deceptive trade practice that is listed in division (A) section 4165.02 of the revised Code may commence a civil action to recover actual damages from the person who commits the deceptive trade practice." Id. § 4165.03(A)(2). Division (A) section 4165.02 provides that a person "engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following: … (2) Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services; … (7) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have; … (9) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of

another; ….” Division (B) section 4165.02 states: “In order to prevail in a civil action under section 4165.03 of the Revised Code that seeks injunctive relief or an award of damages and that is based on one or more deceptive trade practices listed in division (A) of this section, a complainant need not prove competition between the parties to the civil action.”

884. By representing, on its webpage, on the product package and in the product manual or inserts that the “Big Kid” booster seat was “side impact tested” and subject to testing twice as demanding as the government’s standards, whereas in reality there was no applicable government standard for side impact protection and Defendant’s own tests and testimony in personal injury litigation demonstrated that the “Big Kid” booster seats did not protect occupants from anticipated side impact collisions and exposed vulnerable infants and children to traumatic head, neck, spine and other injuries entailing serious injury or even death, Defendant knowingly and intentionally made material misrepresentations of and actionable concealments of material facts, in violation of the OH DTPA.

885. Ohio Plaintiff and all members of the Ohio Subclass suffered ascertainable loss caused by Defendant’s material misrepresentations and actionable concealment of material facts.

886. Ohio Plaintiff and members of the Ohio Subclass are entitled to damages or other appropriate legal or equitable relief, pursuant to the OH DTPA, as set forth above.

COUNT XXXV:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(OHIO REV. CODE § 1302.27)

887. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

888. This claim is brought by Plaintiff Cassandra Honaker (“Ohio Plaintiff” for purposes of this count) on behalf of herself and the Ohio Subclass.

889. Ohio Rev. Code § 1302.27 provides in pertinent part:

> (A) Unless excluded or modified as provided in section 1302.29 of the Revised Code, ***a warranty that the goods shall be merchantable is implied in a contract*** for their sale if the seller is a merchant with respect to goods of that kind….
>
> (B) ***Goods to be merchantable must*** be at least such as:
>
> > (1) pass without objection in the trade under the contract description; and
> >
> > (2) in the case of fungible goods are of fair average quality within the description; and
> >
> > (3) ***are fit for the ordinary purposes for which such goods are used***; and
> >
> > (4) run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit and among all units involved; and
> >
> > (5) ***are adequately contained, packaged, and labeled*** as the agreement may require; and
> >
> > (6) ***conform to the promises or affirmations of fact made on the container or label*** if any.
>
> (emphasis added).

890. The sale of "Big Kid" booster seat for use by children as light as 30 pounds, when they could be killed or grievously injured in the event of a side-impact collision, by stating on the web site, product package and/or product manual that the "Big Kid" booster seat has been tested and meets twice the government side-impact standards, whereas there have never been government side-impact standards, and Defendant's own testing and evidence from personal injury litigation demonstrates that children using the "Big Kid" booster seat were subject to grievous injury and even death in the event of side-impact collisions, Defendant breached the implied warranty of fitness for the "Big Kid" booster seats.

164. Ohio Plaintiff and the Ohio Subclass are entitled to damages and/or other relief.

V. Claims Brought on Behalf of the Oklahoma Subclass

COUNT XXXXVI:
VIOLATION OF THE OKLAHOMA DECEPTIVE TRADE PRACTICES ACT
(OKLA. STAT. TIT. 15, § 751, *ET SEQ*.)

891. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

892. This claim is brought by Plaintiff Linda Mitchell ("Oklahoma Plaintiff") on behalf of herself and the Oklahoma Subclass.

893. Evenflo is a "person," as meant by Okla. Stat. tit. 15, § 752(1).

894. Evenflo's advertisements, offers of sales, sales, and distribution of goods, services, and other things of value constituted "consumer transactions" within the meaning of Okla. Stat. tit. 15, § 752(2).

895. Evenflo advertised and sold the Big Kid booster seats in Oklahoma and engaged in trade or commerce directly or indirectly affecting the people of Oklahoma.

896. Evenflo, in the course of its business, engaged in unlawful practices in violation of Okla. Stat. tit. 15, § 753, including, but not limited to, the following: making false or misleading representations, knowingly or with reason to know, as to the source, sponsorship, approval, or certification of the subject of a consumer transaction, in violation of Okla. Stat. tit. 15 § 753(2); making false representations, knowingly or with reason to know, as to the characteristics, uses, and benefits of the subject of its consumer transactions, in violation of Okla. Stat. tit. 15, § 753(5); representing, knowingly or with reason to know, that the subject of its consumer transactions were of a particular standard when they were of another, in violation of Okla. Stat. tit 15, § 753(7); advertising, knowingly or with reason to know, the subject of its consumer transactions with intent not to sell as advertised, in violation of Okla. Stat. tit 15, § 753 (8); committing unfair trade practices that offend established public policy and were immoral, unethical, oppressive,

unscrupulous, and substantially injurious to consumers, as defined by section 752(14), in violation of Okla. Stat. tit. 15, § 753(20); and committing deceptive trade practices that deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person as defined by section 752(13), in violation of Okla. Stat. tit. 15, § 753(20).

897. Evenflo engaged in unlawful practices that violated the OCPA by knowingly making misleading statements about the safety of its Big Kid booster seats and knowingly failing to disclose the safety risks posed by its Big Kid booster seats, which put children's health and well-being at serious risk in side-impact car crashes.

898. For example, Evenflo falsely and misleadingly represented that the Big Kid booster seats were "Side Impact Tested" and safe for children as small as 40 or even 30 pounds. Evenflo also failed to disclose material facts, including but not limited to the following: (1) that neither states nor the federal government have developed side-impact testing rules for child safety seats; (2) that the bar for "passing" Evenflo's testing is so low that the only way to fail the company's test is if a child-sized dummy ends up on the floor or the booster seat itself breaks into pieces; (3) that the booster seat passes the company's side-impact tests even if the child-sized dummy is violently moved or jostled; (4) that Evenflo's side-impact testing is performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it which is in stark contrast to NHTSA's rating program; (5) that internal videos of Evenflo's side impact tests for the Big Kid booster seats show child-sized test dummies bending violently at the hip, torsos, and neck, as well as test dummy heads being thrown to the side which present a high risk of serious injuries to the head, neck, and spine; (6) that children should not be moved from a harnessed seat to a booster seat until they reach the maximum weight or height of their harnessed seat; and (7) that no child should use a booster seat until he or she weighs at least

40 pounds and that experts now recommend keeping children in harnessed seats until 65, or even 90, pounds.

899. Evenflo's representations and omissions were material because they were likely to deceive reasonable consumers. Oklahoma Plaintiff and Oklahoma Subclass members relied on Evenflo's material misrepresentations and omissions regarding the safety of Evenflo's Big Kid booster seats.

900. Evenflo intentionally and knowingly misrepresented and failed to disclose material facts it had a duty to disclose regarding its Big Kid booster seats with the intent to mislead Oklahoma Plaintiff and the Oklahoma Subclass and induce them to rely on the misrepresentations and omissions.

901. Evenflo acted unlawfully in failing to disclose to Oklahoma Plaintiff and the Oklahoma Subclass members the material facts about the safety risks posed by its Big Kid booster seats, because Evenflo:

a) Possessed exclusive knowledge about its testing of these seats;

b) Intentionally concealed the foregoing from Plaintiff and the Oklahoma Subclass; and/or

c) Made incomplete and misleading representations that its Big Kid seats were "Side Impact Tested," while purposefully withholding material facts from Plaintiff and the Oklahoma Subclass that contradicted these representations.

902. Evenflo had a duty to disclose the truth about the safety risks posed by its Big Kid booster seats because these seats put children's health and well-being at serious risk in side-impact car crashes.

903. Oklahoma Plaintiff and members of the Oklahoma Subclass could not have discovered through the exercise of reasonable diligence that Evenflo's Big Kid booster seats are unsafe in side impact crash tests. Oklahoma Plaintiff and Oklahoma Subclass members acted reasonably in relying on Evenflo's misrepresentations and omissions, the truth of which they could not have discovered.

904. Had Evenflo disclosed to Oklahoma Plaintiff and Oklahoma Subclass members material facts, including but not limited to, the safety risks posed by its Big Kid booster seats, Oklahoma Plaintiff and the Oklahoma Subclass members would not have purchased Big Kid booster seats or would have paid less. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid booster seats are safe.

905. Evenflo's unlawful acts or practices were likely to and did in fact deceive reasonable consumers, including Oklahoma Plaintiff and the Oklahoma Subclass members, about the true safety risks posed by its Big Kid booster seats.

906. The above unlawful practices and acts by Evenflo were immoral, unethical, oppressive, unscrupulous, unfair, and substantially injurious. These acts caused substantial injury to Oklahoma Plaintiff and absent Oklahoma Subclass members.

907. Evenflo acted intentionally, knowingly, and maliciously to violate the OCPA, and recklessly disregarded Oklahoma Plaintiff's and Oklahoma Subclass members' rights. Evenflo's knowledge of the safety risks posed by the Big Kid booster seats put it on notice that the Big Kid booster seats were not as it advertised.

908. As a direct and proximate result of Evenflo's unlawful acts and practices, Oklahoma Plaintiff and absent Oklahoma Subclass members have suffered and will continue to

suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the Big Kid booster seats.

909. Oklahoma Plaintiff and Oklahoma Subclass members seek all monetary and non-monetary relief allowed by law, including actual damages, civil penalties, and attorneys' fees and costs under Okla. Stat. tit. 15, § 761.1.

COUNT XXXVII:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
(OKLA. STAT. TIT. 12A, § 2-314)

910. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

911. This claim is brought by Plaintiff Linda Mitchell ("Oklahoma Plaintiff") on behalf of herself and the Oklahoma Subclass.

912. Evenflo is and was at all relevant times a merchant as defined by Okla. Stat. tit. 12A, § 2-104(1).

913. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Okla. Stat. tit. 12A, § 2-314.

914. Oklahoma Plaintiff and members of the Oklahoma Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

915. The Big Kid booster seats are and were at all relevant times goods within the meaning of Okla. Stat. tit. 12A, § 2-105.

916. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

917. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

918. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

919. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Oklahoma Plaintiff and members of the Oklahoma Subclass have been damaged in an amount to be proven at trial.

920. Oklahoma Plaintiff and members of the Oklahoma Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

W. Claims Brought on Behalf of the Pennsylvania Subclass

COUNT XXXXVIII:
VIOLATION OF THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW
(73 PA. CONS. STAT. § 201-1, *ET SEQ*.)

921. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this complaint.

922. This claim is brought by Plaintiffs Hailey Lechner and Lauren Mahler ("Pennsylvania Plaintiffs") on behalf of themselves and the Pennsylvania Subclass.

923. The Pennsylvania Unfair Trade Practices and Consumer Protection Law ("Pennsylvania CPL") prohibits unfair or deceptive acts or practices, including representing that goods or services have characteristics, benefits or qualities that they do not have; representing that goods or services are of a particular standard, quality or grade if they are of another; advertising goods or services with intent not to sell them as advertised and certified; and engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding. 73 Pa. Cons. Stat. § 201-2(4).

924. Evenflo, Pennsylvania Plaintiffs, and Pennsylvania Subclass members are "persons" within the meaning of 73 Pa. Cons. Stat. § 201-2(2).

925. Pennsylvania Plaintiffs purchased an Evenflo Big Kid booster seat primarily for personal, family, or household purposes within the meaning of 73 Pa. Cons. Stat. § 201-9.2.

926. All of the acts complained of herein were perpetrated by Evenflo in the course of trade or commerce within the meaning of 73 Pa. Cons. Stat. § 201-2(3).

927. In the course of its business, Evenflo willfully failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its Big Kid model booster seats.

928. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Pennsylvania Plaintiffs and the Pennsylvania Subclass members, about the true safety risks posed by its Big Kid booster seats.

929. Evenflo intentionally and knowingly misrepresented material facts regarding its Big Kid model booster seats with intent to mislead Pennsylvania Plaintiffs and the Pennsylvania Subclass.

930. Evenflo knew or should have known that its conduct violated the Pennsylvania CPL.

931. Evenflo owed Pennsylvania Plaintiffs and the Pennsylvania Subclass a duty to disclose the truth about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Plaintiff and the Pennsylvania Subclass; and/or

c. Made incomplete and misleading representations that its Big Kid model seats were "side impact tested," while purposefully withholding material facts from Pennsylvania Plaintiffs and the Pennsylvania Subclass that contradicted these representations.

932. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid model booster seats were material to Pennsylvania Plaintiffs and the Pennsylvania Subclass.

933. Pennsylvania Plaintiffs and the Pennsylvania Subclass suffered ascertainable loss caused by Evenflo's misrepresentations and its concealment of and failure to disclose material information. Pennsylvania Plaintiffs and the Pennsylvania Subclass members would not have purchased Big Kid model booster seats but for Evenflo's violations of the Pennsylvania CPL.

934. Evenflo had an ongoing duty to all Evenflo customers to refrain from unfair and deceptive practices under the Pennsylvania CPL. As a direct and proximate result of Evenflo's violations of the Pennsylvania CPL, Pennsylvania Plaintiffs and the Pennsylvania Subclass have suffered injury-in-fact and/or actual damage.

935. Evenflo's violations present a continuing risk to Pennsylvania Plaintiffs, the Pennsylvania Subclass, as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

936. Evenflo is liable to Pennsylvania Plaintiffs and the Pennsylvania Subclass for treble their actual damages or $100, whichever is greater, and attorneys' fees and costs. 73 Pa. Cons. Stat. § 201-9.2(a). Pennsylvania Plaintiffs and the Pennsylvania Subclass are also entitled to an award of punitive damages given that Evenflo's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.

COUNT IL:
BREACH OF IMPLIED WARRANTY
(13 PA.C.S. § 2314)

937. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

938. This claim is brought by Plaintiffs Hailey Lechner and Lauren Mahler ("Pennsylvania Plaintiffs") on behalf of themselves and the Pennsylvania Subclass.

939. Evenflo is and was at all relevant times a merchant.

940. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to 13 Pa.C.S. § 2314.

941. Pennsylvania Plaintiff and members of the Pennsylvania Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries

of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

942. The Big Kid booster seats are and were at all relevant times goods within the meaning of 13 Pa.C.S. § 2314.

943. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

944. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

945. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

946. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Pennsylvania Plaintiff and members of the Pennsylvania Subclass have been damaged in an amount to be proven at trial.

947. Pennsylvania Plaintiff and members of the Pennsylvania Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

X. Claims Brought on Behalf of the South Carolina Subclass

COUNT L:
VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
(S.C. CODE §§ 39-5-10, *ET SEQ.*)

948. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

949. Plaintiffs Tarnisha Alston and Rachel Huber ("South Carolina Plaintiffs" for purposes of this count) brings this count on behalf of themselves and the South Carolina Subclass.

950. Defendant's foregoing acts and practices, including its omissions in the conduct of trade or commerce, were directed at consumers.

951. Defendant's foregoing deceptive acts and practices, including its omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, or that the Seat will not adequately protect children in the event of a side impact collision. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested" and misrepresented that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards."

952. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested."

953. The Big Kid booster seat poses an unreasonable risk to the safety of children who weigh less than 40 pounds, despite Defendant's representation that the Seat is safe for children weighing 30 to 110 pounds.

954. Defendant did not disclose this information to consumers.

955. Defendant's violations have the potential for repetition and present a continuing risk to South Carolina Plaintiffs and South Carolina Subclass Members as well as to the general public. Defendant's unlawful acts and practices complained herein adversely impact the public interest.

956. Defendant willfully failed to disclose the safety risks of Defendant's Big Kid booster seats.

957. Defendant knew or should have known that its conduct violated the South Carolina Act.

958. Defendant's foregoing deceptive acts and practices, including its omissions, were and are deceptive acts or practices in violation of S.C. Code §§ 39-5-10, et seq., in that:

a. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested," when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b. Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by South Carolina Plaintiffs and South Carolina Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c. South Carolina Plaintiffs and South Carolina Subclass members were deceived by

Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event of a side impact collision;

d. Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as safe for children weighing 30 to 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing less than 40 pounds;

e. Defendant knew that the unreasonable risk to the safety of children under 40 pounds was unknown to and would not be easily discovered by South Carolina Plaintiffs and South Carolina Subclass Members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats; and

f. South Carolina Plaintiffs and South Carolina Subclass members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children weighing less than 40 pounds posed by the Big Kid booster seat.

959. South Carolina Plaintiffs and South Carolina Subclass members suffered damages when they purchased the Big Kid booster seats. Defendant's unconscionable, deceptive and/or unfair practices caused actual damages to South Carolina Plaintiffs and the South Carolina Subclass members who were unaware that the Big Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and in the event that the child weighed less than 40 pounds, notwithstanding Defendant's representations at the time of purchase.

960. Defendant's foregoing deceptive acts and practices, including its omissions, were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

961. Consumers, including South Carolina Plaintiffs and South Carolina Subclass Members, would not have purchased the Big Kid booster seats had they known about the

unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

962. As a direct and proximate result of Defendant's deceptive acts and practices, including its omissions, South Carolina Plaintiffs and South Carolina Subclass members have been damaged as alleged herein, and are entitled to recover actual damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

963. In addition, South Carolina Plaintiffs and South Carolina Subclass members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

Y. Claims Brought on Behalf of the Tennessee Subclass

COUNT LI:
VIOLATION OF THE TENNESSEE CONSUMER PROTECTION ACT
(TENN. CODE. §§ 47-18-101, *ET SEQ.*)

964. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

965. Plaintiff Ashley Miller ("Tennessee Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Tennessee Subclass.

966. Tennessee Plaintiff has standing to pursue this claim because she suffered injury in fact and lost money or property as a result of Evenflo's actions as described above. All members of the Tennessee Subclass have incurred actual damages and ascertainable loss in the form of the diminished value of their car seats because had they known the truth about the Big Kid booster seats, they would not have purchased them or paid as much for these products.

967. Tennessee Plaintiff and the Tennessee Subclass members are "natural persons" and "consumers" within the meaning of the Tennessee Consumer Protection Act ("Tennessee CPA"). Tenn. Code § 47-18-103(3).

968. Evenflo is a "person" within the meaning of Tenn. Code § 47-18-103(14).

969. Evenflo is engaged in "trade," "commerce," or "consumer transactions" within the meaning of Tenn. Code § 47-18-103(20).

970. The Tennessee CPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce," including, but not limited to: "Representing that goods…have characteristics…, uses, [or] benefits…that they do not have…"; "Representing that goods…are of a particular standard, quality or grade…, if they are of another"; "Advertising goods…with intent not to sell them as advertised"; "Using statements or illustrations in any advertisement which create a false impression of the grade, quality,…[or] usability…or which may otherwise misrepresent the goods…in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised goods…to other goods…"; and "Engaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn. Code §§ 47-18-102(2), 47-18-104.

971. In the course of its business, Evenflo concealed, suppressed, and misrepresented material facts concerning the Big Kid booster seats, in violation of Tenn. Code § 47-18-102(2) and Tenn. Code § 47-18-104. It did so by, among other things, representing that Big Kid booster seats were suitable for children weighing as little as 30 pounds and that the products were "side impact tested" and provided side impact collision protection—but concealing that Big Kid booster seats were unsafe for any purpose for children weighing less than 40 pounds and that Evenflo's internal tests showed that a child in its Big Kid booster seats could be in grave danger in such a crash. Evenflo's representations and omissions were material because they were likely to and did in fact deceive reasonable consumers, including Tennessee Plaintiff. Evenflo knew these statements were false and misleading at the time of sale.

972. Evenflo's actions as alleged were further "unfair" and "deceptive" because they offend established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to Evenflo's customers. The harm caused by Evenflo's wrongful conduct outweighs any utility of such conduct and has caused—and will continue to cause—substantial injury to Tennessee Plaintiff and the Tennessee Subclass. Evenflo could and should have chosen one of many reasonably available alternatives, including not selling the Big Kid booster seats, disclosing to prospective buyers that these products were not suitable for use by children weighing less than 40 pounds for any purpose and that Evenflo's own testing showed that child in the Big Kid booster seats could be in grave danger in a side impact collision, and/or not representing that the Big Kid booster seats were suitable for consumer use. Additionally, Evenflo's conduct was "unfair" because it violated the legislatively declared policies reflected by Tennessee's strong consumer warranty laws.

973. Evenflo's actions as set forth above occurred in the conduct of trade or commerce.

974. As a result of Evenflo's conduct in violation of Tenn. Code § 47-18-104, Tennessee Plaintiff and the Tennessee Subclass received an inferior product to the product which they were promised. Had Evenflo disclosed the aforementioned material facts concerning the Big Kid booster seat, Tennessee Plaintiff and the Tennessee Subclass would not have purchased these products or would have paid substantially less.

975. Evenflo owed Tennessee Plaintiff and the Tennessee Subclass a duty to disclose the true nature of the Big Kid booster seats because Evenflo: (a) possessed exclusive knowledge about the Big Kid booster seats' true nature; (b) intentionally concealed the foregoing from Tennessee Plaintiff and the Tennessee Subclass ; and (c) made incomplete representations about side impact collision protection the Big Kid booster seats provided and these products' suitability

for children weighing less than 40 pounds, while purposefully withholding material facts from Tennessee Plaintiff and the Tennessee Subclass that contradicted these representations. At the time of sale, Evenflo knew about the Big Kid booster seats' unsafe nature and that these products were not suitable for use by children weighing less than 40 pounds. Evenflo acquired additional information concerning the Big Kid booster seats' safety attributes and suitability for use for children weighing less than 40 pounds after these products were sold but continued to conceal such information.

976. Evenflo thus violated the Tennessee CPA by, at a minimum, employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression, or omission, in connection with the sale of Big Kid booster seats.

977. Evenflo acted intentionally, knowingly, and maliciously in misrepresenting material facts regarding the Big Kid booster seats with the intent to mislead Tennessee Plaintiff and the Tennessee Subclass members. Evenflo's knowledge of the Big Kid booster seats' internal safety crash results put it on notice that these booster seats were not as advertised. Accordingly, Evenflo knew or should have known that its conduct violated the Tennessee CPA.

978. As a direct and proximate result of Evenflo's violations of the Tennessee CPA, Tennessee Plaintiff and the Tennessee Subclass have suffered injury-in-fact, actual damage, or both.

979. Evenflo's wrongful conduct constitutes a continuing course of unfair practices because Evenflo continues to represent that the Big Kid booster seats are suitable for children weighing as little as 30 pounds and that the products are "side impact tested" and provide side impact collision protection. Evenflo's violations present a continuing risk to Tennessee Plaintiff,

the Tennessee Subclass members, as well as the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest. Tennessee Plaintiff and the Tennessee Subclass therefore seek injunctive and equitable relief to remedy Evenflo's deceptive marketing, advertising, and packaging and to recall all Big Kid booster seats.

980. Tennessee Plaintiff and the Tennessee Subclass further seek monetary damages against Evenflo, measured as actual damages in an amount to be determined at trial, treble damages as a result of Evenflo's "willful or knowing violation[s]" of the Tennessee CPA, and any other just and proper relief available under Tenn. Code § 47-18-109.

COUNT LII:
BREACH OF THE IMPLIED WARRANTY OF MERCHANTIBILITY
(TENN. CODE. §§ 47-2-314)

981. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

982. Plaintiff Ashley Miller ("Tennessee Plaintiff" for purposes of this count) brings this count against Evenflo on behalf of herself and the Tennessee Subclass.

983. Evenflo is and was at all relevant times a merchant.

984. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Tenn. Code. §§ 47-2-314.

985. Tennessee Plaintiff and members of the Tennessee Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

986. The Big Kid booster seats are and were at all relevant times goods within the meaning of Tenn. Code. §§ 47-2-314.

987. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

988. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

989. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

990. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Tennessee Plaintiff and members of the Tennessee Subclass have been damaged in an amount to be proven at trial.

991. Tennessee Plaintiff and members of the Tennessee Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

Z. Claims Brought on Behalf of the Texas Subclass

COUNT LIII:
VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION ACT
(TEX. BUS. & COM. CODE § 17.4, *ET SEQ.*)

992. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

993. This claim is brought by Plaintiff Lindsey Brown ("Plaintiff" for purposes of this count) against Evenflo on behalf of residents of Texas who are members of the Class ("Texas Subclass").

994. Plaintiff and the Texas Subclass members are individuals with assets of less than $25 million (or are controlled by corporations or entities with less than $25 million in assets). *See* Tex. Bus. & Com. Code § 17.41.

995. The Texas Deceptive Trade Practices-Consumer Protection Act ("Texas DTPA") provides a private right of action to a consumer where the consumer suffers economic damage as the result of either (i) the use of false, misleading, or deceptive acts or practices specifically enumerated in Tex. Bus. & Com. Code § 17.46(b); or (ii) "an unconscionable action or course of action by any person." Tex. Bus. & Com. Code § 17.50(a)(2) & (3). The Texas DTPA declares several specific actions to be unlawful, including: "(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have"; "(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"; and "(9) advertising goods or services with intent not to sell them as advertised." An "unconscionable action or course of action" means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus.

& Com. Code § 17.45(5). As detailed herein, Evenflo has engaged in an unconscionable action or course of action and thereby caused economic damages to the Texas Subclass.

996. In the course of its business, Evenflo willfully failed to disclose the safety risks posed by its Big Kid booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes.

997. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its Big Kid booster seats.

998. Evenflo's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiff and the Texas Subclass members, about the true safety risks posed by its Big Kid booster seats.

999. Evenflo intentionally and knowingly misrepresented material facts regarding its Big Kid model booster seats with intent to mislead Plaintiff and the Texas Subclass.

1000. Evenflo knew or should have known that its conduct violated the Texas DTPA.

1001. Evenflo owed Plaintiff and the Texas Subclass a duty to disclose the truth about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Plaintiff and the Texas Subclass; and/or

c. Made incomplete and misleading representations that its Big Kid model seats were "side impact tested," while purposefully withholding material

facts from Plaintiff and the Texas Subclass that contradicted these representations.

1002. Evenflo's omissions and/or misrepresentations about the safety of its Big Kid model booster seats were material to Plaintiff and the Texas Subclass.

1003. Plaintiff and the Texas Subclass suffered ascertainable loss caused by Evenflo's misrepresentations and its concealment of and failure to disclose material information. Plaintiff and the Texas Subclass members would not have purchased Big Kid model booster seats but for Evenflo's violations of the Texas DTPA.

1004. Evenflo had an ongoing duty to its customers to refrain from unfair and deceptive practices under the Texas DTPA. As a direct and proximate result of Evenflo's violations of the Texas DTPA, Plaintiff and the Texas Subclass have suffered injury-in-fact and actual damages.

1005. Evenflo's violations present a continuing risk to Plaintiff as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

1006. On February 19, 2020, Plaintiff sent a letter complying with Tex. Bus. & Com. Code § 17.505 to Evenflo.

1007. On February 19, 2020, a copy of this complaint was mailed to the Attorney General of the State of Texas in accordance with Tex. Bus. & Com. Code § 17.501.

1008. Pursuant to Tex. Bus. & Com. Code § 17.505(a), because Plaintiff did not rectify its conduct within 60 days, Plaintiff is entitled under the DTPA to obtain monetary relief against Evenflo, measured as actual damages in an amount to be determined at trial, treble damages for Evenflo's knowing violations of the Texas DTPA, and any other just and proper relief available under the Texas DTPA.

COUNT LIV:
BREACH OF THE IMPLIED
WARRANTY OF MERCHANTABILITY
(TEX. BUS. & COM. CODE ANN. § 2.314)

1009. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

1010. This claim is brought by Plaintiff Lindsey Brown ("Texas Plaintiff") on behalf of herself and the Texas Subclass.

1011. Evenflo is and was at all relevant times a merchant as defined by Tex. Bus. & Com. Code Ann. § 2.104.

1012. A warranty that the Big Kid booster seats were in merchantable condition is implied by law pursuant to Tex. Bus. & Com. Code Ann. § 2.314.

1013. Texas Plaintiff and members of the Texas Subclass purchased the Big Kid booster seats manufactured and marketed by Evenflo by and through Evenflo's authorized sellers for retail sale to consumers, or were otherwise expected to be the third-party beneficiaries of Evenflo's contracts with authorized sellers, or eventual purchasers when bought from a third party. At all relevant times, Evenflo was the merchant, manufacturer, marketer, warrantor, and/or seller of the Big Kid booster seats. Evenflo knew or had reason to know of the specific use for which the Big Kid booster seats were purchased.

1014. The Big Kid booster seats are and were at all relevant times goods within the meaning of Tex. Bus. & Com. Code Ann. § 2.105.

1015. Evenflo impliedly warranted that the Big Kid booster seats were in merchantable condition and fit. The Big Kid booster seats when sold at all times thereafter were not in merchantable condition and were and are not fit for the ordinary purpose of providing safety and protection for children in the event of a collision. The Big Kid booster seats, however, are not safe

for children in the event of a side impact crash and present undisclosed safety risks to children under 40 pounds. Thus, Evenflo breached its implied warranty of merchantability for the ordinary purpose for which the Big Kid booster seats are purchased and used.

1016. Evenflo cannot disclaim its implied warranty as it knowingly sold unsafe and hazardous Big Kid booster seats.

1017. Evenflo was provided notice by the numerous consumer class action complaints filed against it. Affording Evenflo a reasonable opportunity to cure its breach of implied warranties would be unnecessary and futile here because Evenflo has known of and concealed the safety risks attendant to the Big Kid booster seats.

1018. As a direct and proximate result of Evenflo's breach of the implied warranty of merchantability, Texas Plaintiff and members of the Texas Subclass have been damaged in an amount to be proven at trial.

1019. Texas Plaintiff and members of the Texas Subclass have been excused from performance of any warranty obligations as a result of Evenflo's conduct described herein.

AA. Claims Brought on Behalf of the Washington Subclass

COUNT LV:
VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT
(RCW. § 19.86, *ET SEQ.*)

1020. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

1021. This claim is brought by Plaintiff Lindsey Reed ("Washington Plaintiff" for purposes of this count) against Evenflo on behalf of herself and members of the Washington Subclass.

1022. Defendant's foregoing unfair and deceptive acts and practices, including its omissions, were and are committed in its course of trade or commerce, directed at consumers, affect the public interest, and injured Washington Plaintiff and the Washington Subclass.

1023. Defendant's foregoing deceptive acts and practices, including its omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, that the Seat will not adequately protect children in the event of a side impact collision, or that the Seat will not adequately protect children weighing 30 to 39 pounds. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested," misrepresented that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards," and misrepresented that the Seat is safe for children weighing 30 to 110 pounds.

1024. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested."

1025. The Big Kid booster seat poses an unreasonable risk to the safety of children weighing 30 to 39 pounds, despite Defendant's representation that the Seat is safe for children weighing 30 to 110 pounds.

1026. Defendant did not disclose this information to consumers.

1027. Defendant's foregoing deceptive acts and practices, including its omissions, were and are deceptive acts or practices in violation of the Consumer Protection Act, RCW §§ 19.86, et seq., in that:

a) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested," when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b) Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by Washington Plaintiff and Washington Subclass members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c) Washington Plaintiff and Washington Subclass members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event of a side impact collision;

d) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as being safe for children weighing 30 to 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing 30 to 39 pounds;

e) Defendant knew that the unreasonable risk to the safety of children weighing 30 to 39 pounds was unknown to and would not be easily discovered by Washington Plaintiff and Washington Subclass members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

f) Washington Plaintiff and Washington Subclass Members were deceived by Defendant's failure to disclose and could not discover the unreasonable risk to the safety of children weighing 30 to 39 pounds posed by the Big Kid booster seat; and

g) Defendant's deceptive acts and practices, including its omissions, injured Washington Plaintiff and Washington Subclass members, and had – and still has – the potential to injure members of the public at-large.

1028. Washington Plaintiff and Washington Subclass members suffered damages when they purchased the Big Kid booster seats. Defendant's unconscionable, deceptive and/or unfair practices caused actual damages to Washington Plaintiff and the Washington Subclass members who were unaware that the Big Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and an unreasonable safety risk to children weighing 30 to 39 pounds, notwithstanding Defendant's representations at the time of purchase.

1029. Defendant's foregoing deceptive acts and practices, including its omissions, were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

1030. Consumers, including Washington Plaintiff and Washington Subclass members, would not have purchased the Big Kid booster seats had they known about the unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

1031. As a direct and proximate result of Defendant's deceptive acts and practices, including its omissions, Washington Plaintiff and Washington Subclass members have been damaged as alleged herein, and are entitled to recover actual damages and/or treble damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

1032. In addition, Washington Plaintiff and Washington Subclass members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

BB. Claims Brought on Behalf of the West Virginia Subclass

COUNT LVI:
VIOLATION OF THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT
(W. VA. CODE § 46A-6-101, *ET SEQ*.)

1033. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

1034. This claim is brought by Janette D. Smarr and Kristin Atwell ("Plaintiffs" for purposes of this count) against Evenflo on behalf of themselves and members of the West Virginia Subclass.

1035. The West Virginia Consumer Credit and Protection Act ("WVCCPA") broadly prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce…" W. Va. Code § 46A-6-104.

1036. Plaintiffs and the West Virginia Subclass are "consumers" within the meaning of W. Va. Code § 46A-1-102.

1037. In the course of its business, Evenflo willfully failed to disclose the safety risks posed by its "Big Kid" booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its "Big Kid" booster seats.

1038. Additionally, Evenflo willfully and intentionally labelled its "Big Kid" booster seats as safe for children weighing between 30 and 40 pounds when it knew – and, in fact, changed its labelling internationally – that its "Big Kid" booster seats were not safe for children weighing less than 40 pounds. These seats were restricted in Canada to children weighing above 40 pounds, and there was evidence that they should be used only with even heavier children.

1039. Evenflo's unlawful acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiffs and the West Virginia Subclass members, about the true safety risks posed by its "Big Kid" booster seats.

1040. Plaintiffs and West Virginia Subclass members relied on Evenflo's representations regarding their side-impact testing and weight limits when purchasing car seats for their children.

1041. Evenflo intentionally and knowingly misrepresented material facts regarding its "Big Kid" booster seats with intent to mislead Plaintiffs and the West Virginia Subclass.

1042. Evenflo knew or should have known that its conduct violated the WVCCPA.

1043. Evenflo owed Plaintiffs and the West Virginia Subclass a duty to disclose the truth about the safety risks posed by its "Big Kid" booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Plaintiffs and the West Virginia Subclass; and/or

c. Made incomplete and misleading representations that its "Big Kid" booster seats were "side impact tested," while purposefully withholding material facts from Plaintiffs and the West Virginia Subclass that contradicted these representations.

1044. Evenflo's omissions and/or misrepresentations about the safety of its "Big Kid" booster seats were material to Plaintiffs and the West Virginia Subclass.

1045. Plaintiffs and the West Virginia Subclass suffered ascertainable loss caused by Evenflo's misrepresentations and its concealment of and failure to disclose material information. Plaintiffs and the West Virginia Subclass members would not have purchased "Big Kid" model seats but for Evenflo's violations of the WVCCPA.

1046. Evenflo had an ongoing duty to all Evenflo customers to refrain from unlawful acts or practices under the WVCCPA. As a direct and proximate result of Evenflo's violations of the WVCCPA, Plaintiffs and the West Virginia Subclass have suffered injury-in-fact and/or actual damage.

1047. Evenflo's violations present a continuing risk to Plaintiffs and the West Virginia Subclass, as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

1048. Plaintiffs seek injunctive and monetary relief against Evenflo measured as the greater of (a) actual damages in an amount to be determined at trial and (b) statutory damages in the amount of $200 for each plaintiff; reasonable attorneys' fees and court costs; and any other just and proper relief available under W. Va. Code § 46A-6-106. posed by its "Big Kid" booster seats, which put children's health and wellbeing at serious risk in side-impact car crashes. Evenflo also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale of its "Big Kid" booster seats.

1049. Additionally, Evenflo willfully and intentionally labelled its "Big Kid" booster seats as safe for children weighing between 30 and 40 pounds when it knew—and, in fact, changed

its labelling internationally—that its "Big Kid" booster seats were not safe for children weighing less than 40 pounds.

1050. Evenflo's unlawful acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiffs and the West Virginia Subclass members, about the true safety risks posed by its "Big Kid" booster seats.

1051. Plaintiffs and West Virginia consumers relied on Evenflo's representations regarding their side-impact testing and weight limits when purchasing car seats for their children.

1052. Evenflo intentionally and knowingly misrepresented material facts regarding its Big Kid model booster seats with intent to mislead Plaintiffs and the West Virginia Subclass.

1053. Evenflo knew or should have known that its conduct violated the West Virginia CPA.

1054. Evenflo owed Plaintiffs and the Virginia Subclass a duty to disclose the truth about the safety risks posed by its Big Kid model booster seats, because Evenflo:

a. Possessed exclusive knowledge about the testing of these seats;

b. Intentionally concealed the foregoing from Plaintiffs and the West Virginia Subclass; and/or

c. Made incomplete and misleading representations that its "Big Kid" booster seats were "side impact tested," while purposefully withholding material facts from Plaintiffs and the West Virginia Subclass that contradicted these representations.

1055. Evenflo's omissions and/or misrepresentations about the safety of its "Big Kid" booster seats were material to Plaintiffs and the West Virginia Subclass.

1056. Plaintiffs and the West Virginia Subclass suffered ascertainable loss caused by Evenflo's misrepresentations and its concealment of and failure to disclose material information. Plaintiffs and the West Virginia Subclass members would not have purchased "Big Kid" booster seats but for Evenflo's violations of the WVCCPA.

1057. Evenflo had an ongoing duty to all Evenflo customers to refrain from unlawful acts or practices under the WVCCPA. As a direct and proximate result of Evenflo's violations of the WVCCPA, Plaintiffs and the West Virginia Subclass have suffered injury-in-fact and/or actual damage.

1058. Evenflo's violations present a continuing risk to Plaintiffs as well as to the general public. Evenflo's unlawful acts and practices complained of herein affect the public interest.

1059. Pursuant to W. Va. Code § 46A-6-106, Plaintiffs' counsel advised Defendant, on behalf of the West Virginia Subclass, of the violation of this statute and afforded Defendant an opportunity to cure this violation, but Defendant has failed to timely do so.

1060. Plaintiffs seek monetary relief against Evenflo measured as the greater of (a) actual damages in an amount to be determined at trial and (b) statutory damages or other damages available by law for each plaintiff; reasonable attorneys' fees and court costs; and any other just and proper relief available under 46 W Va. Code § 46A-6-106.

CC. Claims Brought on Behalf of the Wisconsin Subclass

COUNT LVII:
VIOLATION OF THE WISCONSIN DECEPTIVE TRADE PRACTICES ACT
(WIS. STAT. § 100.18, *ET SEQ.*)

1061. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

1062. This claim is brought by Plaintiff Najah Rose ("Wisconsin Plaintiff" for purposes of this count) against Evenflo on behalf of herself and members of the Wisconsin Subclass.

1063. Defendant's foregoing acts and practices, including its fraudulent representations and omissions in the conduct of trade or commerce, were directed at consumers for the purpose of inducing sales of its Big Kid booster seats.

1064. Defendant's foregoing deceptive acts and practices, including its fraudulent representations and omissions, were material, in part, because they concerned an essential part of the Big Kid booster seats' intended use and provision of safety to children. Defendant omitted material facts regarding the safety (or lack thereof) of the Big Kid booster seat by failing to disclose the results of its internal side-impact testing, or that the Seat will not adequately protect children in the event of a side impact collision or children weighing 30 to 39 pounds. Rather than disclose this information, Defendant marketed and labeled the Big Kid booster seat as "side impact tested" and made untrue, deceptive, and misleading misrepresentations that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards" and is safe for children weighing 30 to 39 pounds.

1065. The Big Kid booster seat poses an unreasonable risk to the safety of children in the event of a side impact collision, despite Defendant's representation that the Seat is "side impact tested," and poses an unreasonable risk to safety of children weighing 30 to 39 pounds despite Defendant's representation that the Seat is safe for children weighing 30 to 110 pounds.

1066. Defendant did not disclose this information to consumers.

1067. Defendant's foregoing deceptive acts and practices, including its misrepresentations and omissions, were and are deceptive acts or practices in violation of Wis. Stat. § 100.18, in that:

a) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as "side impact tested" and claimed that the Seat "meets or exceeds all applicable federal safety standards and Evenflo's side impact standards" when, through its own internal side-impact testing it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children in the event of a side impact collision;

b) Defendant knew that the unreasonable risk to the safety of children and the results of its own internal side-impact testing were unknown to and would not be easily discovered by Wisconsin Plaintiff and Wisconsin Subclass members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats;

c) Wisconsin Plaintiff and Wisconsin Subclass members were deceived by Defendant's fraudulent misrepresentations and failure to disclose, and could not discover the unreasonable risk to the safety of children posed by the Big Kid booster seat in the event of a side impact collision;

d) Defendant manufactured, labeled, packaged, marketed, advertised, distributed, and/or sold the Big Kid booster seats as safe for children weighing 30 to 110 pounds when it knew, or should have known, that the Big Kid booster seats posed an unreasonable risk to the safety of children weighing 30 to 39 pounds;

e) Defendant knew that the unreasonable risk to the safety of children weighing 30 to 39 pounds were unknown to and would not be easily

discovered by Wisconsin Plaintiff and Wisconsin Subclass members, and would defeat their ordinary, foreseeable and reasonable expectations concerning the performance of the Big Kid booster seats; and

f) Wisconsin Plaintiff and Wisconsin Subclass members were deceived by Defendant's fraudulent misrepresentations and failure to disclose, and could not discover the unreasonable risk to the safety of children weighing 30 to 39 pounds posed by the Big Kid booster seat.

1068. Wisconsin Plaintiff and Wisconsin Subclass members suffered damages when they purchased the Big Kid booster seats for personal, family, and/or household use. Defendant's unconscionable, deceptive and/or unfair practices caused actual damages to Wisconsin Plaintiff and Wisconsin Subclass members who were unaware that the Big Kid booster seat posed an unreasonable safety risk to children in the event of a side impact collision and to children weighing 30 to 39 pounds, notwithstanding Defendant's representations at the time of purchase.

1069. Defendant's foregoing deceptive acts and practices, including its fraudulent representations and omissions, were likely to deceive, and did deceive and induce the purchase of Big Kid booster seats by, consumers acting reasonably under the circumstances.

1070. Consumers, including Wisconsin Plaintiff and Wisconsin Subclass members, would not have purchased the Big Kid booster seats had they known about the unreasonable safety risk they pose to children, or the results of Defendant's internal side-impact testing.

1071. As a direct and proximate result of Defendant's deceptive acts and practices, including its fraudulent representations and omissions, Wisconsin Plaintiff and Wisconsin Subclass members have been damaged as alleged herein, and are entitled to recover actual damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

1072. In addition, Wisconsin Plaintiff and Wisconsin Subclass members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs.

DD. Claims Brought on Behalf of Multiple State Sublasses

COUNT LVIII:
VIOLATION OF ADDITIONAL CONSUMER PROTECTION LAWS

1073. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

1074. Plaintiffs bring this claim on their own behalf, and on behalf of the members of the State Subclasses set forth below.

1075. Evenflo had a statutory duty to refrain from unfair or deceptive acts or practices in the design, development, manufacture, promotion and sale of its Big Kid booster seats.

1076. Had Evenflo not engaged in the deceptive conduct described above, Plaintiffs and the Class members would not have purchased Evenflo's Big Kid booster seats or would have paid less for them.

1077. Evenflo's deceptive, unconscionable or fraudulent representations and material omissions to consumers and the public, including Plaintiffs and members of the State Subclasses set forth below, constituted unfair and deceptive acts and practices in violation of the state consumer protection statutes listed below:

a. Toward consumers in the Arizona Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Ariz. Rev. Stat. § 44-1522, *et seq.*;

b. Toward consumers in the Arkansas Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Ark. Code § 4-88-101, *et seq*.;

c. Toward consumers in the Connecticut Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Conn. Gen. Stat. § 2-1 10a, *et seq*.;

d. Toward consumers in the Delaware Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of 6 Del. Code §§ 2511, *et seq*. and 2531, *et seq*.;

e. Toward consumers in the District of Columbia Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of D.C. Code § 28-3901, *et seq*.;

f. Toward consumers in the Hawaii Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Haw. Rev. Stat. § 480-1, *et seq*.;

g. Toward consumers in the Idaho Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Idaho Code § 48-601, *et seq*.;

h. Toward consumers in the Kansas Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Kan. Stat. § 50-623, *et seq*.;

i. Toward consumers in the Maryland Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Md. Com. Law Code § 13-101, *et seq.*;

j. Toward consumers in the Mississippi Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Miss. Code § 75-24-1, *et seq.*;

k. Toward consumers in the Montana Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Mont. Code § 30-14-101, *et seq.*;

l. Toward consumers in the Nebraska Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Neb. Rev. Stat. § 59-1601, *et seq.*;

m. Toward consumers in the Nevada Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Nev. Rev. Stat. Ann. § 598.0903, *et seq.*;

n. Toward consumers in the New Hampshire Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of the New Hampshire Consumer Protection Act (N.H. Rev. Stat. §§ 358-A:1, *et seq.*;

o. Toward consumers in the New Mexico Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of N.M. Stat. § 57-12-1, *et seq.*;

p. Toward consumers in the North Dakota Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of N.D. Cent. Code §§ 51-12-01, *et seq*., and 51-15-01, *et seq*.;

q. Toward consumers in the Oregon Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Or. Rev. Stat. § 6464.605, *et seq.*;

r. Toward consumers in the Rhode Island Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of R.I. Gen. Laws. § 6-13.1-1, *et seq*.;

s. Toward consumers in the South Dakota Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of S.D. Codified Laws § 37-24-1, *et seq*.;

t. Toward consumers in the Utah Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Utah Code Ann. § 13-11-1, *et seq.*;

u. Toward consumers in the Vermont Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vt. § 2451, *et seq*.;

v. Toward consumers in the Virginia Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Va. Code § 59.1-196, *et seq*.;

w. Toward consumers in the Wyoming Subclass, Evenflo has engaged in unfair competition or unfair or deceptive acts or practices in violation of Wyo. Stat. §§ 40-12-101, *et seq*.;

1078. Plaintiffs and members of the State Subclasses set forth above relied upon Evenflo's misrepresentations and/or omissions in buying their Big Kid model booster seats.

1079. Plaintiffs have provided any required notice to appropriate entities regarding Evenflo's unfair and deceptive trade practices.

1080. As a direct and proximate result of Evenflo's wrongful conduct, Plaintiffs and State Subclass members have been damaged by their purchase of Big Kid model booster seats.

1081. As a direct and proximate result of Evenflo's wrongful conduct, Plaintiffs and the State Subclass members are entitled to compensatory damages, treble damages, attorneys' fees and cost of this suit.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of members of the Class, respectfully request that the Court enter judgment in their favor and against Evenflo, as follows:

A. A determination that this action may be maintained as a class action pursuant to Federal Rules of Civil Procedure Rule 23, and for an order certifying this case as a class action, appointing Plaintiffs as Class representatives as reflected above, and appointing Plaintiffs' counsel as Class Counsel;

B. A declaration that Evenflo's failure to disclose the dangers associated with using its Big Kid model booster seats was unfair, deceptive, fraudulent, wrongful, and unlawful;

C. Restitution for all Big Kid model booster seats purchased by Plaintiffs and the Class and subclasses, in an amount to be determined at trial;

D. Disgorgement of the ill-gotten gains derived by Evenflo from its misconduct;

E. Actual damages;

F. Statutory damages;

G. Punitive damages;

H. Treble damages;

I. Compensatory damages caused by Evenflo's unfair or deceptive practices; along with exemplary damages to Plaintiff and each Class member for each violation;

J. A permanent injunction requiring Evenflo to: (i) recall all Big Kid model booster seats still in use; (ii) cease selling Big Kid model booster seats; and (iii) add labeling to all future Big Kid model booster seats warning consumers of the dangers associated with their use;

K. Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

L. An order awarding Plaintiffs and Class members their attorney's fees, costs, and expenses incurred in connection with this action; and

M. Such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues so triable.

DATED: October 20, 2020

Respectfully submitted,

/s/ Steve W. Berman

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Plaintiffs' Executive Committee

UNITED STATE DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE EVENFLO CO., INC. MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:20-md-02938-DJC
THIS DOCUMENT RELATES TO: ALL ACTIONS	

MEMORANDUM IN SUPPORT OF EVENFLO COMPANY, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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I. INTRODUCTION.

Parents and caregivers across the country undoubtedly seek to make an inherently unsafe endeavor—car travel—safer for themselves and their family members. That applies to the decision to purchase a car seat, whether that is a booster seat like the Big Kid, the aim of which is to properly position an older child so as to utilize the vehicle's lap and shoulder belt to protect in a collision, or child restraints containing internal harnesses like rear-facing infant seats or convertible or combination car seats. Defendant Evenflo Company, Inc. ("Evenflo") manufactures and markets all of these options. For its part, Evenflo seeks to provide parents and caregivers information designed to enable them to make good decisions about what type of car seat works best for their families, understanding that parents and caregivers are in the best position to assess the needs of their family and the developmental stages of their own children. Evenflo includes information on its website, social media, product packaging, instruction manuals, and on-product labeling. Here, Plaintiffs seize on two particular statements about the Big Kid drawn from the universe of public information, and quarrel with the adequacy of these two isolated statements in the abstract, rather than in context. They claim solely economic harm.

Specifically: Plaintiffs take issue with Evenflo's representations that the Big Kid was "side impact tested" (the "Side Impact Representation") and could be used by children weighing between 30 and 40 pounds (the "Weight Minimum"). They claim the Side Impact Representation is misleading, not because Evenflo fails to perform side impact testing, but because they wish Evenflo would have performed it differently. They also fault Evenflo for representing that children weighing between 30 and 39 pounds, who meet all other child requirements for booster seat use, can use the Big Kid even though that weight range is specifically sanctioned by the National Highway Traffic Safety Administration ("NHTSA"). Plaintiffs challenge the regulatory sanctioned weight range because the American Academy of Pediatricians ("AAP") allegedly

prefers a different type of car seat for those children—one with an internal harness. Evenflo and its industry peers, with NHTSA's approval, have offered such a harnessed product for many years.

The Consolidated Amended Class Action Complaint (10/20/20) ("Amended Complaint" or "AC") begs the question: How have Plaintiffs been harmed? Plaintiffs tacitly admit to purchasing and using the Big Kid—some for months, others for years—without incident.[1] The Big Kid worked for them as represented. There are no plausible allegations that the Big Kid's market value would have been less had Evenflo omitted or altered the challenged representations. Nor do Plaintiffs allege that an alternative belt-positioning booster seat exists for less cost. Moreover, the representations Plaintiffs challenge are true: The Big Kid is side-impact tested, and NHTSA specifically permits the 30-pound weight threshold. Plaintiffs' inability to plead actionable injury or deception, along with a host of other deficiencies, requires dismissal of the Amended Complaint under Fed. Rs. Civ. P. 12(b)(1) or 12(b)(6). Principal among them are:

First, Plaintiffs lack Article III standing to seek money damages or injunctive relief because they suffered no injury in fact and face no realistic threat of immediate harm from Evenflo's Big Kid sales. Plaintiffs do not allege that the Big Kid failed to operate as expected for them, that cheaper alternative products exist, or that the Big Kid's market value would be less had it omitted or altered the challenged representations. For the same reasons, Plaintiffs cannot state a claim under the consumer fraud and implied warranty laws of many states.

Second, the state consumer fraud claims fail due to lack of actionable deception. The implied warranty of merchantability claims fail because there are no allegations that the Big Kid

[1] The Amended Complaint specifically references one product liability lawsuit filed against Evenflo involving a child using a Big Kid. (AC ¶ 212, n.8). That case resulted in a defense verdict for Evenflo after a multi-week trial. *Somoza v. Evenflo Co. Inc.*, 2015-CA-001596, Dkt. No. 776 (Fla. Cir. Ct. Mar. 2, 2018) ("VERDICT –IN FAVOR OF DEFENDANTS").

failed to perform as intended for Plaintiffs, and there is no contractual privity with Evenflo.

Third, Count LVII should be dismissed because Plaintiffs cannot invoke the consumer fraud laws of states unconnected to their purchase of any Big Kid under the commerce clause.

Fourth, nearly half of Plaintiffs, whose claims sound in fraud, fail to plead their claims with the particularity required under Fed. R. Civ. P. 9(b).

Finally, Plaintiffs' assertion of general common law claims for fraudulent concealment, unjust enrichment, and negligent misrepresentation should be dismissed for basic pleading deficiencies, where no attempt is made to allege these claims under specific state laws.

II. BACKGROUND.

A. The Plaintiffs' Allegations.

The 43 Plaintiffs who filed the Amended Complaint are citizens of 28 different states. All allege they purchased at least one Big Kid at a cost of approximately $30 to $50. (*See, e.g.*, AC ¶¶ 39, 83, 122, 133, 143, 167, 183). The Big Kid is a belt-positioning booster seat designed to raise the child so that the vehicle's lap and shoulder belts are positioned to fit the child properly. The seat does not contain its own internal harness for restraint. It merely "boosts" the child to a proper height. *See* 49 C.F.R. § 571.213 at S4.[2] In addition to the Weight Minimum, the Big Kid contains statements concerning suitable height, age, and maturity. (AC ¶¶ 247, 254). Children generally stop using the Big Kid between ages 8 and 12. (*Id.* ¶¶ 216(c), 255)).

Most Plaintiffs purchased their Big Kid before February 2020, when an internet article spawned this litigation. (S*ee, e.g., id.* ¶¶ 285, 14-17 (Davis 2018); 29-33 (Epperson 2013); 42-44

[2] The Big Kid is but one type of car seat. Evenflo offers various types of infant seats, convertible seats, combination seats, and booster seats to ensure all families can afford a car seat that works for them. Rear-facing infant seats are available for the youngest children. Harnessed convertible seats can be used both when the child is rear-facing and once a child is forward-facing. Booster seats like the Big Kid contain no internal harness. Combination seats are used first with an internal harness, and later as a booster seat with the harness removed. (*See* AC ¶¶ 216-218, 255).

(Howland 2014); 45-50 (Hash 2010); 51-54 (Aly 2018); 82-86 (Alexie 2016); 92-97 (Brodeur 2016)). Plaintiffs do not plead how long they used their Big Kids, their children's weight when using the Big Kid, or whether they used alternative seats. (*See, e.g.*, *id.*). For some, such as Plaintiff David Schnitzer, who purchased the Big Kid in 2015 for his five-year old son, their children likely stopped using the Big Kid by the time Plaintiffs filed suit. (*Id.* ¶¶ 132-37).

Even though Plaintiffs willingly purchased and used the Big Kid without incident, Plaintiffs now assert they suffered economic harm due to the Side Impact Representation and the Weight Minimum. (*See generally id.* ¶ 1). Most Plaintiffs allege they relied on the Side Impact Representation in purchasing the Big Kid (*e.g.*, *id.* ¶¶ 26-28, 51-54, 98-101); a few allege they relied solely on the Weight Minimum (*e.g.*, *id.* ¶¶ 34-37, 38-41, 68-73, 178-181); and many allege they relied on both (*e.g.*, *id.* ¶¶ 87-91, 175-177, 182-188). Many Plaintiffs allege they performed research before purchasing the Big Kid (*see, e.g.*, *id.* ¶¶ 31 ("researched various seats online and in-store"); 47 ("researched various seats through word-of-mouth, online, and in-person")), yet implausibly deny knowledge of the AAP's view that children are best served to remain in seats containing internal harnesses—not booster seats like the Big Kid—until the child has outgrown the harness seat (*id.* ¶¶ 216-218).

Plaintiffs concede that the Big Kid is side-impact tested, but claim that the Side Impact Representation is nonetheless misleading because, in their opinion, the testing was not adequate. (*Id.* ¶¶ 231-233). Plaintiffs allege that Evenflo's side-impact test is less rigorous than NHTSA's side-impact testing for automobiles, while overlooking that NHTSA does not require side-impact testing for car seats at all. (*Id.* ¶ 235). Plaintiffs further fault Evenflo's side-impact testing because it *only* tests to ensure: (1) the child stays restrained in the vehicle belts; and (2) the Big Kid does not break apart in a collision. (*Id.* ¶¶ 236-38). Plaintiffs' theory of deception appears to

be that, because Evenflo theoretically could have developed a side-impact test protocol that tested additional safety criteria, its Side Impact Representation is actionably misleading.

Plaintiffs also allege that Evenflo "cling[s] to the 30-pound minimum" for use of the Big Kid "in the face of scientific consensus" that children weighing fewer than 40 pounds should remain in car seats containing an internal harness. (*Id.* ¶ 258). The Amended Complaint ignores that NHTSA—the agency charged with regulating car seat safety and a stakeholder in any actual "consensus"—issued a regulation approving children weighing 30 pounds to use a belt-positioning booster like the Big Kid. *See infra* at II.B. Plaintiffs' theory of deception as to the Weight Minimum appears to be nothing more than Evenflo should have reiterated AAP's guidance that children should remain in harnessed car seats until they have outgrown those seats.

Although the Amended Complaint includes inflammatory allegations that Evenflo has subjected millions of children to the risk of "grave injury and death" (AC ¶ 11), the reality, based on literature cited by Plaintiffs, is that the Big Kid makes children safer. Plaintiffs concede car seats—including belt-positioning booster seats such as the Big Kid—"are associated with a 28% reduction in risk of death[,] adjusting for seating position, vehicle type, model year, driver and passenger ages, and driver survival status." (*Id.* ¶ 223 (citing Michael R. Elliott *et al.*, *Effectiveness of child safety seats vs seat belts in reducing risk for death in children in passenger vehicle crashes*, 160(6) ARCH PEDIATR. ADOLESC. MED. 617-21 (2006))). Similarly, the Amended Complaint cites an AAP Statement, which acknowledges that "[b]ooster seats reduce the risk of nonfatal injury among 4- to 8-year olds by 45% compared to seat belts." Dennis R. Durbin *et al.*, *Child Passenger Safety*, 142(5) Pediatrics (2018); (AC ¶ 216, n.10).[3]

Plaintiffs plead vagaries as to the remedies sought. They plead that they "did not get the

[3] When a document on which the Amended Complaint relies contradicts an allegation in the Amended Complaint, "the document trumps the allegation." *See, e.g.*, *Barricello v. Wells Fargo Bank, N.A.*, 2016 WL 1244993, at *10 (D. Mass. Mar. 22, 2016) (dismissing complaint).

benefit of the bargain they struck" because "[t]hey paid for a booster seat under the mistaken belief . . . that it was actually 'side impact tested,' and that it was safe for children as small as 40 or even 30 pounds in the event of a side impact collision" (AC ¶ 282) and, had they known their competing version of the truth, they "would not have purchased [the] seat, would have paid less for it, or instead would have purchased one of the many safer available alternatives." On this basis, Plaintiffs seek unspecified "actual damages." (*See, e.g., id.* ¶ 120, Request for Relief (E)). No Plaintiff pleads how much he or she "would have paid" for the Big Kid or identifies any specific "safer available alternative." Plaintiffs also ask for injunctive relief to recall all Big Kid models and add additional unspecified label warnings. (*Id.*, Request for Relief (J)).

B. The Big Kid Meets And Exceeds Regulatory Requirements.

NHTSA regulates car seat safety pursuant to the National Traffic and Motor Vehicle Safety Act and the Highway Safety Act, 49 U.S.C. §§ 30101 *et seq.* (the "Safety Act"). The Safety Act directs NHTSA to "prescribe motor vehicle safety standards" by "carry[ing] out needed safety research and development" to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. NHTSA promulgates Federal Motor Vehicle Safety Standards ("FMVSS") utilizing formal rulemaking procedures during which the agency must: "(1) consider relevant available motor vehicle safety information; (2) consult with [state or interstate authorities]; (3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of . . . motor vehicle equipment;" and (4) consider whether the standard furthers the Safety Act. *Id.* § 30111(b).

FMVSS 213 governs car seats used in motor vehicles. *See* 49 C.F.R. § 571.213. That standard regulates belt-positioning booster seats like the Big Kid separately from seats containing internal harnesses. *Id.* at S4 (defining "Belt-positioning seat"). The Big Kid must comply with the requirements in FMVSS 213 concerning dynamic performance in a crash, force

distribution, installation, and labeling. *Id.* at S5.1 to S5.8. NHTSA has a broad range of enforcement remedies in response to violations of the FMVSS, including formal investigatory powers, recalls, and civil penalties. 49 U.S.C. §§ 30118-30121; 49 C.F.R. §§ 510, 554.

FMVSS 213 requires belt-positioning seats to undergo a dynamic testing protocol that includes frontal sled testing. *Id.* at S6.1. Although FMVSS 213 currently does not require side-impact tests on any car seat, it does not prohibit manufacturers from developing their own side-impact test protocols or other tests. *Id.* at S5.5, 5.1, 5.2(e) (requiring Big Kid label to contain thirteen pieces of information, a statement that the seat "conforms to all applicable Federal motor vehicle safety standards," and not be "misleading to the consumer"). NHTSA is working on amending FMVSS 213 to require side-impact tests on some car seats, but the proposed rule would not require side-impact tests on belt-positioning booster seats like the Big Kid.[4]

FMVSS 213 requires children to weigh at least 30 pounds before using a belt-positioning seat. *Id.* at S5.5.2(f) ("[B]ooster seats shall not be recommended for children whose masses are less than 13.6 kg"). NHTSA amended FMVSS 213 in 1994 to adopt this threshold in response to legislation "direct[ing] the agency to initiate rulemaking on child booster seat safety" due to concerns that "some child booster seats 'may not restrain adequately a child in a crash.'" FMVSS, *Child Restraint Systems*, 59 Fed. Reg. 37167-01 (Jul. 21, 1994) (codified at 49 CFR § 571.213). NHTSA determined available data demonstrated that children weighing less than 30 pounds "are better protected" in seats that contain an internal harness, but children weighing at least 30 pounds may use booster seats. *Id.* NHTSA rejected a provision requiring manufacturers

[4] Congress passed legislation in 2012 directing NHTSA to "issue a final rule amending [FMVSS No. 213] to improve the protection of children seated in child restraint systems during side impact crashes." *Moving Ahead for Progress in the 21st Century Act*, Pub. L. No. 112-141, 112 Congress (2012). NHTSA has promulgated a proposed amendment to FMVSS 213 for public comment that is not final. *See* FMVSS, *Child Restraint Systems—Side Impact Protection*, 79 Fed. Reg. 32211 (2014).

to include an "affirmative warning" that children weighing less than 30 pounds should not use booster seats because it "could reduce the effectiveness" of other warnings. *Id.*

III. LEGAL STANDARD.

A plaintiff must plead facts "showing that the pleader is entitled to relief[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (affirming dismissal). A complaint must contain sufficient factual matter that, accepted as true, states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (affirming dismissal). In addition, because many of Plaintiffs' claims sound in fraud, they must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

IV. PLAINTIFFS DO NOT ALLEGE A PLAUSIBLE INJURY IN FACT, DEFEATING ARTICLE III STANDING AND PLAINTIFFS' ABILITY TO STATE A CLAIM.

The Court's jurisdiction is limited to "cases" and "controversies" under Article III of the Constitution. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016) (affirming dismissal for lack of standing). A plaintiff must suffer an "injury in fact" to have Article III standing. *In re Fruit Juice Prods. Mktg. & Sales Pracs. Litig.*, 831 F. Supp. 2d 507, 510-13 (D. Mass. 2011) (dismissing case for lack of standing); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016) (finding "concreteness" is an independent element of "injury in fact"). To establish injury-in-fact, a plaintiff must allege an injury that is not only "concrete and particularized" but also "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. A "concrete" injury is one that "actually exist[s]," meaning it is "real, and not abstract." *Id.*[5]

Plaintiffs allege they "did not get the benefit of the bargain they struck" when they purchased the Big Kid and, had they known of the alleged misrepresentations, they would not

[5] The "plausibility standard applicable under Rule 12(b)(6)" applies "to standing determinations at the pleading stage." *Hochendoner*, 823 F.3d at 730. A plaintiff "bears the burden . . . to plausibly demonstrate his standing to bring the action. Neither conclusory assertions nor unfounded speculation can supply the necessary heft." *Id.* at 731.

have purchased the Big Kid, would have paid less, or would have purchased a safer, alternative product. (*See, e.g.*, AC ¶¶ 120, 282). Plaintiffs further speculate it is "likely" that "many" children "have been, and will be, injured" due to the alleged deceptions. (*Id.* ¶ 281). Neither theory of harm—economic loss or risk of future physical harm—plausibly alleges a "concrete," "actual," or "imminent" injury as required to confer Article III standing. *See Fruit Juice*, 831 F. Supp. 2d at 510-12 (dismissing claims that fruit juice labels misrepresented lead content).

A. Plaintiffs Do Not Allege A Plausible Economic Injury.

Plaintiffs plead no facts establishing an economic injury that confers Article III standing. Plaintiffs do not plausibly plead benefit-of-the-bargain damages, because the Big Kid worked as expected for them. Nor do they plead any viable theory of overpayment or price premium, because they do not allege they would have purchased a cheaper alternative, or that the Big Kid's market value would have been less had the challenged representations been altered or omitted.

In *Fruit Juice*, for example, the MDL plaintiffs alleged that the juice contained lead, yet the defendants advertised their juice as safe to drink—specifically by children—and did not disclose the lead content. 831 F. Supp. 2d at 509-10. This Court dismissed the plaintiffs' claims for violations of various consumer protection laws, breach of warranty, and unjust enrichment for lack of Article III standing, reasoning:

> The fact is that Plaintiffs paid for fruit juice, and they received fruit juice, which they consumed without suffering harm. The products have not been recalled, have not caused any reported injuries, and do not fail to comply with federal standards. The products had no diminished value due to the presence of the lead. Thus, Plaintiffs received the benefit of the bargain, as a matter of law, when they purchased these products.

Id. at 512. The First Circuit later adopted similar reasoning in *Kerin v. Titeflex Corp.*, 770 F.3d 978 (1st Cir. 2014), dismissing for lack of Article III standing plaintiff's claim that he "overpa[id]" for steel tubing because it may fail if struck by lightning, but the tubing did not

violate any applicable regulatory standard and worked as expected for the plaintiff. *Id.* at 983-85.

As in *Fruit Juice*, Plaintiffs here "paid for [a Big Kid], and they received [a Big Kid], which they [used] without suffering harm." 831 F. Supp. 2d at 512. NHTSA has not recalled the Big Kid, the Big Kid meets NHTSA's standards as to testing and minimum weight, and Plaintiffs plead no facts plausibly establishing the Big Kid's economic value as less than what Plaintiffs paid due to the alleged misrepresentations. The *Fruit Juice* result should obtain here.

The First Circuit decisions are consistent with decisions by courts across the country that routinely reject similar claims where consumers allege economic injury after purchasing a product that worked as represented for them. *See, e.g.*, *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 281 (3d Cir. 2018) (plaintiffs who purchased talcum powder did not suffer an economic injury due to any omission of cancer risk disclosures because "[a] plaintiff alleging an economic injury as a result of a purchasing decision must do more than simply characterize that purchasing decision as an economic injury," as "buyer's remorse . . . is not a cognizable injury"); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504–05 (8th Cir. 2009) (observing "[t]his case is similar to other no-injury cases" before concluding "[t]he [plaintiffs' product] performs just as it was intended, and thus there is no injury and no basis for relief"); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (plaintiffs who purchased and safely used a pain killer did not suffer an economic injury because, had the manufacturer "provided additional warnings or made [the product] safer, the plaintiffs would be in the same positon they occupy now").

Here, Plaintiffs likewise fail to plead facts establishing the Big Kid was worth less than the approximately $30 to $50 they paid. For the 43 Plaintiffs here, the Big Kid worked exactly as they expected when they purchased the product. Only one Plaintiff experienced a side-impact

collision while using the Big Kid (AC ¶ 140), and none seeks compensation for physical harm. (*Id.* ¶ 282, Request for Relief)). Plaintiffs presented no facts that would entitle them to benefit-of-the-bargain damages in this case.

Nor do Plaintiffs plead facts establishing any other type of economic injury such as price premium or overpayment. Plaintiffs' allegations that they "would have purchased one of the many safer available alternatives" are unsupported by any factual allegation upon which to base their conclusion. (*Id.* ¶ 120). Plaintiffs do not allege that any alternative belt-positioning booster seat was available for a cheaper price than the Big Kid, which confirms they suffered no out-of-pocket injury. *See Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 59 (Ill. 2005) (no economic loss where "net change in consumers' economic position as a result of th[e] misrepresentation was zero"); *Hubert v. Gen. Nutrition Corp.*, 2017 WL 3971912, at *8 (W.D. Pa. Sept. 8, 2017) (Significantly, "Plaintiffs do not allege GNC advertised the supplements they purchased as superior to other products, nor do Plaintiffs identify any comparable, cheaper products to show that the supplements they purchased from GNC were sold at a premium price").[6]

Plaintiffs' claim that they "would have paid less" for the Big Kid had Evenflo altered or omitted the challenged representations not only is unsupported by any factual allegations, it is rejected by the Amended Complaint itself. (*See, e.g.*, AC ¶¶ 253-254 (alleging Evenflo changed the Big Kid's minimum weight from 30 pounds to 40 pounds in 2020 but alleging no corresponding price change)). Courts reject such "fraud-on-the-market" theories of price inflation. *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) ("[T]o the extent that plaintiff seeks to prove only that the price charged for Vioxx was higher than it should have been as a result of defendant's fraudulent marketing

[6] In fact, the Amended Complaint alleges that the Big Kid was priced $10 less than a competing product, Graco's TurboBooster. (AC ¶ 225).

campaign . . . the theory must fail"); *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 380 (Colo. App. 2009) ("We are unable to conclude that any similar [fraud on the market] theory would be justified . . . where a car buyer claims that there were fraudulent omissions on window stickers and that, but for those omissions, the buyer would have paid a lower price or, perhaps, would not have purchased the automobile").

The Amended Complaint lacks any factual allegations establishing Plaintiffs would have paid less money—either by paying less for the Big Kid or for another booster seat—had Evenflo altered or omitted the challenged representations. Rather, Plaintiffs purchased a Big Kid that worked as expected for them. Hence, they plead no economic injury that confers standing.

B. Plaintiffs' Theory Premised On Risk Of Future Harm Is Legally Insufficient.

Although "a possible future injury" may theoretically serve as an alternative to economic injury for standing purposes, such suits "require caution." *Kerin*, 770 F.3d at 981-85. To confer standing, a plaintiff must plead a future injury that is "certainly impending," meaning "a credible or substantial threat to [Plaintiffs'] health." *Fruit Juice*, 831 F. Supp. 2d at 510.

No Plaintiff alleges that a family member was injured due to the Big Kid, let alone facts establishing that a family member faces an "increased risk of future injury" due to the Big Kid. The absence of allegations establishing a "certainly impending" risk of physical injury forecloses any standing based on future harm. *See Johnson & Johnson*, 903 F.3d at 289 ("had [plaintiff] alleged that she was at risk of developing ovarian cancer, she may have established standing based on a theory of future physical injury" but she "chose not to"); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class[.]").

The closest Plaintiffs come to asserting any risk is to speculate that "[i]t is likely that many [children] have been, and will be, injured[.]" (AC ¶ 281). *But cf. Kerin*, 770 F.3d at 983

(finding no standing because plaintiff failed to show that the "severe" future harm was "anything but remote"). Consistent with cases like *Kerin*, the literature cited in the Amended Complaint demonstrates the Big Kid makes children safer. *Accord Fruit Juice*, 831 F. Supp. 2d at 511 (plaintiffs' failure to allege specific facts establishing that the product was dangerous resulted in a claim "simply too hypothetical or conjectural to establish Article III standing").

C. Plaintiffs' Inability To State An Economic Injury Defeats Many State-Law Claims Under Fed. R. Civ. P. 12(b)(6).

For the same reasons, many state-law claims fail under Fed. R. Civ. P. 12(b):

- **Alabama:** Plaintiff Natalie Davis cannot state a claim under the Alabama Deceptive Trade Practices ("ADTPA") (Count IV (AC ¶¶ 333-54)) because she has not suffered "actual damages" as required by Alabama law. Ala. Code § 8-19-10(a)(1); *see Billions v. White & Stafford Furniture Co.*, 528 So. 2d 878, 880-81 (Ala. Civ. App. 1988) (affirming dismissal of ADTPA claim absent showing of actual damages).

- **Alaska:** Plaintiff Jilli Hiriams, who purchased three Big Kids between 2016 and 2018, cannot state a claim under the Alaska Unfair Trade Practices and Consumer Protection Act ("Alaska CPL") (Count VI (AC ¶¶ 366-86)) because she does not allege an "ascertainable loss" as a result of Evenflo's alleged deceptive conduct. A.S. § 45.50.531(a); *Kirst v. Ottosen Propeller & Accessories, Inc.*, 784 F. App'x 980, 983 (9th Cir. 2019) (affirming dismissal of Alaska CPL claim where plaintiff, who alleged seller misrepresented repaired propeller as "new," suffered no monetary loss).

- **Colorado:** Plaintiff Casey Hash cannot state a claim under the Colorado Consumer Protection Act ("CCPA") (Count XIII (AC ¶¶ 458-78)). To enforce the CCPA privately, a plaintiff must allege injury in fact. *Hall v. Walter*, 969 P.2d. 224, 235 (Colo. 1998) (holding CCPA does not permit a claim for relief when claimant lacks standing). Hash alleges that, had she known of Evenflo's allegedly misleading representations, she would not have purchased the Big Kid or would have paid less for it (AC ¶ 50), which is insufficient under the CCPA.

- **Florida:** Plaintiffs Karyn Aly and Debora de Souza Correa Talutto have no "actual damages," defeating the Florida Deceptive And Unfair Trade Practices Act ("FDUTPA") and implied warranty claims (Counts XIV-XV (AC ¶¶ 479-98)). Fla. Stat. § 501.211(2); *see Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. Dist. Ct. App. 2010) (dismissing FDUTPA claim because Plaintiff could not show market value of jet-boat as delivered was less than as represented). This standard requires pleading "the difference in the market value of the [product] . . . in the condition in which it was delivered and its market value in the condition in which it should have been delivered." *Id.* But the Florida Plaintiffs plead no facts establishing that the Big Kid they received has a lesser market value than a Big Kid that omits the challenged

misrepresentations.

- **Georgia:** Plaintiff Cathy Malone's Georgia Fair Business Practices Act ("GFBPA") claim (Count XVI (AC ¶¶ 499-523)) fails for lack of actual damages. *See Edel v. Southtowne Motors of Newnan II, Inc.*, 789 S.E.2d 224, 228 (Ga. Ct. App. 2016) (buyers of fraudulently marketed car warranties did not allege actual injury where they had not had a warranty claim denied, made no repairs, and otherwise alleged no actual damages).

- **Illinois:** Plaintiff Penny Biegeleisen, who purchased five Big Kids since 2015 (AC ¶ 63), cannot state a claim under Illinois Consumer Fraud And Deceptive Business Practices Act ("ICFA") (Count XIX (AC ¶¶ 556-72)) because she has not pled a tangible, out-of-pocket economic injury constituting "actual damage." 815 ILCS 505/10a(a) (action limited to a person who "suffers actual damage as a result of a violation"); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014) (allegation that "advertised 'sales prices' were in fact just the normal . . . retail prices" not an actionable loss under ICFA because no showing plaintiff "paid more than the actual value of the merchandise he received"). Biegeleisen purchased Big Kids that worked as expected for her, and she "cannot save her ICFA claim by alleging that she would not have bought the Product had she known about [the alleged deception]." *Stemm v. Tootsie Roll Indus., Inc*., 374 F. Supp. 3d 734, 743 (N.D. Ill. 2019) (dismissing claims).

- **Indiana:** The Indiana Plaintiffs' claim under the Indiana Deceptive Consumer Sales Act ("IDCSA") (Count XXII (AC ¶¶ 590-617)) fails because they have no "damages actually suffered," Ind. Code § 24-5-0.5-4(a), which Indiana courts interpret to mean "demonstrable out-of-pocket expenses," but not "hypothetical market price damages." *Kantner v. Merck & Co.*, 2007 WL 3092779, ¶¶ 17-18 (Ind. Sup. Ct. Apr. 18, 2007) (rejecting that "[w]hether couched as 'fraud on the market,' 'excessive price' or 'benefit of the bargain,' [plaintiff's] remaining claim is the same: She allegedly paid more than she 'should' have as a result of the alleged acts or omissions of [defendant] even though she doesn't allege any injuries or additional expenses as a result of taking [the drug]").

- **Iowa:** Plaintiff Anna Gathings does not plead facts establishing an "ascertainable loss" as required to privately enforce the Iowa Private Right Of Action For Consumer Frauds Act ("Iowa CFA") (Count XXIV (AC ¶¶ 629-35)). *See* Iowa Code § 714H.5; *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532 (Iowa 2015) (plaintiff did not suffer an "ascertainable loss" after penny slot machine misrepresented a "Bonus Award" of $41,797,550.16). Gathings pleads no tangible loss of money.

- **Maine:** Plaintiff Jeffrey Lindsey cannot state a claim under the Maine Unfair Trade Practices Act ("Maine UTPA") (Count XXVIII (AC ¶¶ 670-84)). Maine courts construe the private right of action under the Maine UTPA, and its injury requirement, narrowly. *Anderson v. Hannaford Brothers Co.*, 659 F.3d 151, 160-61 (1st Cir. 2011) (imposing a "substantial injury" requirement on private Maine UTPA claims). Maine UTPA damages are limited to non-speculative "loss of money or property." *Poulin v. Thomas Agency*, 746 F. Supp. 2d 200, 206 (D. Me. 2010) (lowered credit score not actionable Maine UTPA injury); *McKinnon v. Honeywell Int'l, Inc.*, 977 A.2d 420, 427 (Me. 2009) (finding that class representative failed to allege injury under Maine

UTPA). Lindsey does not plead any non-speculative loss of money.

- **Massachusetts:** Plaintiff Edith Brodeur has not pled a legally cognizable injury under state law (Count XXIX (AC ¶¶ 685-706)). *See* Mass. Gen. Laws ch. 93A, § 9(1) (a plaintiff must show she was "injured" by the unfair or deceptive act); *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 10 (1st Cir. 2017) ("a claim resting only on a deceptive practice . . . is insufficient to state a Chapter 93A claim"). This is especially true where, as here, Brodeur bought her Big Kid in 2016 (AC ¶ 93) and used it without incident or harm. *Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250, 253 (1st Cir. 2010) (no actionable Chapter 93A injury where plaintiff received the protection she sought after purchase without manifestation of the alleged safety risk).

- **Minnesota:** Plaintiffs Joshua Kukowski and Kari Forhan lack compensable injury and thus cannot state a claim under four Minnesota consumer protection statutes: The Prevention of Consumer Fraud Act ("MCFA") (Minn. Stat. § 325F.68); False Statement in Advertising Act ("MFSAA") (Minn. Stat. § 325F.67); Unlawful Trade Practices Act ("MUTPA") (Minn. Stat. § 325D.09); and Deceptive Trade Practices Act ("MDTPA") (Minn. Stat. § 325D.43); or breach of implied warranty under Minn. Stat. § 3336.2-314. (Counts XXXII-XXXVI (AC ¶¶ 734-87)). Where the Minnesota Plaintiffs received a product that performed as expected for them, and their claimed injury is only that they would have paid less for the product, or not bought it at all, had an alleged safety risk been disclosed, they cannot pursue any of the asserted claims. *Carey v. Select Comfort Corp.*, 2006 WL 871619, *1 (D. Minn. Jan. 30, 2006) (granting motion to dismiss MCFA, MFSAA, MUTPA, and MTDPA claims where plaintiff's mattress performed as expected, and rejecting claims that plaintiff would not have purchased the mattress or would have paid less for it had he known the mattress' "'air-chambered technology' contains a defect that traps moisture and causes mold to grow"); *O'Neil*, 574 F.3d at 504 (rejecting "benefit of the bargain" and price premium claims under Minnesota law "because [plaintiff's] crib has not exhibited the alleged defect" and "[t]heir bargain . . . did not contemplate the performance of cribs purchased by other consumers").

- **Missouri:** Plaintiff Emily Naughton cannot state a claim under the Missouri Merchandising Practices Act ("MMPA") (Count XXXVII (AC ¶¶ 788-804)). She does not allege an "ascertainable loss" of money, measured by the "benefit of the bargain" rule, as she fails to "allege [s]he did not receive the benefit from the [Big Kid] for which [s]he bargained; i.e. the [Big Kid] did not perform as intended." *Polk v. KV Pharm. Co.*, 2011 WL 6257466, at*5 (E.D. Mo. Dec. 15, 2011). She cannot claim an "ascertainable loss" by alleging the Big Kid would have cost less had the safety risk been disclosed. *In re Avandia Mktg. Sales Pracs. & Prods. Liab. Litig.*, 639 F. App'x 866, 869 (3d Cir. 2016) (affirming dismissal of MMPA claim where the plaintiff "received the drug she was prescribed, the drug did the job it was meant to do"); *In re Bisphenol–A (BPA) Polycarbonate Prods. Liab. Litig.*, 687 F. Supp. 2d 897, 912-13 (W.D. Mo. 2009) (product that performed as anticipated conferred full benefit of the bargain despite undisclosed safety risk).

- **New Jersey:** Plaintiff Karen Sanchez fails to allege an "ascertainable loss of moneys or property" as required to state a claim under the New Jersey Consumer Fraud Act

("NJCFA") (Count XXXVIII (AC ¶¶ 805-15)). N.J. Stat. Ann. § 56:8-19. New Jersey rejects "hypothetical diminution in value" as "too speculative to satisfy the CFA requirement of a demonstration of a quantifiable or otherwise measurable loss." *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 795 (N.J. 2005) (purchase of vehicle with defective fuel gauge was not an "ascertainable loss" where repairs were covered by warranty and diminished resale value was "too speculative"). Sanchez's failure to allege what she paid for the Big Kid, that the Big Kid did not perform as expected, or that alternative, cheaper products existed, dooms her attempt to plead economic injury under New Jersey law. *See Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 282 (D.N.J. 2011) (dismissing CFA claim where plaintiff "fails to allege how much he paid for his brewer and how much other comparable brewers manufactured by Defendants' competitors cost at the time of purchase"). Her failure to allege injury also requires dismissal of her implied warranty claim (Count XXXIX (AC ¶¶ 816-24)). *See Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) (dismissing implied warranty claim for failure to plead facts supporting damages).

- **New York:** The New York Plaintiffs do not state an actionable injury under New York Gen. Bus. Law ("NYGBL") §§ 349 or 350 (Counts XXXX-XXXXI (AC ¶¶ 825-54)). *See Small v. Lorillard Tobacco Co.*,720 N.E.2d 892, 898 (N.Y. 1999) (no injury where plaintiffs failed to show "cost of cigarettes was affected by the alleged misrepresentation"). Where, as here, the New York Plaintiffs plead that they bought a product they "would not have purchased, absent a manufacturer's deceptive commercial practices," there is "no manifestation of either pecuniary or 'actual harm.'" *Baron v. Pfizer, Inc.*, 42 A.D.3d 627,629 (N.Y. App. Div. 2007) (finding allegations that plaintiff "would not have purchased the drug absent defendant's deceptive practices" inadequate to allege actionable injury). Nor do the New York Plaintiffs state an implied warranty claim (Count XXXXII (AC ¶¶ 855-65)), because the New York Plaintiffs have no actual damages. *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) (dismissing implied warranty claim for lack of damages).

- **North Carolina:** The North Carolina Unfair & Deceptive Trade Practices Act ("NCUDTPA") claim (Count XXXXIII (AC ¶¶ 866-80)) fails because the North Carolina Plaintiffs have not sufficiently alleged they suffered an actual economic injury. *Coker v. DaimlerChrysler Corp.*, 617 S.E.2d 306, 310-11 (N.C. Ct. App. 2005) ("injury in fact" is required to state a NCUDTPA claim); *Precision Links Inc. v. USA Prods. Grp., Inc.*, 2009 WL 801781, at *3 (W.D.N.C. Mar. 25, 2009) (dismissing claim because "speculative allegations of possible harm in the future are simply insufficient to establish the actual injury necessary to support a claim under the [NC]UDTPA").

- **Oklahoma:** Plaintiff Linda Mitchell's Oklahoma Consumer Protection Act ("OCPA") and implied warranty claims (Counts XXXXVI-XXXXVII (AC ¶¶ 891-920)) fail because Mitchell must be an "aggrieved customer," which requires pleading actual damages. Mitchell—who purchased 4 Big Kids—has not done so. *Sisemore v. Dolgencorp, LLC*, 212 F. Supp. 3d 1106, 1109-10 (N.D. Okla. 2016) (allegation that product was worthless and caused others harm insufficient to state a OCPA claim); *Harrison v. Leviton Mfg. Co.*, 2006 WL 2990524, at *5 (N.D. Okla. Oct. 19, 2006) (dismissing OCPA and implied warranty claims because "[c]ourts do not allow

consumers to bring claims against manufacturers for products that are perceived to be harmful, but that have not actually cause[d] an identifiable injury").

- **Pennsylvania:** Plaintiffs Hailey Lechner and Lauren Mahler fail to state a Pennsylvania Unfair Trade Practices and Consumer Protection Law ("PUTPCPL") claim (Count XXXXVIII (AC ¶¶ 921-36)) because they fail to allege an "ascertainable loss," as neither alleges the Big Kid did not work as expected, or that a cheaper alternative was available. *Riviello v. Chase Bank USA, N.A.*, 2020 WL 1129956, at *3-4 (M.D. Pa. Mar. 4, 2020) ("To allege an ascertainable loss, the plaintiff 'must be able to point to money or property that he would have had but for the defendant's fraudulent actions"); *see also Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001) (explaining that the PUTPCPL requires allegations regarding lack of benefits received and the amount of the purchase). Lechner's claim also fails because she admits that her insurance company replaced her Big Kid with a different booster seat at no cost to her. (AC ¶ 160).

- **South Carolina:** Plaintiffs Tarnisha Alston and Rachel Huber cannot state a claim under the South Carolina Unfair Trade Practices Act ("SCUTPA") (Count L (AC ¶¶ 948-63)), because they "suffered no pecuniary loss" as a result of Evenflo's alleged misrepresentations. S.C. Code § 39-5-140(a) (requiring "ascertainable loss"); *Schnellmann v. Roettger*, 627 S.E.2d 742, 746 (S.C. Ct. App. 2006) (finding no pecuniary injury as a result of alleged misstatements).

- **Tennessee:** Plaintiff Ashley Miller does not plead an "ascertainable loss of money or property" as required to assert a Tennessee Consumer Protection Act ("TCPA") claim (Count LI (AC ¶¶ 964-80)). Tenn. Code § 47-18-109(a)(1). For the claim to be actionable, the ascertainable loss "must be more than trivial or speculative." *Fleming v. Janssen Pharm., Inc.*, 186 F. Supp. 3d 826, 834 (W.D. Tenn. 2016) (dismissing TCPA claim). Miller's claimed loss is speculative.

- **Texas:** Plaintiff Lindsey Brown cannot state a claim under the Texas Deceptive Trade Practices and Consumer Protection Act ("TDTPA") or for implied warranty breach (Counts LIII-LIV (AC ¶¶ 992-1019)), because she does not plead facts establishing either an "out-of-pocket" or "benefit-of-the-bargain" loss. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 858 (Tex. App. 2005) ("The out-of-pocket measure compensates for the difference between what the consumer paid and what he received; the benefit-of-the-bargain measure compensates for the difference between what a consumer was promised and what he received"). Brown has not alleged an economic injury under the TDTPA where the Big Kid worked as represented for her. *Id.* (plaintiff failed to identify "any way in which the [seat belt buckle] in their vehicles performed differently from the way [defendants] represented the buckles would perform"). Brown's implied warranty claim likewise fails. *Polaris Ind., Inc. v. McDonald*, 119 S.W.3d 331 (Tex. App. 2003) (dismissing implied warranty claim where plaintiff "got exactly what he paid for-a water vehicle fit for recreational use").

- **West Virginia.** The West Virginia Plaintiffs have not sustained an "ascertainable loss" sufficient to give rise to a West Virginia Consumer Credit and Protection Act ("WVCCPA") claim (Count LVI (AC ¶¶ 1033-60))—they purchased a Big Kid and do

not allege the booster seat did not work as expected for them. *See In re Baycol Products Litig.*, 265 F.R.D. 453, 459 (D. Minn. 2008) (applying West Virginia law and finding no ascertainable loss existed because the product "served its exact purpose"). Nor do they allege they would have purchased a cheaper, alternative belt-positioning booster seat. *Cf. Midwestern Midget Football Club Inc. v. Riddell, Inc.*, 2016 WL 3406129, at *6 (S.D.W. Va. June 17, 2016) (finding plaintiff "suffered a loss" under the WVCCPA "when it purchased Revolution Helmets at an inflated price—relying on Riddell's safety claims—instead of purchasing the lower-priced traditional helmets").

D. Plaintiffs Lack Standing To Seek Injunctive Relief.

"[S]tanding is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). "[A] plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief." *Id.* To pursue injunctive relief, a plaintiff must demonstrate that he or she is likely to suffer future injury from the product. *Johnson & Johnson*, 903 F.3d at 292 (finding plaintiff lacked standing to pursue injunctive relief).

Plaintiffs do not plead any threat of future economic injury because they do not plead facts sufficient to establish they are likely to purchase another Big Kid. Courts regularly dismiss deceptive marketing claims seeking injunctive relief in such circumstances. *See, e.g., McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 224-25 (3d Cir. 2012) (former customers of magazine did not have standing to seek injunction against magazine's deceptive subscription-renewal practices because plaintiffs "d[id] not allege that they intended to subscribe [to the magazine] again"); *Casey v. Odwalla, Inc.*, 338 F. Supp. 3d 284, 299 (S.D.N.Y. 2018) (denying Article III standing for injunctive relief in deceptive labeling case because "Plaintiff does not allege that she will purchase Defendants' products in the future") (collecting cases).

Plaintiffs further do not plead facts establishing they personally face any "real," "immediate," or "certainly impending" risk of physical harm due to their purchase of the Big Kid that is redressible through injunctive relief. Even if they had, their knowledge of the alleged safety risks, as demonstrated by this lawsuit, prevents them from claiming that Evenflo's alleged

deception caused any future harm in a side-impact collision, as opposed to Plaintiffs' own acceptance of the alleged risks. *See Johnson & Johnson*, 903 F.3d at 292 (finding plaintiff lacked standing to pursue injunctive relief because she was well aware of the risks of using the product and thus could not be harmed in the future); *Winkworth v. Spectrum Brands, Inc.*, 2020 WL 3574687, at *7-8 (W.D. Penn. June 30, 2020) (same).[7]

E. NHTSA, Not This Court, Is The Proper Federal Body To Determine Whether Plaintiffs' Requested Injunctive Relief Is Appropriate.

NHTSA, pursuant to its congressionally-delegated authority, regulates car seat safety pursuant to FMVSS 213. NHTSA set the 30-pound weight minimum for belt-positioning booster seats, and is currently finalizing a side-impact testing rule that imposes no obligations on booster seats. NHTSA may determine whether a booster seat "contains a defect . . . or does not comply with an applicable motor vehicle safety standard," as well as issue recalls or restrict sales. 49 U.S.C. §§ 30118, 30120. NHTSA even solicits consumer complaints to determine whether to investigate an alleged defect or noncompliance. 49 U.S.C. § 30162(a) (authorizing "[a]ny interested person" to file a petition to investigate a defect or noncompliance).

The Supreme Court "recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge." *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970) (applying primary jurisdiction

[7] For the same reason, Plaintiffs' claims under several state laws (Counts XVII (Georgia Uniform Deceptive Trade Practices Act ("GUDTPA")), XX (Illinois Uniform Deceptive Trade Practices Act ("IDTPA")), and XXXIII (Minnesota Deceptive Trade Practices Act ("MDTPA"))) should be dismissed under Fed. R. Civ. P. 12(b)(6). *Amin v. Mercedes-Benz USA, LLC*, 301 F. Supp. 1277, 1296 (N.D. Ga. 2018) (no claim for injunctive relief under GUDTPA where plaintiff had been damaged but was not likely to be damaged again by the fraudulent advertising/marketing); *Greenberg v. United Airlines*, 563 N.E.2d 1031, 1037 (Ill. App. Ct. 1990) (affirming dismissal of claim under IDTPA); *Johnson v. Bobcat Co.*, 175 F. Supp. 3d 1130, 1140 (D. Minn. 2016) (allegation of "continuing" unlawful conduct insufficient for injunction under the MDTPA; plaintiff could not plausibly plead threat of future harm where he was now aware of allegedly misleading promotional material).

doctrine). Consequently, the court may stay a case pending agency review. *Palmer Foundry, Inc. v. Delta-HA, Inc.*, 319 F. Supp. 2d 110, 113 (D. Mass. 2004) (invoking primary jurisdiction doctrine and staying case). The First Circuit relies on three factors: "(1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [is] required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) (holding doctrine applicable).

Here, the factors align to support NHTSA's consideration of the Big Kid's adequacy. The Weight Minimum and side-impact issues Plaintiffs challenge unquestionably "lie[] at the heart of the task assigned the agency by Congress," as Congress has explicitly asked NHTSA to regulate these areas. Agency expertise is also required. To amend FMVSS 213, NHTSA must "consider relevant available motor vehicle safety information" and "consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of . . . motor vehicle equipment." 49 U.S.C. § 30111(b). Finally, NHTSA's determination would materially aid the court in determining the scope of any requested injunctive relief. *See, e.g.*, *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 627-28 (M.D.N.C. 2006) (deferring to NHTSA's investigation of a safety defect); *Silvas v. Gen. Motors, LLC*, 2014 WL 1572590, at *3 (S.D. Tex. Apr. 17, 2014) (finding NHTSA is the proper body to issue a "park it now" alert); *Am. Suzuki Motor Corp. v. Super. Ct. of L.A. Cnty.*, 37 Cal. App. 4th 1291, 1299-1300 (Ct. App. 1995) ("[T]he remedy which will best promote consumer safety, and which will address [purchasers] concern that 'tragic consequences' will result if the [alleged rollover] defect is not remedied, is to petition the . . . (NHTSA) for a defect investigation").

V. PLAINTIFFS' REMAINING STATE-LAW CLAIMS SHOULD BE DISMISSED.

Plaintiffs assert additional claims under the consumer fraud and implied warranty statutes

of their home states. Those claims, however, fail for a myriad of different reasons, including no actionable deception where the challenged representations are true and permitted by NHTSA. The implied warranty claims likewise fail for lack of injury, privity, and omission of factual allegations establishing Plaintiffs could not use the Big Kid as intended.

A. The Alabama Implied Warranty (Count V).

No Privity. To recover economic loss for breach of implied warranty (AC ¶¶ 355-65), Plaintiff Davis must have privity of contract with Evenflo. *Rampey v. Novartis Consumer Health, Inc.*, 867 So. 2d 1079, 1089 (Ala. 2003) (dismissing implied warranty claims on lack of privity grounds). She does not allege privity with Evenflo. (AC ¶ 15).

No Notice. The implied warranty claim also fails because Davis did not provide pre-suit notice. Ala. Code § 7-2-607(3)(a); *Smith v. Apple, Inc.*, 2009 WL 3958096, at *1-2 (N.D. Ala. Nov. 4, 2009) (dismissing implied warranty claim). Her attempt (AC ¶ 363) to rely on class action complaints to satisfy the notice requirement is deficient. *Smith*, 2009 WL 3958096, at *1 ("the filing of a lawsuit itself constitutes sufficient notice only if personal injuries are involved").

B. The Alaska CPL And Implied Warranty (Counts VI-VII).

No Deceptive Act or Practice. The Alaska CPL claim (AC ¶¶ 366-86) fails for lack of an actionable "unfair or deceptive act or practice." *Nicdao v. Chase Home Fin.*, 839 F. Supp. 2d 1051, 1076 (D. Alaska 2012) (defining "deceptive" as "the capacity or tendency to deceive"). The Side Impact Representation is true, and the Weight Minimum complies with FMVSS 213.

Fit for Ordinary Purpose. To recover for breach of implied warranty (AC ¶¶ 387-97), Plaintiff Hiriams must plausibly allege that the Big Kid was not "fit for the ordinary purpose for which the goods are used." A.S. § 45.02.314(b)(3). Hiriams has failed to allege the Big Kid did not work as intended for her.

C. The California Consumer Protection Statutes (Counts VIII-X) And Implied Warranty (Counts XI & XII).

No Deceptive Act or Practice. The California Plaintiffs do not state a claim under California's Unfair Competition Law ("UCL"), Legal Remedies Act ("CLRA"), or False Advertising Law ("FAL") because they fail to allege that Evenflo made an actionable "deceptive," "misleading," or "fraudulent" representation (AC ¶¶ 398-434). Cal. Civ. Code § 1770(a) (CLRA); Cal. Bus. & Prof. Code § 17500 (FAL); *Id.* § 17200 (UCL).[8] Neither the Side Impact Representation nor the Weight Minimum (AC ¶ 401) is actionable under California law because neither is misleading to a "reasonable consumer." *See Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1011 (N.D. Cal. 2014) ("reasonable consumer" test "requires a plaintiff to show that members of the public are likely to be deceived;" dismissing UCL, CLRA, and FAL claims).

The Side Impact Representation is not actionable because the only "measurable claim"—that the Big Kid was side-impact tested—is true. *Id.* at 1012 ("to be actionable as an affirmative misrepresentation, a statement must make a specific and measurable claim, capable of being proved false"). Any inference the California Plaintiffs made that the Big Kid represented the ultimate side-impact safety or was the "best choice" for their children is subjective and not measurable. *See Beck v. FCA US LLC*, 273 F. Supp. 3d 735, 750 (E.D. Mich. 2017) (dismissing UCL claim based on representations vehicle was subject to "rigorous testing" and "equipped with some of the most advanced safety and security technology available"). Nor is the Weight Minimum actionable, given that NHTSA set that threshold. The Big Kid does not claim to be the best option for every child between 30 and 40 pounds—it merely lists the minimum and maximum weight for the seat as set by NHTSA, along with height, age, and maturity

[8] "Generally, a violation of the FAL or the CLRA is also a violation of the fraudulent prong of the UCL." *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017) (dismissing each statutory claim).

requirements for the Big Kid's use. (*See, e.g.*, AC ¶¶ 230, 247).

No Actionable Omissions. The California Plaintiffs fare no better by framing their UCL, CLRA, and FAL claims as omissions. (*See, e.g., id.* ¶ 401). An obligation to disclose extends only when concealment results in an "unreasonable safety hazard." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012) (affirming dismissal of CLRA and UCL claims for failure to allege that the product defect posed an unreasonable safety hazard). Plaintiffs plead no facts quantifying the injury risk children weighing less than 40 pounds face in a side-impact collision *due to using the Big Kid*, let alone that any risk is "unreasonable." *See Corral v. Carter's Inc.*, 2014 WL 197782, at *4 (E.D. Cal. Jan. 16, 2014) (holding that plaintiffs "must allege at least some evidence that the use of *Defendant's* product, as directed, increases the frequency with which the harm will occur") (emphasis in original).

Fit For Ordinary Purpose. The implied warranty claims under the Song-Beverly Consumer Warranty Act ("Song-Beverly Act") and the Uniform Commercial Code ("UCC") (AC ¶¶ 435-57) fail because the implied warranty—whether brought under the UCC or the Song-Beverly Act—does "not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.'" *Am. Suzuki*, 37 Cal. App. 4th at 1296-97 (rejecting that product must be "free of all speculative risks, safety-related or otherwise"); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1142 (N.D. Cal. 2010) ("The mere manifestation of a defect by itself does not constitute a breach of the implied warranty[.] Instead, there must be a fundamental defect that renders the product unfit for its ordinary purpose").

Plaintiffs do not establish that the Big Kid was unfit for its ordinary purpose, as Plaintiffs used the Big Kid as intended, and received the intended result—their children were adequately

and safely restrained. "To hold otherwise would, in effect, contemplate indemnity for a potential injury that never, in fact, materialized. And, compensation would have to be paid for a product 'defect' that was never made manifest, in a product that for the life of any warranty actually performed as [Evenflo] guaranteed it would." *Am. Suzuki*, 37 Cal. App. 4th at 1299.

D. The Colorado CCPA (Count XIII).

Regulatory Exemption. The CCPA claim (AC ¶¶ 458-78) fails because NHTSA set the Weight Minimum and permitted the Side Impact Representation, exempting both from the CCPA. *See* Colo. Rev. Stat. § 6-1-106(1)(a) (CCPA exempts "[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency").

E. The Florida FDUTPA And Implied Warranty (Counts XIV-XV).

Regulatory Exemption. The FDUTPA claim (AC ¶¶ 479-87) fails because the FDUTPA "does not apply" to any "act or practice required or specifically permitted by federal or state law." Fla. Stat. § 501.212(1); *Savalli v. Gerber Prods. Co.*, 2016 WL 5390223, at *4 (S.D. Fla. Sep. 20, 2016) (dismissing FDUTPA marketing claims because the labeling on the product "plainly [met] the [federal] regulatory requirements, and [was] thus expressly permitted" by federal law). Plaintiff Aly alleges she relied on the Side Impact Representation, but NHTSA is aware that companies like Evenflo have been completing their own protocols for years. Plaintiff Talutto alleges she additionally relied on the Weight Minimum, which is a threshold NHTSA set.

No Privity. The implied warranty claim (AC ¶¶ 488-98) fails because the Florida Plaintiffs did not purchase the Big Kid product directly from Evenflo, in violation of Florida's "bright-line privity rule." *Toca v. Tutco, LLC*, 430 F. Supp. 3d 1313, 1326 (S.D. Fla. 2020) (dismissing claims for lack of privity); *Padilla v. Porsche Cars N. Am.*, 391 F. Supp. 3d 1108, 1116 (S.D. Fla. 2019) ("[t]ime and again, Florida courts have dismissed . . . implied warranty claims . . . for lack of contractual privity where the plaintiff [] did not purchase a product directly

from the defendant").

F. The GFBPA, Georgia Uniform Deceptive Trade Practices Act ("GUDTPA"), And Breach Of Implied Warranty (Counts XVI-XVIII).

Safe Harbor. The GFBPA and GUDTPA claims (AC ¶¶ 499-544) fail because both statutes contain safe harbors for activities specifically authorized and in compliance with rules or statutes administered by federal agencies. *See* Ga. Code § 10-1-396(1) (GFBPA); *id.* § 10-1-374(a)(1) (GUDTPA). Because Evenflo's challenged conduct complies with FMVSS 213, it cannot violate either the GFBPA or GUDTPA.

Fit For Ordinary Purpose. The implied warranty claim requires a showing that the Big Kid was not "fit for the ordinary purpose for which such goods are used." Ga. Code § 11-2-314(2)(c). But Plaintiff Malone failed to allege the Big Kid did not work as intended for her.

G. The Illinois ICFA And Implied Warranty (Counts XIX & XXI).

No Deceptive Act Under ICFA. The IFCA claim (AC ¶¶ 556-72) should be dismissed because the alleged misrepresentations are "literally true" and comply with federal law (FMVSS 213). *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 940-41 (7th Cir. 2001) (concluding that 815 ILCS 505/10b(1) exempts from ICFA those representations "specifically authorized" by federal law and dismissing claims); *Fuchs v. Menard, Inc.*, 2017 WL 4339821, at *4-5 (N.D. Ill. Sept. 29, 2017) (dismissing allegations that lumber had smaller dimensions than labeled because the applicable federal regulator approved the size representations).

Implied Warranty: No Privity. The implied warranty claim (AC ¶¶ 579-89) fails because Plaintiff Biegeleisen purchased five Big Kids from Walmart, not Evenflo (AC ¶ 63). 810 ILCS 5/2-314; *Manley v. Hain Celestial Grp., Inc.*, 417 F. Supp. 3d 1114, 1121 (N.D. Ill. 2019) (dismissing claims, concluding that, "with respect to purely economic loss, . . . implied warranties give a buyer . . . a potential cause of action only against his immediate seller").

H. The Indiana IDCSA And Implied Warranty (Counts XXII-XXIII).

No Actionable Conduct. The Indiana Plaintiffs' IDCSA claim (AC ¶¶ 590-617) fails because NHTSA "expressly permit[s]" the Weight Minimum. *See* Ind. Code § 24-5-0.5-6 (IDCSA "does not apply to an act or practice that is: (1) required or expressly permitted by federal law, rule or regulation"). While Plaintiff Jessica Greenshner challenges the Side Impact Representation and Evenflo's statement that the Big Kid is "rigorously" tested (AC ¶ 66), those statements are not deceptive. The Big Kid is tested in compliance with FMVSS 213, and the term "rigorous" is non-actionable opinion. *See Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 333 (Ind. 2013) (statement that vehicle is "sporty" and a "great value" is not actionable).

Fit For Ordinary Purpose. To state an implied warranty claim (AC ¶¶ 618-28), the Indiana Plaintiffs must plead that their Big Kids were not "fit for the ordinary purposes for which such goods are used." Ind. Code § 26-1-2-314(2)(c). Like the other Plaintiffs, the Indiana Plaintiffs do not allege the Big Kid did not work as intended for them.

I. The Iowa CFA And Implied Warranty (Counts XXIV-XXV).

No Actionable Conduct. Neither the Weight Minimum nor the Side Impact Representation violates the Iowa CFA (AC ¶¶ 629-35). NHTSA set the Weight Minimum in FMVSS 213, which exempts that representation from the CFA's scope. *See* Iowa Code § 714H.4(1)(g) (Iowa CFA does not apply to "[c]onduct that is required or permitted by the orders or rules or a statute administered by, a federal, state, or local governmental agency"). The Side Impact Representation is an objectively accurate statement that complies with FMVSS 213 such that it does not violate the Iowa CFA.

Fit For Ordinary Purpose. To state an implied warranty claim (AC ¶¶ 636-43), the Big Kid must be "[un]fit for the ordinary purposes for which such goods are used." Iowa Code § 554.2314(2)(c). Plaintiff Gathings does not allege that the Big Kid did not work as intended.

J. The Kentucky Consumer Protection Act ("KCPA") (Count XXVI).

No Privity. The KCPA claim (AC ¶¶ 644-50) fails for lack of privity of contract. *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952, 962 (E.D. Ky. 2019) (dismissing KCPA claim for lack of privity because the plaintiff purchased the dog food from retailers and not the manufacturer). Plaintiff Joseph Wilder purchased the Big Kid from a retailer, Walmart (AC ¶ 79), not from Evenflo, and thus lacks privity.

K. The Louisiana Warranty Against Redhibitory Defects (La. Civ. Code Art. 2520) (Count XXVII).

Fit For Ordinary Use. Plaintiff Talise Alexie's claim for violation of the warranty against redhibitory defects should be dismissed. (AC ¶¶ 651-69). "[A] defect is redhibitory if it 'renders the thing useless' or renders its use 'so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect.'" *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, 2020 WL 1819668, at *3 (E.D. La. Apr. 7, 2020) (finding no redhibitory defect where medication worked for plaintiff and accordingly "was far from being 'useless'"). Alexie, like the *Taxotere* plaintiff, has failed to plead facts showing the Big Kid was "useless" or "so inconvenient or imperfect" that Alexie would not have used it, where she purchased her Big Kid seat in 2016 (AC ¶ 83), and she does not allege the Big Kid failed to work as intended.

L. The Maine UTPA (Count XXVIII).

No Actionable Conduct. Neither the Side Impact Representation nor the Weight Minimum (AC ¶ 89) violates the Maine UTPA (AC ¶¶ 670-84), because neither is misleading to a reasonable consumer, and NHTSA permits both representations. 5 M.R.S. § 208(1) (Maine UTPA specifically exempts from its scope "actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the State or of the United States"). The Weight Minimum is exempt because NHTSA set that threshold in

FMVSS 213. *Id.* The Side Impact Representation is an objectively accurate statement that complies with FMVSS 213 such that it does not violate the Maine UTPA.

M. The Massachusetts Consumer Protection Law (Count XXIX).

No Actionable Conduct. Plaintiff Brodeur's claim that the Big Kid was defective does not state a claim under Chapter 93A (AC ¶¶ 685-706). *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 888 (Mass. 2008) ("Because the term 'defect' is conclusory and can be subjective as well, a bare assertion that a defendant, while representing the opposite, has knowingly manufactured and sold a product that is 'defective,' or suffers from 'safety-related defects,' does not suffice to state a viable [93A] claim."); *Shaulis*, 865 F.3d at 12 (claims based on overpayment must be measurable against an objective standard that the product was represented as meeting, but did not).

Regulatory Exemption. Evenflo's decision to conduct side-impact testing that exceeds FMVSS 213 requirements does not give rise to Chapter 93A liability. *Iannachino*, 888 N.E.2d at 888 ("in the absence of any allegation of personal injury . . . we decline to adopt a rule that would expose a company to liability for failing to meet self-imposed standards that may in fact be aspirational goals conducive to the development and implementation of improved safety measures that exceed regulatory requirements"). Further, Chapter 93A is not intended to provide a remedy for alleged economic loss in the face of Evenflo's compliance with NHTSA standards. *Id.* at n.17 (explaining that NHTSA was better positioned to remedy economic injury arising from NHTSA standard); Mass. Gen. Laws ch. 93A § 3 (expressly exempting "transactions or actions otherwise permitted" by a federal or state regulatory scheme).

N. The Michigan Consumer Protection Act ("MCPA") And Implied Warranty (Counts XXX-XXXI).

Regulatory Exemption. The Michigan Plaintiffs fail to state a claim under the MCPA

(AC ¶¶ 707-22) because the MCPA exempts any "transaction or conduct specifically authorized under laws administered by . . . [an] officer acting under statutory authority of . . . the United States." Mich. Comp. Laws § 445.904(1)(a). In interpreting the exemption, the "focus is on whether the transaction at issue, *not the alleged misconduct*, is 'specifically authorized.'" *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514, 518 (Mich. 2007) (finding exemption applied). NHTSA regulates the Big Kid's design, testing, and labeling, exempting Big Kid sales from the MCPA. *See Cyr v. Ford Motor Co.*, 2019 WL 7206100, at *3 (Mich. Ct. App. Dec. 26, 2019) (dismissing MCPA claims concerning purchase of vehicles with defective transmissions because "the manufacture, sale, and lease of automobiles, and the provision of express and implied warranties concerning those automobiles and their components . . . . [are all] conduct [that] is 'specifically authorized' under federal and state law").

No Notice. The implied warranty claim (AC ¶¶ 723-33) fails for lack of pre-suit notice. *Gorman v. Am. Honda Motor Co.*, 839 N.W.2d 223, 229 (Mich. Ct. App. 2013) (upholding dismissal of implied warranty claims). The Michigan Plaintiffs cannot satisfy the notice requirement by pointing to the multiple consumer class action complaints filed against Evenflo (AC ¶ 731). *Johnson Controls, Inc. v. Jay Indus., Inc.*, 459 F.3d 717, 729-30 (6th Cir. 2006) (requiring statutory notice even if defendant had notice of alleged misconduct).

Fit for Ordinary Purpose. The Michigan Plaintiffs used the Big Kid as intended for them and have not alleged that the Big Kid did not work properly, which defeats the implied warranty claim. *Gorman*, 839 N.W.2d at 228 (requiring a showing that the product is below the "average quality within the industry" to state a claim for implied warranty of merchantability).

O. The Minnesota Consumer Statutes (Counts XXXII-XXXV).

MCFA, MFSAA, & MUTPA Claims Do Not Allege A Public Benefit. The Minnesota Plaintiffs seek actual damages, injunctive relief, and attorneys' fees under the MCFA, MFSAA,

and MUTPA. (AC ¶¶ 745-46, 765-66, 776-77). They seek to enforce all three statutes via Minnesota's private attorney general statute, Minn. Stat. § 8.31. Section 8.31 permits private enforcement of the MCFA, MFSAA, and MUTPA only when the claims benefit the public. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). The Minnesota Plaintiffs' claim for monetary damages does not benefit the public. *Skelton Truck Lines LTD v. Peoplenet Commc'ns. Corp.*, 2017 WL 11570877, at *27 (D. Minn. Jan. 18, 2017) ("Courts consistently focus their inquiry on the relief sought by the plaintiff, and find no public benefit where plaintiffs request only damages even when plaintiffs are suing for injuries resulting from mass produced and mass marketed products"). Plaintiffs state in passing they are also seeking injunctive relief, but "merely seeking injunctive relief has been held insufficient to constitute a public benefit," *id.* at *29, and in any event they do not allege irreparable harm.

P. The New Jersey Implied Warranty (Count XXXIX).

Fit for Ordinary Purpose. The implied warranty claim (AC ¶¶ 816-24) fails. Plaintiff Sanchez used the Big Kid as intended for her and has not alleged that the Big Kid failed to satisfy the "minimum level of quality," malfunctioned, or harmed her children. *See Sheris v. Nissan N. Am. Inc.*, 2008 WL 2354908, at *6 (D.N.J. June 3, 2008) (dismissing implied warranty claims).

Q. The New York NYGBL And Implied Warranty (Counts XXXX-XXXXII).

No Actionable Deception. The NYGBL claims are premised on the Side Impact Representation and the Weight Minimum, (AC ¶¶ 831, 846), neither of which is actionable under the NYGBL. *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) (a statement's deceptiveness may be determined as a matter of law). "[T]he statute . . . does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d

512, 529 (S.D.N.Y. 2003) (restaurant's omission of nutritional content not actionable). The Weight Minimum is not actionable because NHTSA authorized it, and it is accompanied by other statements concerning, for example, height and age. Nor is the factually true Side Impact Representation actionable, because Plaintiffs do not plausibly allege that Evenflo's testing showed any defect. *See, e.g.*, *Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 307-08 (N.D.N.Y. 2019) (dismissing § 349 claim premised on omission of internal vehicle test results).

No Privity. The implied warranty claim (AC ¶¶ 855-65) also fails because there is no privity between the New York Plaintiffs, who purchased the Big Kid from retailers (*id.* ¶ 130), and Evenflo, as required to state such a claim. *Tomasino v. Estee Lauder Cos.*, 44 F. Supp. 3d 251, 262-63 (E.D.N.Y. 2014) (dismissing implied warranty claim).

R. The North Carolina NCUDTPA (Count XXXXIII).

No Deceptive Act. The NCUDTPA claim (AC ¶¶ 866-80) also fails because the challenged representations are not the type of "egregious or aggravating circumstances" required to trigger the NCUDTPA. *Maxwell v. Remington Arms Co.*, 2014 WL 5808795, at *5 (M.D.N.C. Nov. 7, 2014) (conclusory allegations labeling the defendant's advertising as "false, misleading, or deceptive" were not sufficient to allege "the requisite level of unscrupulous, unethical conduct, or aggravating circumstances required to adequately state an UDTPA claim").

S. The Ohio Deceptive Trade Practices Act ("ODTPA") And Implied Warranty (Counts XXXXIV-XXXXV).

ODTPA: No Statutory Standing. The ODTPA claim (AC ¶¶ 881-86) should be dismissed because the ODTPA cannot be privately enforced by individual consumers, like Plaintiff Cassandra Honaker. *See Michelson v. Volkswagen Aktiengesellschaft*, 99 N.E.3d 475, 479-80 (Ohio Ct. App. 2018) (sustaining dismissal because the ODTPA exclusively protects "a purely commercial class"); *Hamilton v. Ball*, 7 N.E.3d 1241, 1252-53 (Ohio Ct. App. 2014)

("consumers lack standing to file suit under the DTPA"); *Borden v. Antonelli Coll.*, 304 F. Supp. 3d 669, 673-76 (S.D. Ohio 2018) ("The majority of courts to address the issue have held that an individual consumer does not have standing to sue under the ODTPA").

Implied Warranty: No Notice, No Privity, Fit for Intended Use. Honaker's implied warranty claim (AC ¶¶ 887-90) also fails. ***First***, Honaker failed to plead that she provided pre-litigation notice of her claim. *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008) ("If a plaintiff fails to plead pre-litigation notice, her breach of warranty claim must be dismissed."). ***Second***, Honaker purchased her seat from Walmart (AC ¶ 149) and thus lacks privity with Evenflo. *Savett v. Whirlpool Corp.*, 2012 WL 3780451, at *10 (N.D. Ohio Aug. 31, 2012) ("Ohio law requires privity in order to sustain a breach of implied warranty claim.") (citation omitted). ***Finally***, like the other state-law claims, Honaker has failed to allege that the Big Kid is not fit for its ordinary purpose. *Id.* at *11 (dismissing implied warranty claim because the plaintiff failed to allege a defect that rendered the product unfit for its ordinary purpose).

T. The Oklahoma OCPA (Count XXXXVI).

Regulatory Exemption. The OCPA claim (AC ¶¶ 891-909) fails because the OCPA exempts from its purview "any 'actions or transactions regulated under laws administered'" by any regulatory body of the United States—including NHTSA. *Dinwiddie v. Suzuki Motor of Am., Inc.*, 111 F. Supp. 3d 1202, 1215-16 (W.D. Okla. 2015) (finding acts under NHTSA's supervision and regulatory authority were not actionable under OCPA). NHTSA regulates the Big Kid's design, testing and labeling; the OCPA claim should be dismissed.

U. The Pennsylvania Implied Warranty (Count IL).

Implied Warranty: Lack of Notice and Fitness. The implied warranty claim (AC ¶¶ 937-47) fails for two reasons. ***First,*** the Pennsylvania Plaintiffs failed to provide the requisite pre-suit notice of the alleged defect. *Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 718 (E.D.

Penn. 2013) (dismissing implied warranty claim for failure to provide statutory pre-suit notice). ***Second,*** the Pennsylvania Plaintiffs failed to plead that the Big Kid "functioned improperly in the absence of abnormal use and reasonable secondary causes." *Painter Tool, Inc. v. Dunkirk Specialty Steel, LLC*, 2017 WL 2985578, at *3-4 (W.D. Pa. July 13, 2017) (dismissing claim) (citing *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1992)).

V. The South Carolina SCUTPA (Count L).

No Deceptive Act. The SCUTPA claim (AC ¶¶ 948-63) also fails because the Side Impact Representation and Weight Minimum do not have the "the tendency to deceive," as these statements are true and comply with FMVSS 213. *Bahringer v. ADT Sec. Servs., Inc.*, 942 F. Supp. 2d 585, 593-94 (D.S.C. 2013) (ADT's statement that alarm would notify the fire department "[a]s soon as an ADT fire or smoke detector signals an alarm" was not misleading where the alarm failed to trigger, as "[t]he language . . . focuses on what happen[ed] once a fire . . . alarm has been triggered" and "does not suggest that its fire alarm systems are infallible").

W. The Tennessee Implied Warranty (Count LII).

Fit for Ordinary Purpose. The implied warranty claim (AC ¶¶ 981-91) fails because Plaintiff Miller has not pled the Big Kid was not fit for its ordinary purpose. Tenn. Code § 47-2-314(2)(c). To state an implied warranty claim, the defect must "essentially deprive the owner of beneficial use of the goods." *Taylor v. Mid-Tenn Ford Truck Sales, Inc.*, 1994 WL 700859, at *5 (Tenn. Ct. App. Dec. 16, 1994) (dismissing claims). Miller has not pled facts showing the Big Kid she purchased for her 38-pound son has "essentially" no "beneficial use."

No Privity. The warranty claim also fails as Miller purchased her Big Kid from Walmart and lacks privity with Evenflo (AC ¶ 176). Tenn. Code § 47-2-314; *Travis v. Ferguson*, 2017 WL 1736708, at *2-3 (Tenn. Ct. App. May 3, 2017) (dismissing implied warranty claim against prior vehicle owner where plaintiff purchased vehicle through auction house).

X. The Texas TDTPA (Count LIII).

Regulatory Exemption. The TDTPA claim (AC ¶¶ 992-1008) fails because NHTSA specifically set the Weight Minimum Plaintiff Brown challenges (AC ¶ 180) in FMVSS 213. *See, e.g.*, *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 165 (Tex. App. 2000) (failure to file purchase agreements related to bond issues did not violate TDTPA where nothing in Texas law required their filing); *Duke v. Flying J, Inc.*, 178 F. Supp. 3d 918, 926 (N.D. Cal. 2016) (recognizing TDTPA safe harbor for specifically permitted conduct).

Y. The Washington Consumer Protection Act ("WCPA") (Count LV).

Regulatory Exemption. The WCPA claim (AC ¶¶ 1020-32) should be dismissed because NHTSA expressly regulates the Weight Minimum in FMVSS 213, and permits the Side Impact Representation. *See* Wash. Rev. Code § 19.86.170 (WCPA does not "apply to actions or transactions otherwise permitted by . . . any other regulatory body [of] . . . the United States."); *Denton v. Dep't Stores Nat'l Bank*, 2011 WL 3298890, at *4 (W.D. Wash. Aug. 1, 2011) (dismissing claim because defendant's conduct complied with federal regulations).

Z. The West Virginia WVCCPA (Count LVI).

No Notice. The WVCCPA claim (AC ¶¶ 1033-60) fails because, although the West Virginia Plaintiffs plead "counsel advised" Evenflo of a violation (AC ¶ 1059), they do not plead that they provided the requisite written notice. *Waters v. Electrolux Home Prods., Inc.*, 154 F. Supp. 3d 340, 354 (N.D. W. Va. 2015) (dismissing claim for lack of notice because the WVCCPA "requires a plaintiff to provide notice 'in writing and by certified mail,' not by filing a complaint").

AA. The Wisconsin Deceptive Trade Practices Act ("WDTPA") (Count LVII).

No Duty to Disclose. Plaintiff Najah Rose alleges that the Side Impact Representation and the Weight Minimum violated the WDTPA (AC ¶¶ 1061-72). The WDTPA claim's

gravamen is that Evenflo omitted facts about internal testing data that revealed alleged safety risks about side-impact collisions. (*Id.* ¶¶ 1064-66). But nondisclosure or omissions are not actionable under the WDTPA. *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245 (Wis. 2004) ("Silence—an omission to speak—is insufficient to support a claim under [the WDTPA]" which "does not purport to impose a duty to disclose but, rather, prohibits only affirmative assertions, representations or statements of fact that are false, deceptive, or misleading").

No Untrue, Deceptive, or Misleading Representations. To state a WDTPA claim, Rose must allege an untrue, deceptive, or misleading affirmative representation. *Murillo v. Kohl's Corp.*, 197 F. Supp. 3d 1119, 1126 (E.D. Wis. 2016) (dismissing WDTPA claim). None of her alleged misrepresentations meet that standard: (1) she admits Evenflo performed side-impact testing, she just wishes testing had been conducted differently; and (2) the Weight Minimum was set by NHTSA. Evenflo does not market the Big Kid as the proper car seat for all children, nor as the "ultimate" in safety, and any inference Plaintiff made to the contrary is not reasonable. *See, e.g.*, *Tietsworth*, 677 N.W.2d at 246 (upholding dismissal of WDPTA claim because manufacturer's representations as to quality were not actionable).

VI. COUNT LVIII FAILS BECAUSE IT ASSERTS CLAIMS UNDER THE LAWS OF TWENTY-TWO STATES AND THE DISTRICT OF COLUMBIA THAT HAVE NO CONNECTION TO THESE PLAINTIFFS' PURCHASE OF A BIG KID.

Plaintiffs purport to assert causes of action under the laws of 22 states that have no connection to Plaintiffs' Big Kid purchases. (AC ¶¶ 1073-81). Unless a class is actually certified, Plaintiffs are the only individuals with live claims against Evenflo. *See Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998) ("Until the putative class is certified, the action is one between the [named plaintiffs] and the defendants. Accordingly, the First Amended Complaint must be evaluated as to these particular plaintiffs").

The "Commerce Clause . . . precludes the application of a state statute to commerce that

takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 311 (1st Cir. 2005) ("A state statute is per se invalid under the dormant Commerce Clause when it 'regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state'"). Courts apply this principle to dismiss consumer protection claims alleged under state statutes that are unconnected to the allegedly fraudulent transaction. *Elyazidi v. SunTrust Bank*, 2014 WL 824129, at *8 (D. Md. Feb. 28, 2014) (dismissing plaintiff's claim under the Maryland Consumer Protection Act because "the conduct about which Plaintiff complain[ed] occurred entirely in the Commonwealth of Virginia[.]"), *aff'd*, 780 F.3d 227 (4th Cir. 2015).[9] And nearly all the consumer protection statutes Plaintiffs invoke are expressly limited to in-state conduct.[10]

VII. NEARLY HALF THE PLAINTIFFS FAIL TO PLEAD THEIR STATE CONSUMER FRAUD CLAIMS WITH PARTICULARITY.

Fed. R. Civ. P. 9(b) applies to many of Plaintiffs' consumer protection claims, requiring them to plead the "who, what, when, where, and how of the misconduct charged."[11] The

[9] *See also The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 501-02 (M.D.N.C. 1987) (dismissing extraterritorial claims under the North Carolina Unfair Trade Practices Act); *Rios v. Cabrera*, 2010 WL 5111411, at *3 (M.D. Pa. Dec. 9, 2010) ("Ms. Rios, as a New York consumer, cannot invoke Pennsylvania consumer protection statutes regarding conduct occurring outside Pennsylvania"); *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 2013 WL 5448078, at *6-7 (D. Colo. Sept. 27, 2013) (dismissing extraterritorial claims under Colorado, Florida, and Oklahoma consumer protection statutes).

[10] For statutes, *see, e.g.*, Conn. Gen. Stat. § 42-110a; D.C. Code § 28-3901; 6 Del. Code § 2512; Idaho Code § 48-602; Kan. Stat. § 50-624; Miss. Code Ann. § 75-24-3; Mont. Code Ann. § 30-14-102; Neb. Rev. Stat. § 59-1601; N.H. Rev. Stat. § 358-A:1; N.M. Stat. § 57-12-2; Or. Rev. Stat. § 646.605; R.I. Gen. Laws § 6-13.1-1; S.D. Codified Laws § 37-24-1; Utah Code Ann. § 13-11a-1. For case law, *see Thuney v. Lawyer's Title of Ariz.*, 2019 WL 467653, at *6-7 (D. Ariz. Feb. 6, 2019) (Arizona); *Cortina v. Wal-Mart, Inc.*, 2015 WL 260913, at *3 (S.D. Cal. Jan. 20, 2015) (Arkansas); *Elyazidi*, 2014 WL 824129, at *8 (Maryland); *Rimini St., Inc. v. Oracle Int'l Corp.*, 2020 WL 5531493, at *41 (D. Nev. Sept. 14, 2020) (Nevada); *MyWebGrocer, Inc. v. Adlife Mktg. & Commc'ns Co.*, 383 F. Supp. 3d 307, 313 (D. Vt. 2019) (Vermont).

[11] *See Keating v. Nordstrom, Inc.*, 2018 WL 576825, at *8 (D. Alaska Jan. 26, 2018) (Alaska); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (California); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441 (7th Cir.

following 21 Plaintiffs fail to plead their state-law claims with particularity:

State	Plaintiff	Rule 9(b) Defect(s)
AK	Jilli Hiriams	No model or specific source of the representation pled (AC ¶ 20).[12]
CA	Mike Xavier	No purchase dates or specific source of the representations pled (AC ¶ 23-24).
	Desinae Williams	No model, representations, or specific source of the representations pled (AC ¶ 27).
	Keith Epperson	No specific source of the representation pled (AC ¶ 31).
	Heather Hampton	No specific source of the representation pled (AC ¶ 40).
IL	Penny Biegeleisen	No model, purchase date, representations, or specific source of the representations pled (AC ¶ 63).
IN	Becky Brown	No purchase location pled (AC ¶ 69).
MA	Edith Brodeur	No model, purchase date, purchase location, or source of the representations pled (AC ¶ 93-96).
MI	Marcella Reynolds	No model, purchase date, or specific source of the representation pled (AC ¶ 99-100).
	Theresa Holliday	No model or purchase date pled (AC ¶ 103).
	Amy Sapeika	No representation pled (AC ¶ 108).
MN	Joshua Kukowski	No model, purchase date, or specific source of the representation pled (AC ¶ 113).
	Kari Forhan	No model, purchase date, or representation pled (AC ¶ 116-18).
NJ	Karen Sanchez	No specific source of the representation pled (AC ¶ 127).
NY	Danielle Sarratori	No model or specific source of representation pled (AC ¶ 130).
	David Schnitzer	No purchase location or specific source of representations pled (AC ¶ 133-34).
NC	Carla Matthews	No purchase dates or specific source of the representation pled (AC ¶ 139).
PA	Lauren Mahler	No model, purchase date, or specific source of representation pled (AC ¶ 163-64).

2011) (Illinois); *Agrolipetsk, LLC v. Mycogen Seeds*, 2017 WL 7371191, at *3 (S.D. Ind. June 5, 2017) (Indiana); *Mulder v. Kohl's Dep't Stores, Inc.*, 865 F.3d 17, 22-23 (1st Cir. 2017) (Massachusetts); *Home Owners Ins. Co. v. ADT LLC*, 109 F. Supp. 3d 1000, 1004 (E.D. Mich. 2015) (Michigan); *Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 1003 (D. Minn. 2006) (Minnesota); *In re Riddell Concussion Reduction Litig.*, 77 F. Supp. 3d 422, 433-36 (D.N.J. 2015) (New Jersey); *Weaver*, 172 F.R.D. at 101 (New York); *Topshelf Mgmt., Inc. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 729 (M.D.N.C. 2015) (North Carolina); *Laskowski v. Brown Shoe Co.*, 2015 WL 1286164, at *7 (M.D. Pa. Mar. 20, 2015) (Pennsylvania); *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 782 (4th Cir. 2013) (South Carolina); *McLearn v. Wyndham Resort Dev. Corp.*, 2020 WL 1189844, at *4 (M.D. Tenn. Mar. 11, 2020) (Tennessee); *Siemens Med. Sols. USA, Inc. v. Sunrise Med. Tech., Inc.*, 2005 WL 615747, at *5 (N.D. Tex. Mar. 16, 2005) (Texas); *Miller v. Vonage Am., Inc.*, 2015 WL 59361, at *5 (E.D. Wis. Jan. 5, 2015) (Wisconsin).

[12] The model information is essential; the Big Kid has more than one model (AC ¶¶ 272 (identifying Sport and AMP high back models)), and the Amended Complaint acknowledges that Evenflo's representations changed over the years (*see, e.g.*, *id.* ¶ 67 (explaining that Evenflo changed some of its U.S. booster seats to a 40-pound minimum in May 2016)).

SC	Tarnisha Alston	No model or specific source of the representation pled (AC ¶ 168).
TN	Ashley Miller	No model or purchase date pled (AC ¶ 176).
TX	Lindsey Brown	No model, purchase date, or specific source of representations pled (AC ¶ 179-80).
WI	Najah Rose	No model, purchase location, or specific source of representations pled (AC ¶ 198-200).

The state-law claims asserted by these Plaintiffs should be dismissed under Rule 9(b).

VIII. PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUDULENT CONCEALMENT, UNJUST ENRICHMENT, AND NEGLIGENT MISREPRESENTATION.

Plaintiffs' back-of-the-hand attempt to plead claims for fraudulent concealment, unjust enrichment, and negligent misrepresentation on behalf of all 43 plaintiffs under the laws of all 50 states, the District of Colombia, and Puerto Rico fails to satisfy both Fed. Rs. Civ. P. 12(b)(6) and 9(b).[13] Counts I-III constitute the exact boilerplate, impermissible "formulaic recitation of the elements of a cause of action" that the Supreme Court clearly rejected in *Twombly*. 550 U.S. at 555 (affirming dismissal). Plaintiffs make no attempt to "plead[] *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (emphasis added). Moreover, these claims are based on the legally incorrect assertion that the fraudulent concealment, unjust enrichment, and negligent misrepresentation laws of all states are "materially the same." (AC ¶¶ 305, 321, 328).

Unjust Enrichment. Plaintiffs' claims for unjust enrichment are barred under the laws of many states. Some states preclude unjust enrichment claims where the plaintiff received the benefit of the bargain (as Plaintiffs did here). *E.g.*, *Prohias v. Pfizer, Inc.* 485 F. Supp. 2d 1329, 1336 (S.D. Fla. 2007) (dismissing unjust enrichment claims where plaintiffs received the benefit of the bargain in purchase of Lipitor); *Castillo v. Tyson*, 268 A.D.2d 336, 337 (N.Y. App. Div.

[13] *See N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) (applying Rule 9(b) to unjust enrichment and negligent misrepresentation claims sounding in fraud); *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183, 189-90 (1st Cir. 2006) (applying Rule 9(b) to claim for fraudulent concealment) (citation omitted).

2000) (affirming dismissal of putative class plaintiffs' claims that fight promoters were unjustly enriched when boxer was disqualified, because "plaintiffs received what they paid for, namely, 'the right to view whatever event transpired'").

Other states preclude unjust enrichment claims when there is an adequate remedy at law, as Plaintiffs seek here. *Pershouse v. L.L. Bean, Inc.*, 368 F. Supp. 3d 185, 190 (D. Mass. 2019) (dismissing nationwide unjust enrichment claim and holding, under Massachusetts law, "[i]t is the availability of a remedy at law, not the viability of that remedy, that prohibits a claim for unjust enrichment"); *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (2012) (dismissing unjust enrichment claim and holding, under New York law, that unjust enrichment is "available only in unusual situations," is "not a catchall cause of action to be used when others fail," and is not available "where it simply duplicates, or replaces, a conventional contract or tort claim").

Finally, many states require contractual privity to state an unjust enrichment claim. *See, e.g.*, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 952 (N.D. Ohio 2009) (dismissing unjust enrichment claim where plaintiffs purchased Whirlpool washing machines from retailers, not Whirlpool, and thus had not conferred a direct benefit on defendant Whirlpool). All Plaintiffs lack privity with Evenflo.[14]

Negligent Misrepresentation And Fraudulent Concealment. Plaintiffs also fail to plead essential elements of negligent misrepresentation and fraudulent concealment, or their claims are otherwise barred by state laws. For example, some states apply the economic loss doctrine, which prohibits Plaintiffs from recovering economic damages for negligent representation or fraud claims here. *Welk v. Beam Suntory Import Co.*, 124 F. Supp. 3d 1039, 1044 (S.D. Cal. 2015) (dismissing negligent misrepresentation claims because California's

[14] *See* AC ¶¶ 15, 19, 23, 27, 30, 35, 39, 43, 46, 52, 56, 59, 63, 66, 69, 75, 79, 83, 88, 93, 99, 103, 106, 113, 116, 122, 127, 130, 133, 139, 143, 149, 155, 159, 163, 167, 173, 176, 179, 183, 190, 194, 198.

economic loss doctrine prevented recovery absent personal injury); *Burns v. Winnebago Indus., Inc.*, 2013 WL 4437246, at *4 (M.D. Fla. Aug. 16, 2013) (finding that economic loss rule barred claims of fraudulent concealment and negligent misrepresentation in the products liability context). Other states require a "special" or "privity-like" relationship to sustain misrepresentation or fraudulent concealment claims, potentially resulting in dismissal of multiple Plaintiffs. *Anschultz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 113 (2d Cir. 2012) (noting that "New York and California law clearly diverge" regarding privity requirements for negligent misrepresentation claims); *MacDonald v. Thomas M. Cooley Law School*, 724 F.3d 654, 665 (6th Cir. 2013) (dismissing fraudulent concealment claim under Michigan law because plaintiff did not allege making inquiries to defendant that triggered duty to disclose). Finally, some states do not recognize negligent representation as a distinct tort. *Darst v. Ill. Farmers Ins. Co.*, 716 N.E.2d 579, 584 (Ind. Ct. App. 1999) ("Indiana does not recognize the tort of negligent misrepresentation" except in employment context).

IX. RELIEF REQUESTED.

For these reasons, Evenflo respectfully asks the Court to dismiss the Amended Complaint in its entirety pursuant to Fed. Rs. Civ. 12(b)(1), and 12(b)(6).

Dated: November 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence G. Scarborough, hereby certify that this document was electronically filed and served using the Court's CM/ECF system on November 20, 2020.

/s/ Lawrence G. Scarborough
Lawrence G. Scarborough

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE EVENFLO CO., INC. MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:20-md-02938-DJC Hon. Denise J. Casper
This Document Relates To: ALL ACTIONS	

[CORRECTED] PLAINTIFFS' MEMORANDUM IN OPPOSITION TO EVENFLO COMPANY, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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INTRODUCTION

There can be no question that one of the most important decisions the parents of young children must make is which car seat to buy to keep their child safe in the event of an accident. In its brief, Evenflo pays lip service to the importance of this decision and claims that it "seeks to provide parents and caregivers information designed to enable them to make good decisions about what type of car seat works best for their families . . . ." Mem. of Law in Support of Evenflo Company, Inc.'s Mot. to Dismiss the Consol. Am. Class Action Compl. ("Def. Br.") at 1. However, as the Consolidated Amended Complaint ("CAC") alleges in detail, the false and misleading information Evenflo provided was designed to sell more Evenflo booster seats and not to enable parents to decide which booster seat would actually best keep their children safe.

Although Evenflo has known since 1992 that the National Highway Traffic Safety Administration ("NHTSA") believes that children weighing less than 40 pounds are too small to safely use a booster seat, Evenflo insisted on a minimum weight of 30 pounds for its booster seats because its research showed it would sell more seats using that figure. Then, when Evenflo began to lose ground to its top competitor, Evenflo decided to create a false perception of its seats being safer by fraudulently claiming that its seats underwent "rigorous" side impact testing.

Evenflo now cavalierly argues that these key marketing claims are "two isolated statements in the abstract." Def. Br at 1. The statements were not abstract to the parents. They were key to parents' decisions on which car or booster seat to buy. Despite Evenflo's claim that Plaintiffs lack standing and have suffered no economic injury, each Plaintiff has alleged that if they had known that the advertising campaign including those safety claims was false, they would not have purchased the seat or would have paid less for it. Based on Evenflo's marketing, the parents thought they were paying to keep their children safe if they were in a side-impact collision or if they weighed 30

pounds, but that is not what they ultimately got. Plaintiffs' allegations are precisely the type that courts have routinely concluded are sufficient for standing and to allege injury.

Evenflo's motion to dismiss Plaintiffs' state law consumer protection act claims depends almost entirely on its claim that its statements were true—an argument that cannot survive even a cursory review of the CAC, which details the deceit underlying the marketing campaign. Alternatively, Evenflo attempts to hide behind NHTSA, claiming that its regulation of booster seats should exempt Evenflo from state law claims. Since NHTSA expressly forbids misleading statements about products, agrees that booster seats are not safe for children under 40 pounds, and has made no effort at all to regulate side-impact testing of booster seats, NHTSA does not protect Evenflo from liability for violation of state consumer protection statutes.

Courts have also repeatedly recognized that false advertising by manufacturers allows consumers to sue for breach of an implied warranty of merchantability, as they have here, even when they have not purchased the product directly from the manufacturer. And when the sole purpose of the booster seat is to keep children safe—especially when marketed as safe for children as small as 30 pounds and in side impact collisions—any suggestion that the seat was "fit" for its purpose is absurd. Evenflo's motion to dismiss should be denied.

STATEMENT OF FACTS

Beginning in the late 1970s, as the public became increasingly aware of the high rates of morbidity and mortality for children riding in vehicles, states began passing laws requiring the use of child restraint devices. By the early 1980s, states had started requiring crash testing for children's car seats. Then, in the 1990s, NHTSA, as well as professional associations like the American Academy of Pediatrics ("AAP"), developed child passenger safety standards and guidelines, including, among other practices, emphasizing the need for device-based restraints tailored to the age and size of child passengers. CAC ¶¶ 208-11.

Generally, there are three device-based restraints that a child progresses through as he or she ages and grows. Infants and toddlers should ride in a rear-facing, harnessed car safety seat with most convertible seats permitting a child to ride rear-facing for two years or more. When a child outgrows the rear-facing weight or height limit for their seat, they should use a forward-facing seat with a harness for as long as possible and up to the highest weight or height allowed by the manufacturer. Children whose weight or height exceed the forward-facing car seat's limit should then use a belt-positioning booster seat until a vehicle lap and shoulder seat belt can fit the child properly, usually when they have reached 4 feet 9 inches in height and are between 8 and 12 years old. CAC ¶¶ 215, 217.

As early as 1992, Evenflo was aware that booster seats were not safe for children under 40 pounds and should not be used by them. A memo was circulated to 24 Evenflo employees attaching a proposed NHTSA flyer that stated: "A toddler over one year of age, weighing 20 to 40 pounds, is not big enough for a booster seat in the car. He needs the extra protection for his upper body and head that a harness with hip and shoulder straps can give." In 2000, first Massachusetts and then California passed the first booster seat laws, which required booster seats for children over 40 pounds. At that time, the weight limit of most front-facing car seats was 40 pounds, although today, almost all front-facing, harnessed seats can accommodate children up to 65 pounds with some fitting children weighing up to 90 pounds. CAC ¶¶ 212, 214.

Since 2011, the AAP has recommended that children stay in harnessed seats as long as possible. Children who are too small for a booster seat will not get adequate protection in a crash because the seat belt will not be positioned across the strongest parts of the child's body and young children often wriggle out of position. CAC ¶¶ 218.

Evenflo introduced the Big Kid booster seat in the early 2000s to enter the developing booster seat category, which was expanding as a result of states requiring school-age children to use

booster seats. Evenflo's competitor Graco had recently released a popular booster seat model and Evenflo developed its booster seat for the purpose of "regaining control in the market" from Graco. To achieve this goal, Evenflo advertised the Big Kid as safe for babies as young as one year old with a minimum weight of 30 pounds. Evenflo sought to have a product that would sell briskly at large retailers, such as Walmart, Target, Costco, Babies R Us, and Amazon. Within a few years, Evenflo considered the Big Kid "the reliable workhorse in the Evenflo platform stable." CAC ¶¶ 224-25.

Nonetheless, by 2008, Graco was still outselling Evenflo. To compete, Evenflo added "side wings" on either side of the Big Kid headrest. Evenflo believed that Big Kid's relative "on-shelf perception" was diminished because Graco's seat looked like it had more side support. So, Evenflo made the aesthetic side-wing change to give Big Kid an "increased perceived side protection" among consumers. Evenflo's own internal side-impact testing showed that there was no difference in safety between its original model and the new booster seat with side-wings. CAC ¶¶ 226-27.

To further increase the *perceived* safety of the Big Kid, Evenflo began publicizing that it performed rigorous side-impact testing. However, the federal government had no standard for car seat side-impact testing, so Evenflo had simply developed its own protocol, which it falsely claimed was analogous to government tests and simulated government side-impact tests conducted for automobiles. In fact, Evenflo's testing did not involve any side impact at all: the test involved placing the booster seat on a bench, moving the bench at 20 miles per hour and then suddenly decelerating the bench. In contrast, NHTSA's side-impact test for cars involved a 3,015 pound moving barrier crashing at 38.5 miles per hour into a standing vehicle. CAC ¶¶ 230-32.

Despite the lack of any resemblance between the NHTSA test and Evenflo's booster seat test, Evenflo claimed on its website: "we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard." It announced that it "continually enhance[s] [their] products with new technologies that distribute crash forces away

from your child during a crash." Evenflo identified side-impact testing as one of those technologies and emphasized that the testing "[m]eets or exceeds all applicable federal safety standards and Evenflo's Side [sic] impact standards." According to its website, "Evenflo Side impact testing simulates a crash in which the vehicle carrying the car seat is struck on the side by another vehicle." But since there was no impact, the testing did not in fact simulate a crash. CAC ¶¶ 233.

In truth, Evenflo's side-impact "test" was essentially impossible to fail. Following each test, an Evenflo employee would check either "yes" or "no" on whether the test showed "dummy retention." "Dummy retention" meant only that the dummy did not fall out of the booster seat and end up on the floor of the vehicle. In other words, there were only two ways that a booster seat could fail Evenflo's "rigorous" test: (1) if a the child-sized dummy slipped out of the seat belt entirely and ended up on the floor, or (2) if the booster seat broke into pieces. CAC ¶¶ 235-238.

One Evenflo technician admitted that in 13 years, he had not once had a booster seat "fail" the side-impact test. In fact, photos in the CAC of booster seats that passed the test show the seat belt slipping off the dummy's shoulders and tightening around the dummy's abdomen and ribs. That kind of violent movement at high speed can cause serious damage to a child's internal organs, head, neck, and spine, including causing paralysis or death. Evenflo knew that fact: a safety engineer admitted under oath that when real children move the way the dummies did in the tests, they are at risk for injurious head contact. CAC ¶¶ 239-41.

Despite Evenflo's knowledge that its side-impact testing was not showing the safety of its booster seat, but rather was demonstrating how severely a child could be hurt during a side-impact collision while riding in a Big Kid seat, Evenflo aggressively marketed its Big Kid booster seats as "side impact tested" to both businesses and consumers. Evenflo sent marketing materials to Walmart, Target, and Babies R Us that emphasized in large bold letters that its new Big Kid booster seat was "side impact tested." Other marketing materials stated: "Knowing that one in four

automobile accidents are side impact collisions, we believe it's important to go beyond the current government standards when designing the next generation of Evenflo car seats, including the Big Kid L.X." CAC ¶¶ 246.

Evenflo marketed the side impact testing just as vigorously to consumers, emphasizing the testing on Evenflo's own website and on retailer websites like Amazon and Walmart and putting a "side impact tested" label on the Big Kid's packaging and stitching it into the seats. CAC ¶¶ 247,

While it was duping consumers regarding its side-impact testing, it continued to promote its Big Kid booster seats as being safe for children weighing as little as 30 pounds. Even though Evenflo had known since 1992 from NHTSA and since the early 2000s from the AAP that booster seats should not be used with children under 40 pounds, Evenflo would not change its minimum weight of 30 pounds for marketing in the U.S. Evenflo only changed some of its seats to a 40 pound minimum weight limit in order to sell those seats in Canada, which does not allow booster seats for children under 40 pounds. Evenflo stated on booster seat materials for the Canadian market that children weighing less than 40 pounds are at risk of serious injury or death if placed in the Big Kid booster seats, but it kept that information from U.S. consumers. CAC ¶¶ 253.

Evenflo clung to the 30-pound minimum in order to sell more booster seats. Evenflo knows that children complain to their parents about not wanting to be in harnessed seats and parents prefer booster seats as well. Evenflo disregarded safety in order to increase sales and profits. Long after it knew better, Evenflo was saying that its seat was safe for children as young as one year old so long as they weighed 30 pounds. Although Evenflo's engineers admitted that one- and two-year-old children should not be in booster seats, Evenflo waited until 2007 to increase the minimum age to three, and then Evenflo made no effort to notify past purchasers or issue corrective advertising. Evenflo was even more resistant to changing the weight minimum. Despite both the AAP and NHTSA changing their guidelines in 2011 to recommend that children remain in forward-facing

harnessed seats and that switching to booster seats at 40 pounds was no longer recommended, Evenflo refused to alter its 30-pound minimum. In 2012, Evenflo's top booster seat engineer made a presentation to his colleagues in which he stated that three- and four-year-old children are at an "increased risk of injury" in booster seats and expressed concern that keeping the seat at a 30-pound limit "encourages parents to transition them earlier because they can[.]" He advocated discouraging early transitions to booster seats by increasing the minimum to 40 pounds and increasing the age to four years. He also sent his colleagues a 2010 NHTSA report on booster seats that noted that early graduation to boosters may "present safety risks" and that children should remain in harnessed seats until they are four or weigh 40 pounds. CAC ¶¶ 258-63, 264, 266-67,

Nonetheless, Evenflo's senior marketing director "vetoed" the weight recommendation and only increased the age limit to four. But even then, Evenflo continued to sell an older model of its booster seat with manuals stating that the seat was safe for three-year-olds. Later in 2012, when another engineer again urged increasing the weight rating, the marketing director, who had been promoted to Vice President of Marketing and Product Development, again refused. Since then, despite two decades of knowledge otherwise, Evenflo has unequivocally maintained in advertising that its booster seats are safe for children weighing as little as 30 pounds and has continued to deceive the public into believing its side-impact testing was ensuring Evenflo's booster seats would be safe in side-impact collisions. CAC ¶¶ 268,

Not until ProPublica did an expose of Evenflo, including publicly revealing the actual results of its "side impact testing," and not until after Congress announced an investigation did Evenflo finally increase its minimum to 40 pounds. And even now, in its motion to dismiss, it characterizes its representations to the public about the permissible minimum weight limit and its highly-promoted "side impact testing" as just "two isolated statements" taken out of context. CAC ¶¶ 253, 255; Def. Br. at 1.

LEGAL STANDARD

Under Rule 12(b)(6), the Court treats all well-pleaded facts in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011). A complaint will survive dismissal if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. PLAINTIFFS HAVE STANDING

A. Plaintiffs allege a plausible economic injury.

Evenflo primarily argues that "Plaintiffs plead no facts establishing an economic injury that confers Article III standing." Def. Br at 9. To the contrary, all of the named Plaintiffs allege that they "would not have purchased the seat" or "would have paid less for it" if they had known that the seat was not safe for children weighing between 30 and 40 pounds and that Evenflo's statements about side-impact testing were false and misleading. Those allegations establish an economic injury—money out of the named plaintiffs' pockets—sufficient to establish standing under First Circuit cases.

In *Gustavsen v. Alcon Laboratories, Inc.*, 903 F.3d 1 (1st Cir. 2018), the court held that the plaintiffs had Article III standing for their claim that the defendants' design of eye drop dispensers to cause them to emit larger drops was "unfair" under the laws of twenty-seven jurisdictions. The court held that an alleged "out-of-pocket loss of $500 to $1000 per year" resulting from the deceptive large drops satisfied the "injury in fact" requirement, because (1) "plaintiffs have a legally protected interest in their own money" and because (2) that loss "constitutes undisputed harm to the plaintiff specifically." *Id.* at 7. The Court rejected the defendants' argument that the plaintiffs' "theory of injury" was "speculative" when the complaint alleged that scientific studies and

admissions by one of the defendants established that smaller drops would decrease the consumer's cost. *Id.*

Here, the CAC includes numerous citations to industry materials and Evenflo admissions establishing the falsity of Evenflo's statement that its booster seats were safe for children weighing between 30 and 40 pounds. For plaintiffs with children weighing under 40 pounds, the seats were essentially worthless since their children could not ride safely in them. Likewise, the CAC includes photos of the side-impact testing, studies, and expert opinions establishing that plaintiffs purchasing Evenflo booster seats to keep their children safe, including in side-impact collisions, were not getting what they paid for.

Although Evenflo argues that "Plaintiffs do not plausibly plead benefit-of-the-bargain damages, because the Big Kid worked as expected for them," Def. Br at 9, Evenflo cynically disregards that plaintiffs were not getting what Evenflo advertised and what they thought they were spending money to purchase. *Gustavsen* rejected an argument virtually identical to Evenflo's in which the defendant asserted the plaintiffs "received the 'benefit of the bargain'" because plaintiffs bought the eye-drops and used them. *Id.* In dismissing that defense, the court used an analogy pointing out that the fact plaintiffs had fully used the product would not preclude them from seeking a partial refund if they could show that the price of the eye drops was inflated due to price fixing. *Id.* The court conceived of no reason that plaintiffs who could show they had to pay more than they should have for other reasons would not equally be able to sue despite having used and benefited from the product. *Id.* at 8–9.

Because of Evenflo's deceit, Plaintiffs did not get the benefit of the bargain since they did not get what they thought they were purchasing: a booster seat that was safe for children between 30 and 40 pounds and that had been subjected to rigorous side-impact testing, meaning that the seat would protect their children in a side-impact collision. This is a concrete injury that provides

standing. *See, e.g.*, *ITyX Sols. AG v. Kodak Alaris, Inc.*, 952 F.3d 1, 10 (1st Cir. 2020) (standing satisfied because "[m]oney damages redress the economic injury ITyX alleged").[1]

The cases Evenflo relies upon are beside the point. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982, 984 (1st Cir. 2014), was a product liability case not involving false advertising. The Court found no standing when the alleged injury was a risk of future injury, but the product was not defective and had been governmentally approved. *Kerin* provides no guidance when the injury is, as here, that Plaintiffs would not have bought the product or would have paid less for it if they had known that the defendant had falsely promised them that a product was safe for a particular use and that it had been tested for safety. Given these allegations, Plaintiffs here, in contrast to the *Kerin* plaintiff, had no need to prove the risk of injury; the economic injury alone is enough. *See Gustavsen*, 903 F.3d at 5 (finding Article III standing based on economic injury when "[a]lthough plaintiffs allege an increased risk of these consequences, they do not allege that any named plaintiff did, in fact, experience any such side effect").

The case upon which Evenflo primarily relies expressly acknowledges the economic injury that Plaintiffs have alleged. In *In re Fruit Juice Prods. Mktg. & Sales Pracs. Litig.*, 831 F. Supp. 2d 507 (D. Mass. 2011), the plaintiffs had purchased and consumed orange juice that contained an unspecified amount of lead that the plaintiffs could not allege was harmful—the orange juice "had no diminished value due to the presence of the lead." *Id.* at 511. The court, in holding that the plaintiff had received the benefit of the bargain and had no standing, emphasized that plaintiffs had

[1] *See also In re Nexium Antitrust Litig.*, 777 F.3d 9, 32 (1st Cir. 2015) (plaintiffs "were overcharged for at least one Nexium transaction during the class period, establishing [Article III] standing"); *Katz v. Pershing*, LLC, 672 F.3d 64, 77 (1st Cir. 2012) (Article III's "causation requirement is usually satisfied when a consumer purchases a falsely advertised product because the defendant's misrepresentations would have artificially inflated the price paid by the consumer"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 190 (1st Cir. 2009) ("overpayment" stemming from violation of consumer protection statutes established Article III standing); *Geis v. Nestle Waters N. Am., Inc.*, 321 F. Supp. 3d 230, 242 (D. Mass. 2018) ("Geis has claimed that she lost money as a result of the allegedly deceptive practices that arose from the Massachusetts call center. This is enough to allege an injury in fact for Article III standing purposes.").

"*failed to allege that the fruit juice products had any diminished value because of the presence of lead or that they would have purchased different or cheaper fruit juice products had they known about the lead*. Plaintiffs' allegations only support the contention that the levels of lead in Defendants' products were unsatisfactory to them. This allegation is simply insufficient to support a claim for injury in fact." *Id.* at 513 (emphasis added).

Unlike *Fruit Juice*, Plaintiffs do not simply allege the Booster Seats were unsatisfactory to them, but rather they allege that children weighing 30 to 40 pounds could not safely ride in the seats and the trumpeted "side-impact testing" not only did not test for safety but demonstrated that the seats did not protect a child in a side-impact collision. In other words, Evenflo lied about the most important aspect of the seat—its ability to protect children—and that the seats do not perform that basic function. Plaintiffs then allege the injury in fact necessary for standing: if they had known the truth, they would not have bought the seat or would have paid less for it. This is sufficient to allege an economic injury for purposes of Article III standing. *See Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89, 97–98 (D.N.H. 2020) (relying on *Gustavsen* to hold that plaintiff had sufficiently alleged economic injury when he alleged that he would not have purchased a gun or would not have paid as much for it if he had known that it might fire when dropped).

Evenflo's cases from outside the First Circuit, like *Fruit Juice*, all lack the allegations critical to establish economic injury that are present in this case. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 281 (3d Cir. 2018) (holding that plaintiff "fails to allege that the purchase provided her with an economic benefit worth less than the economic benefit for which she bargained"); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009) (holding that plaintiffs could not bring products liability case for a non-defective crib that happened to come from product line at risk for a defect); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319–20 (5th Cir. 2002) (holding that "[b]y plaintiffs' own admission, Rivera paid for an effective pain killer, and she

received just that—the benefit of her bargain."); *Hubert v. Gen. Nutrition Corp.*, 2017 WL 3971912, at *8 (W.D. Pa. Sept. 8, 2017) ("Plaintiffs do not allege that the supplements at issue … failed to work for their intended purpose or did not deliver the advertised benefits.").

Evenflo's repeated complaint that Plaintiffs' *factual allegations* that if Evenflo had not deceived them, they would not have purchased the seat or would have paid less for it (*see, e.g.*, ¶ 308) are "unsupported by any factual allegations," Def. Br at 11, is, ironically, unsupported by authority requiring anything more. Evenflo then makes the irrelevant argument that "Plaintiffs do not allege that any alternative belt-positioning booster seat was available for a cheaper price than the Big Kid, which confirms they suffered no out-of-pocket injury." Def. Br at 11. Evenflo cites only to a statement by a concurring Justice in *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005), that "there was no cost differential for consumers between the 'healthy' and 'regular' versions" of cigarettes so that the "net change in consumers' economic position as a result of those misrepresentations was zero." *Id.* at 59. Whether "light" and regular forms of cigarettes sell for the same price is irrelevant here, because Evenflo cannot establish at the pleading stage (or any time, for that matter) that *non-fraudulently-advertised* seats safe for children at the advertised weight and in collisions are somehow equal in value to booster seats falsely marketed both as safe for children under 40 pounds and as having been tested and found safe in side-impact collisions.[2]

Evenflo's additional argument that there cannot be any relationship between the weight limit and the price since Evenflo did not itself change the price of its Booster Seat when—after ProPublica exposed Evenflo's lies—it raised the weight minimum to 40 pounds needs no response.

[2] Further, the statement by the concurring Justice in *Price* is incorrect. *See Aspinall v. Philip Morris USA Inc.*, 2015 WL 9999126, at *4 (Mass. Super. Ct. Aug. 11, 2015) ("Plaintiffs must prove the market value of a hypothetical product because during the class period there did not exist a product known as Marlboro Lights with full disclosure that the cigarettes were no safer than regular cigarettes. There is no market price for a hypothetical product. The fact that Marlboro Reds or regulars sold for the same price as Lights is not dispositive.").

CAC ¶¶ 253-54. Lastly, Evenflo's fraud-on-the-market argument (Def. Br at 11), which relies solely on two cases addressing class certification,[3] is equally inexplicable since all Plaintiffs expressly allege they would not have bought their Evenflo seats but for Evenflo's fraud, *not* that a fraud on the market caused their losses. *See, e.g.*, CAC ¶¶ 308, 323. Whether a class can be certified in this matter is an issue for another day. *See Gustavsen*, 903 F.3d at 7 ("Because this appeal comes to us before any class is certified, we evaluate only whether the named plaintiffs have standing to pursue their own claims.").

Plaintiffs' allegations present a mainstream demonstration of economic injury sufficient to provide Article III standing. Thus, as in *Gustavsen*, Plaintiffs need not also establish a risk of injury to have standing. However, Plaintiffs nonetheless also adequately allege that should Plaintiffs' children continue to travel in Evenflo's Booster Seats, they would face a concrete and substantial risk of physical injury in the event of an accident. There is no merit to Evenflo's brazen assertion, without citation to *anything*, that "the literature cited in the Amended Complaint demonstrates the Big Kid makes children safer," Def. Br at 13, unless Evenflo means that they are safer than having no car seat at all, but that is unknown and it is outside the CAC.

B. Plaintiffs' state-law claims sufficiently allege economic injury.

Although it has nothing to do with Article III standing, Evenflo repeats its flawed economic injury analysis in arguing that Plaintiffs have not adequately alleged damages under state law. This argument appears in five single-spaced pages that are a blatant maneuver to evade this Court's 40-page limitation. *See* Def. Br at 13–18. Respectfully, Plaintiffs would suggest that an appropriate sanction would be for the Court not to consider the single-spaced portion of Evenflo's brief. In

[3] *See Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) (at class certification stage, plaintiffs could not rely on "fraud on the market" theory to "establish a price effect in place of a demonstration of an ascertainable loss"); *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 380 (Colo. App. 2009) (reversing certification of class and holding that "fraud on the market" theory could not be used as "a classwide theory of presumed reliance").

order to not repeat Evenflo's violation of the Court's order, Plaintiffs have limited their response to citing one case for each state that establishes Plaintiffs' allegations are sufficient to state a damages claim. The cases cited by Evenflo either do not involve a motion to dismiss determination or, as with Evenflo's standing cases, involve distinguishable fact scenarios and allegations. In the event that the Court would find it helpful, Plaintiffs would welcome an opportunity to supplement this response.

Alabama: *In re Takata Airbag Prod. Liab. Litig.*, 193 F. Supp. 3d 1324, 1345 (S.D. Fla. 2016) (rejecting defendant's argument that under ADTPA, Plaintiffs failed to state claim for fraudulently concealing defect in safety bags).

Alaska: *Borgen v. A & M Motors, Inc.*, 273 P.3d 575, 585-92 (Alaska 2012) (affirming verdict for plaintiff, who showed the model year of his motor home was misrepresented and proved the "difference in value between a 2002 and 2003" model).

Colorado: *O'Connor v. BMW of N. Am., LLC*, 2020 WL 2309617, at *13 (D. Colo. Jan. 7, 2020) ("Plaintiffs have plausibly pleaded that BMW's authorized dealers failed to disclose the N63 engine defect, which was material information about the vehicle known to BMW at the time of each sale, and withholding information of the defect was intended to induce Plaintiffs to purchase their vehicles."), *adopted*, 2020 WL 1303285 (D. Colo. Mar. 19, 2020).

Florida: *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 986–87 (11th Cir. 2016) ("In *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988, 991 (Fla. Dist. Ct. App. 2004), a Florida appellate court held that a plaintiff adequately alleged actual damages under FDUTPA when she purchased a vehicle with defective seatbelts. Chrysler argued that the plaintiff did not suffer any out-of-pocket damages because the seatbelt never malfunctioned during an accident. *Id.* at 989. The court, however, recognized that this was the wrong metric. *Id.* at 990–91. Because FDUTPA allows for damages based on diminution of market value, the court permitted the plaintiff to proceed on the theory that

she did not get what she bargained for…. The similar question here is amenable to classwide resolution.").

Georgia: *Edel v. Southtowne Motors of Newnan II, Inc.*, 338 Ga. App. 376, 789 S.E.2d 224, 376-77 (2016) (reversing summary judgment as to a claim for deceptive sale of a vehicle, based on evidence that plaintiffs "would have never purchased the vehicle had they known it was a manufacturer buyback (that had previously been in an accident), and that the vehicle's market value was substantially impaired.").

Illinois: *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505, 675 N.E.2d 584, 588 (1996) (holding that the "plaintiffs adequately pled a consumer fraud violation based on a material omission by Suzuki" and that "they would not have purchased the vehicles if Suzuki had disclosed the Samurai's safety risk").

Indiana: *In re Actiq Sales & Mktg. Practices Litig.*, 2012 WL 2135560, at *5 (E.D. Pa. June 13, 2012) (plaintiffs "submitted ample evidence on the record such that a genuine issue of material fact remained [under the IDCSA] about whether Plaintiffs overpaid for Actiq, a drug intended solely for late-stage cancer patients, and prescribed to beneficiaries of Plaintiff who were not suffering from the extreme medical condition for which Actiq was intended").

Iowa: Iowa Code § 714H.2(1) ("'Actual damages' means all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount.").

Maine: *Cohan v. Pella Corp.*, 2015 WL 6465639, at *7 (D.S.C. Oct. 26, 2015) ("Since plaintiffs have pleaded facts similar to those alleged in [*Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526 (D. Md. 2011)]—that Pella was aware of a defect, that Pella concealed the defect from consumers, and that plaintiffs would have taken different action had they known about the defect—the court denies Pella's motion to dismiss plaintiffs' MUTPA claim….").

Massachusetts: *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 398-99, 813 N.E.2d 476, 490 (2004) (where "plaintiffs allege that, as a result of the defendants' deceptive advertising, all consumers of Marlboro Lights in Massachusetts paid more for the cigarettes than they would have otherwise paid," court agreed with plaintiffs that "the correct model for measuring actual damages is the difference between the price paid by the consumers and the true market value of the 'misrepresent[ed]' cigarettes they actually received").

Minnesota: *Laughlin v. Target Corp.*, 2012 WL 3065551, at *3–4 (D. Minn. July 27, 2012) ("[Plaintiff] is not asserting that the TrimStep® shoes have merely a propensity to fail in the future—she is asserting that the product already fails to perform as advertised.").

Missouri: *In re Bisphenol–A (BPA) Polycarbonate Prods. Liab. Litig.*, 687 F. Supp. 2d 897, 913 (W.D. Mo. 2009) (plaintiffs who "purchased a product they allege they would not have purchased had they known the true facts" and later learned "the true facts [and] are unwilling to risk allowing their children to use the product … incurred damages").

New Jersey: *Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 336 (D.N.J. 2014) ("Plaintiffs 'received something less than, and different from, what they reasonably expected in view of defendant's presentations. That is all that is required to establish "ascertainable loss" ….'") (citation omitted).

New York: *Fishon v. Peloton Interactive, Inc.*, 2020 WL 6564755, at *10 (S.D.N.Y. Nov. 9, 2020) ("'An actual injury claim under [s]ection 349 typically requires a plaintiff to allege that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase.'" (collecting cases; citation omitted)).

North Carolina: *Jones v. BMW of N. Am., LLC*, 2020 WL 5752808, at *8 (M.D.N.C. Sept. 25, 2020) (plaintiff stated claim under UDTPA where the "complaint demonstrates that had [plaintiff] known of the engine defect, he would not have purchased the subject vehicle, illustrating the fruits obtained from the misrepresentation").

Oklahoma: *McAlister v. Ford Motor Co.*, 2015 WL 4775382, at *4 (W.D. Okla. Aug. 13, 2015) (plaintiff stated valid claim under Consumer Protection Act based on allegation that "Defendant engaged in deceptive trade practices by 'concealing from consumers a known defect'").

Pennsylvania: *Solarz v. DaimlerChrysler Corp.*, 2002 WL 452218, at *13 (Pa. Com. Pl. Mar. 13, 2002) ("the plaintiffs allege[d] ascertainable loss to support a claim under [the UTPCPL]" where they alleged a "difference in value between minivans with the park-brake interlock device and those without it"); *Grant v. Bridgestone Firestone Inc.*, 57 Pa. D. & C 4th 72, 2002 WL 372941 at *2 (Com. Pl. 2002) ("[w]henever a consumer has received something other than what he bargained for, he has suffered a loss of money or property") (internal quotation marks omitted).[4]

South Carolina: *Turkewitz v. Philips Oral Healthcare, Inc.*, 2020 WL 833021, at *3 (D.S.C. Feb. 20, 2020) (plaintiff's claim is "premised on how the Toothbrush is marketed and the alleged injuries arising from Philips's representations about the Toothbrush, as opposed to Turkewitz's physical injuries," so that plaintiff "need not prove that the Toothbrush caused his physical injuries in his SCUTPA claim; instead, he will need to prove that Philips' alleged unfair trade practices caused him to suffer the loss of money and/or property").

Tennessee: *In re Gen. Motors LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 292 (S.D.N.Y. 2018) ("Plaintiffs' overpayment claims easily fit within the scope of damages cognizable under the Tennessee CPA").

Texas: *Nissan Motor Co. v. Fry*, 27 S.W.3d 573, 583 (Tex. App. 2000) (class properly certified where plaintiffs claimed "the seat belt system and its accompanying warnings are defective because they do

[4] Evenflo's conclusory argument with respect to plaintiff Hailey Lechner that her "claim also fails because she admits that her insurance company replaced her Big Kid with a different booster seat at no cost to her," Def. Br.Def. Br at 17, ignores that she overpaid for the Evenflo seat and also the "collateral source rule provides that payments from a third-party to a victim will not lower the damages that the victim may recover." *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 442 (3d Cir. 2000).

not perform the ordinary function of a seat belt system—to provide adequate protection in a traffic accident").

West Virginia: *In re W. Virginia Rezulin Litig.*, 585 S.E.2d 52, 75 (W. Va. 2003) ("[F]or a consumer to make out a prima facie case to recover damages for 'any ascertainable loss' under W.Va.Code, 46A–6–106, the consumer is not required to allege a specific amount of actual damages. If the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the 'ascertainable loss' requirement is satisfied.").

C. Plaintiffs may pursue claims for injunctive relief.

Evenflo argues that Plaintiffs cannot seek injunctive relief because they do not allege that they are likely to purchase another Big Kid, and no future harm is likely since Plaintiffs already know about the alleged safety risks. As recognized in *Winfield v. Citibank, N.A.*, 842 F. Supp. 2d 560, 574-75 (S.D.N.Y. 2012), this argument is premature. Relying on the Supreme Court's decisions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999),[5] the district court held that it is "appropriate to defer standing objections until after class certification where certification issues are 'logically antecedent to Article III concerns.'" 842 F. Supp. 2d at 574. Of course, the "named plaintiffs in a class action must have standing to sue the defendant on at least some claims," but "whether they may bring each claim asserted on behalf of the proposed class is properly determined after class certification is decided." *Id.*

If the proposed class "includes plaintiffs who . . . have standing to bring claims for injunctive relief," the "only relevant question will be whether the injuries of the named plaintiffs are sufficiently similar to those of the purported Class." *Id.* Otherwise, as another court put it, no named plaintiff in a consumer class action based on fraudulent representations "would ever be able to pursue

[5] None of Evenflo's cases addressed *Amchem* or *Ortiz*. *See* Def. Br. at 18-19.

injunctive relief," because at some point each "will discover that the product falls short of what was promised." *Block v. Lifeway Foods, Inc.*, No. 17 C 1717, 2017 WL 3895565, at *7 (N.D. Ill. Sept. 6, 2017) ("declin[ing] to rule on whether [the plaintiff] has standing to pursue injunctive relief until the parties have briefed the issue of class certification" and denying motion to dismiss claim under Illinois Deceptive Business Practices Act). So, too, here.

In any event, instead of deferring the determination, other courts have held that "a previously deceived consumer may have standing to seek an injunction." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018), *cert. denied,* 139 S. Ct. 640 (2018). In *Davidson*, 889 F.3d at 969-70, for example, the Ninth Circuit explained that "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." Consequently, a plaintiff faces a "similar injury of being unable to rely on [a defendant']s representations of its product in deciding whether or not she should purchase the product in the future." *Id.* at 971-72. Thus, a plaintiff's "allegation that she has no way of determining whether the representation 'flushable' is in fact true when she regularly visits stores where Defendants' 'flushable' wipes are sold constitutes a threatened injury" sufficient to establish Article III standing to assert a claim for injunctive relief. *Id.* at 972.[6] Without an injunction requiring a label warning, Plaintiffs face a similar threat of future economic injury here.

D. NHTSA is not the proper body to address injunctive relief to remedy violation of consumer protection laws.

As the First Circuit has stated, "primary jurisdiction should be invoked sparingly," *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23, 34 (1st Cir. 2003), and only

[6] *See also Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1328 (D. Minn. 2018) (holding that standing for injunctive relief under the MDTPA existed based on allegations stating that plaintiffs remain in the market for the product and cannot know if defendants have ceased making misrepresentations); *Amin v. Mercedes-Benz USA, LLC*, 301 F. Supp. 3d 1277, 1295 (N.D. Ga. 2018) (denying motion to dismiss plaintiffs' "GUDTPA injunctive relief claim" with respect to plaintiffs' allegations of defendant's "ongoing denial" of defect). *Compare* Def. Br. at 19 n.7.

"occasionally requires a court to stay its hand." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.,* 633 F.3d 20 (1st Cir. 2011); *see also Palmer Foundry, Inc. v. Delta-HA, Inc.*, 319 F. Supp. 2d 110, 112 (D. Mass. 2004) (it is "a rare instance in which the doctrine of primary jurisdiction requires reference").

Evenflo argues that this Court should defer to NHTSA regarding whether to enter an injunction because it purportedly set a "30-pound weight minimum for belt-positioning booster seats" and is "currently finalizing a side-impact testing rule." Def. Br at 19. Of course, the CAC alleges that NHTSA has since updated its weight guidelines. CAC ¶ 265. But, in any event, FMVSS 213, which regulates car seats, including booster seats, "is intended to establish only minimum safety standards for child restraint systems." *Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1166 (Ind. Ct. App. 2000). As a result, tort remedies setting a higher standard are meant for courts to adjudicate. *Id.* (holding that tort remedy attempting "to impose a greater safety standard through the prohibition of booster seats such as the Grand Explorer for children under forty pounds is not pre-empted by the Safety Act"). *See also Welsh v. Century Prod., Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) (holding that tort remedies are "neither expressly nor impliedly preempted" by FMVSS 213); 49 U.S.C. § 30103 ("Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.").

Moreover, because Evenflo acknowledges that NHTSA's new proposed side-impact testing rule "imposes no obligations on booster seats," Def. Br at 7, 19, its potential side-impact testing rule can have no bearing on injunctive relief relating to Evenflo's Big Kid testing. Indeed, courts have rejected the argument that "FMVSS 213 is relevant because it shows an absence of regulation for side impact collisions"—instead, "fail[ing] to see how the *lack of a federal regulation* is probative of whether the car seat was defective." *Uxa v. Marconi*, 128 S.W.3d 121, 130-31 (Mo. Ct. App. 2003) (emphasis added).

In these circumstance, "because the district court's injunction does no more than impose additional constraints," the First Circuit has held it "cannot undermine the central thrust of the [agency] regime." *U.S. Pub. Interest Research Grp.*, 339 F.3d at 34 (affirming "refusal . . . to make a primary jurisdiction reference"). Having decided *not* to issue a regulation on booster seat side-impact testing, such testing cannot be "at the heart" of the task assigned by Congress to NHTSA. *Pejepscot Indus. Park, Inc.*, 215 F.3d at 205. Simply put, an agency determination is not likely to materially aid the Court when NHTSA has decided not to address side-impact testing and its weight requirements are mere safety minimums. Moreover, "federal courts must frequently adjudicate disputes involving complicated technical claims, particularly in the field of products liability." *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 593 (E.D. Mich. 2017) (holding that "invocation of the primary jurisdiction doctrine would be inappropriate"). And it is the courts that are "well-equipped to address issues of consumer expectation and deceptive or misleading statements like those alleged here." *Ferrari v. Vitamin Shoppe, Inc.*, No. CV 17-10475-GAO, 2018 WL 1586028, at *2 (D. Mass. Mar. 30, 2018) (declining to dismiss claim under primary jurisdiction doctrine). In sum, the primary jurisdiction doctrine is inapplicable here.[7]

II. PLAINTIFFS' ADEQUATELY PLEAD STATE-LAW CLAIMS

Evenflo challenges the sufficiency of the allegations to support Plaintiffs' claims under their states' consumer protection acts ("CPAs") and for breach of implied warranty.

A. Plaintiffs adequately plead all CPA claims.

Even though the CAC includes specific allegations that Evenflo has known for 28 years that NHTSA believes that children under 40 pounds should not use booster seats and that Evenflo

[7] In the event that the Court does not believe that it has adequate allegations regarding NHTSA's position, Plaintiffs request leave to file an amended complaint to include allegations from the recent report of the House Subcommittee on Economic and Consumer Policy of the Committee on Oversight and Reform that was issued on December 10, 2020.

intentionally marketed its supposed "side impact testing" as a means of fraudulently promoting the safety of its booster seats, Evenflo remarkably claims that Plaintiffs have not sufficiently alleged a violation of Alaska, California, Illinois, Indiana, Iowa, Maine, Massachusetts, New York, North Carolina, South Carolina, and Wisconsin consumer protection statutes because Plaintiffs have not alleged an unfair or deceptive act or practice.

First, Evenflo denies that its statements that its booster seats are safe for children between 30 and 40 pounds are false because NHTSA specifically permits the 30-pound weight threshold. As already explained, NHTSA regulations do not permit Evenflo to recommend a minimum 30 pound weight when it knows it is not safe. Indeed, as Evenflo admits, FMVSS 213 specifically prohibits statements that are "misleading to the consumer," Def. Br at 7, which is certainly the case when Evenflo does not disclose to consumers that it knows that its seats are not safe for children weighing less than 40 pounds.

The CAC includes numerous specific allegations showing that Evenflo knew starting in 1992 that its 30-pound threshold was not in line with NHTSA recommendations; that in 2012, Evenflo's top internal booster seat expert had notified Evenflo marketing executives of the NHTSA 2010 report that "children should remain in harnessed seats until they are four or weigh 40 pounds;" that also in 2012, Evenflo's internal booster seat experts had futilely urged Evenflo's marketing executives to change its minimum weight to 40 pounds to match the NHTSA guidelines; and that Evenflo continued to market its booster seats with the 30-pound minimum in the United States while simultaneously telling parents in Canada that failing to comply with a 40-pound minimum could lead to a child's death or serious injury. CAC ¶¶ 266 267, 272. The CAC more than adequately pleads that the 30-pound weight limitation was sufficiently false or misleading to support a claim under state consumer protection statutes.

In the ultimate cynical argument, Evenflo asserts that its claim that Big Kid booster seats were side-impact tested was true and attempts to twist the allegations of the CAC by arguing that Plaintiffs simply "wishe[d] Evenflo would have performed [side impact testing] differently." Def. Br at 1. The phrase "side impact tested" standing alone is deceptive because a reasonable consumer would believe that side impact testing of a product designed to protect children from harm would in fact measure whether the booster seat would protect the child from harm—especially if the claim was prominently stitched into the seat.

Indeed, the CAC alleges that conclusion is precisely what Evenflo hoped consumers would reach. Evenflo specifically began marketing its "side impact testing" to both retailers and consumers expressly in order to create the perception that Evenflo's booster seats are safer than the competition. The CAC alleges that Evenflo intended for consumers to believe that "side impact tested" meant that the booster seats would protect children in a side impact collision. And Evenflo did not limit itself to just referencing a side impact test, but rather characterized the testing as "rigorous," comparable to NHTSA side-impact testing of vehicles, and as exceeding government testing standards for booster seats—even though there were no standards for side-impact testing of booster seats. CAC ¶ 230.

Further, Evenflo hid that its testing did not involve any impact at all and showed that during a side-impact collision, booster seats that had "passed" the testing could result in serious damage to a child's internal organs, head, neck, and spine, including paralysis or death. CAC ¶ 240. There can be little question that Evenflo's cynical marketing strategy, that is now perpetuated in its motion to dismiss, is fraudulent, deceitful, and deeply disturbing.

Plaintiffs have amply identified fraudulent and deceptive acts sufficient to support claims under the state CPAs below, and no other ground exists to dismiss Plaintiffs' CPA claims:

Alaska: *Merdes & Merdes, P.C. v. Leisnoi, Inc.*, 410 P.3d 398, 412 (Alaska 2017) (holding that under Alaska law, "whether an act is 'deceptive' is determined simply by asking whether it 'has the capacity or tendency to deceive'" and that conduct is unfair if it "offends public policy" or "is immoral, unethical, . . . or unscrupulous").

California: *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (holding that under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §1770, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, whether a representation is misleading is judged according to "the effect it would have on a reasonable consumer."); *see also Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161, 1172 (E.D. Cal. 2013) (a statement that may be accurate on some level, but will nonetheless tend to mislead or deceive, is actionable under the both the CLRA and UCL).

Illinois: Illinois Consumer Fraud and Deceptive Business Act prohibits "the use or employment or any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact . . ." 815 Ill. Comp. Stat. § 505/2. *See also Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 941 (7th Cir. 2001) (IFCA "exemption is not available for statements that manage to be in technical compliance with federal regulations, but which are so misleading or deceptive in context that federal law itself might not regard them as adequate."); *Pennington v. Travelex Currency Servs., Inc.*, 114 F. Supp. 3d 697, 706 (N.D. Ill. 2015) ("IFCA liability can arise from literally true disclosures when stated in a misleading manner.").

Indiana: The Indiana Deceptive Consumer Sales Act prohibits "unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction." Ind. Code Ann. § 24-5-0.5-3(a); *see also Gasbi, LLC v. Sanders*, 120 N.E.3d 614, 620 (Ind. App. 2019) ("[D]eceptive acts are broadly defined to include non-disclosures or omissions").

Iowa: *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013) (Iowa Consumer Frauds Act "defines deception as 'an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts'" (quoting Iowa Code § 714.16(1)(f)); *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254, 258 (Iowa 1991) ("A statement which is literally true may nonetheless be deceptive.")).

Kentucky: Contrary to Evenflo's argument, privity in not necessary to state a claim under the Kentucky CPA under the circumstances here. Kentucky recognizes an exception to the privity requirement when a manufacturer makes express warranties directly to and for the benefit of the intended consumer. *See Bosch v. Bayer Healthcare Pharm., Inc.*, 13 F. Supp. 3d 730, 749-51 (W.D. Ky. 2014) (denying motion to dismiss KCPA claim for lack of privity when plaintiffs alleged that manufacturer made express warranties in advertisements regarding safety of contraceptive device).

Maine: *State v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005) ("An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances . . . .").

Massachusetts: *Dumont v. Reily Foods Co.*, 934 F.3d 35, 40 (1st Cir. 2019) (explaining that "an advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product" and holding that at motion to dismiss stage, the court need only determine that it is plausible that the label has the capacity to mislead).

Minnesota: Plaintiffs' allegations of a nationwide false advertising campaign regarding the safety of the Big Kid seats are sufficient to satisfy the public benefit requirement for private enforcement of Minnesota CPAs even though Plaintiffs seek money damages. *See Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1017 (D. Minn. 2012) ("The Court finds that Plaintiffs have sufficiently alleged a public benefit because of the size of the audience that [defendant] targeted to sell the [product].");

Johnson v. Bobcat Co., 175 F. Supp. 3d 1130, 1142 (D. Minn. 2016) (request for money damages satisfies public benefit requirement when it would have deterrent effect or when misrepresentations were made to significant segment of the public).

New York: *Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 304, 306 (N.D.N.Y. 2019) (holding that act is deceptive under New York law if it is "likely to mislead a reasonable consumer acting under the circumstances" and emphasizing that "question of whether the[] representations were ones that might deceive a reasonable consumer is a question of fact better left for decision on a developed record").

North Carolina: *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 622 (N.C. 1980) (overruled on other grounds by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 374 S.E.2d 385, 392 (N.C. 1988)) ("An act or practice is deceptive if it has the capacity or tendency to deceive. . . . Words or phrases, though literally true, may still be deceptive.").[8]

Ohio: Although there is a split in authority on whether consumers may bring claims under the Ohio DTPA, the better-reasoned position is that Plaintiff Honaker is a "person" under the DTPA who has standing to bring a DTPA claim. *See Schumacher v. State Auto. Mut. Ins. Co.*, 47 F. Supp. 3d 618, 632 (S.D. Ohio 2014); *Bower v. Int'l Bus. Machines, Inc.*, 495 F. Supp. 2d 837, 843-44 (S.D. Ohio 2007). Regardless, there is no dispute that Plaintiff Honaker can bring a claim under the Ohio Consumer Sales Practices Act and thus leave to amend on that basis is warranted.

South Carolina: *Wright v. Craft*, 640 S.E.2d 486, 500 (S.C. App. 2006) ("A deceptive act is any act which has a tendency to deceive. . . . Even a truthful statement may be deceptive if it has a capacity or tendency to deceive.").

[8] *Branch Banking and Tr. Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. App. 1992) (pleading egregious or aggravating circumstances necessary only with breach of contract claims).

West Virginia: Despite Evenflo's claim otherwise, Evenflo was provided with written notice of the WVCPA claim and Plaintiffs pleaded that Evenflo had been advised of their violation. CAC ¶ 1059. No basis exists for dismissing the West Virginia Plaintiffs' consumer protection claim.

Wisconsin: Plaintiff Rose's claims fall within the scope of the Wisconsin Deceptive Trade Practices Act because they are not solely omission-based allegations of deception, but rather the omissions and misrepresentations are intertwined. *See Christense v. TDS Metrocom LLC*, 2009 WI App 21, 316 Wis. 2d 356, 763 N.W.2d 248 (2008) ("Although a nondisclosure … is not actionable under the statute, a nondisclosure of facts, combined with an affirmative representation that is undermined by the non-disclosed facts, may result in liability.").

B. No "regulatory exemption" applies.

Evenflo asserts that the claims under the consumer protection laws of seven states (Colorado, Florida, Massachusetts, Michigan, Oklahoma, Texas,[9] and Washington) fail as a matter of law based on what Evenflo describes as "regulatory exemptions." *See* Def. Br. 24, 28–29, 32, 34. The statutory provisions Evenflo cites, although varying in precise verbiage, generally exempt from liability acts or practices that are "permitted" by some law or regulation. *See, e.g.*, 5 M.R.S. § 2018 (defendant must show that "[t]he specific activity that would otherwise constitute a violation…is authorized, permitted or required by…applicable law, rule or regulation…."). Evenflo cites similar provisions for a handful of additional states to argue either a "safe harbor" or that there was "no deceptive act." *See* Def. Br. 25–27 (Georgia, Illinois, Iowa, Indiana, and Maine). Although Evenflo does not characterize its argument for those other five states as "regulatory exemptions," the argument is in substance the same.

[9] The TDTPA contains no exemption for permitted acts and practices but instead limits the permitted practice exemption to "practices authorized under specific rules or regulations promulgated by the Federal Trade Commission." Tex. Bus. & Com. Code § 17.49. As Evenflo's defense is not based on a regulation by the FTC, the TDTPA exemption does not apply.

Because the exemptions upon which Evenflo relies present affirmative defenses, Evenflo bears the "heavy" burden of proving that a particular practice is "affirmatively" permitted, especially in the context of a motion to dismiss. *Aspinall v. Philip Morris, Inc.*, 453 Mass. 431, 434-35 (2009).

1. No regulatory exemption based on general regulatory scheme.

The substance of Evenflo's permitted practices defense is that because the "NHTSA regulates the Big Kid's design, testing, and labeling," such regulation provides Evenflo a complete defense to any claim arising from the same subject matter of that regulation (i.e., the design, testing, and labeling of booster seats). Def. Br. 32. This is not the law.

The fact that a business is subject to a regulatory regime does not remove the business from the scope of state consumer protection acts; were the rule otherwise, all businesses would be exempt, as all businesses are subject to regulation to some degree. Instead, the affirmative defense applies only when the conduct at issue is "affirmatively permitted." *Aspinall*, 453 Mass. at 436. As the Colorado Supreme Court explained in construing the CCPA, the permitted practices defense is "intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is regulated by another statute or agency." *Showpiece Home Corp. v. Assur. Co. of Am.*, 39 P.3d 47, 56 (Colo. 2001); *see also Good v. Altria Group, Inc.*, 501 F.3d 29, 57–58 (1st Cir. 2007) (holding that Maine UTPA permitted practice defense "exempts '[t]ransactions otherwise permitted', not 'otherwise regulated.'"); *In re Dollar Corp.*, 2017 U.S. Dist. LEXIS 144316, at *21–24, 78–79 (W.D. Mo. Aug. 2018) (rejecting permitted practices defense under Colorado, Florida, Illinois, Michigan, and Texas acts because "every business is subject to regulation, and conduct can be deceptive despite compliance with [such] regulation[s]").[10] Thus, the mere fact that Evenflo's car and booster seats are

[10] *See also Vogt v. Seattle-First Nat'l Bank*, 817 P.2d 1364, 1370 (Wash. 1991) ("[The WCPA] does not exempt actions or transactions merely because they are regulated generally. The exemption applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited, or regulated.").

subject to regulation by NHTSA does not insulate Evenflo's actions from litigation under state consumer protection statutes.

2. NHTSA regulations do not permit Evenflo's false advertising.

Here, Evenflo points to nothing more than an overlapping regulatory regime under NHTSA; it has offered no evidence of the *specific* permission required to establish a permitted practices defense under any of the state laws at issue. In fact, in arguing exemption from litigation over its false and misleading statements, Evenflo conveniently ignores FMVSS 213's provision that expressly prohibits its deception by requiring that "[a]ny labels or written instructions provided in addition to those required by this section shall not…be otherwise misleading to the consumer." 49 C.F.R. 571.213.S5.5. *See Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 741, 756–57 (N.D. Ill. 2018) (because FDA regulation "forbids them from using 'misleading' labels," even without addressing defendants' particular representations, the ICFC's permitted practice defense did not apply).

Further, with respect to its "side impact testing" misrepresentations, no NHTSA standards or regulations exist covering side-impact testing, as Evenflo acknowledges. Since Evenflo's testing is not regulated, Evenflo has no "regulatory exemption" defense with respect to the side-impact testing fraud.

While Evenflo also argues that "NHTSA is aware that companies like Evenflo have been completing their own [testing] protocols for years," that unproven allegation still does not demonstrate that NHTSA granted *permission* for Evenflo's false and deceptive marketing regarding its side impact testing. As the Massachusetts Supreme Judicial Court emphasized in *Aspinall*, inaction by the administrative agency does not establish permission; to invoke the regulatory exemption—the defendant must show that the agency "has affirmatively permitted" the conduct. 453 Mass. at 436. *See also Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738 (7th Cir. 2019) (rejecting permitted practice defense under IFCA where defendant "wrongly equates regulatory forbearance with

regulatory authorization," as only the latter provides a defense); *Santa Fe*, 288 F. Supp. at 1247–51 (holding under Colorado, Florida, Massachusetts, Michigan, and Washington statutes that the fact that a "federal agency has agreed not to enforce a statute does not demonstrate that conduct is" permitted).

With respect to Evenflo's representations regarding the minimum safe weight, as previously pointed out, the regulation prohibits booster seat manufacturers from marketing booster seats for children under 30 pounds, but nowhere does FMVSS 213 provide a stamp of approval for Evenflo's claim that booster seats are safe for children between 30 and 40 pounds. This regulatory silence cannot exempt Evenflo from liability, especially given NHTSA's repeated acknowledgment dating back to 1992 that booster seats *are not* safe for children weighing under 40 pounds and Evenflo's awareness of NHTSA's position. *See, e.g.*, *Natural Tobacco Co. Mtkg. & Sales Prac. & Prods. Liab. Litig.*, 288 F. Supp. 2d 1087, 1248 (D.N.M. 2017) (MCPA "does not contemplate implicit authorization, only specific authorization).

C. The CAC properly pleads claims for breach of implied warranty.

1. Privity does not require dismissal.

Evenflo contends that Plaintiffs' implied warranty claims under Alabama, Florida, Illinois, New York, Ohio, and Tennessee law fail for lack of privity since Plaintiffs did not buy their seats directly from Evenflo. The courts in each of these jurisdictions have recognized exceptions to the privity requirement since, otherwise, the majority of consumers would never be able to bring an implied warranty claim against a manufacturer. These exceptions apply to Plaintiffs.

Third-Party Beneficiary Exception: Alabama, Florida, Illinois, and New York all recognize a third party beneficiary exception to the privity rule. Under that exception, intended beneficiaries may bring breach of implied warranty claims despite a lack of direct contractual privity. *See, e.g.*, *Rampey v. Novartis Consumer Health, Inc.*, 867 So. 2d 1079, 1092 (Ala. 2003); *Sanchez-Knutson v.*

Ford Motor Co., 52 F. Supp. 3d 1223, 1233-34 (S.D. Fla. 2014); *In re Rust-Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig.*, 155 F. Supp. 3d 772, 806-07 (N.D. Ill. 2016); *Praxair, Inc. v. Gen. Insulation Co.*, 611 F. Supp. 2d 318, 330 (W.D.N.Y. 2009). Plaintiffs allege that they are third-party beneficiaries of Evenflo's contracts with retailers and are the eventual purchasers of the Big Kid purchased from retailers. *See* CAC ¶¶ 359, 492, 583, 859. Such allegations suffice at the pleading stage to satisfy the privity requirements.

Ohio also recognizes a third-party beneficiary exception to privity. *See Kondash v. Kia Motors Am.*, 2016 U.S. Dist. LEXIS 185184, *49 (S.D. Ohio June 24, 2016) (allegations that dealer was not the intended consumer and that the warranty agreements were designed for and intended to benefit the ultimate consumer were sufficient to support the third-party beneficiary requirement). The CAC, however, does not specifically include third-party beneficiary allegations related to Ohio Plaintiff Cassandra Honacker. While the totality of the allegations in the CAC, including the allegations regarding the third-party beneficiary exception with respect to other states, should be adequate to sustain the Ohio implied warranty claim, in the event that the Court concludes otherwise, Plaintiffs request leave to replead.

Direct Dealing Exception: In Illinois, plaintiffs may satisfy the privity requirement by alleging that they had a direct relationship with the manufacturer by relying on the manufacturer's written labels or advertisements. *See In re Rust-Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig.*, 155 F. Supp. 3d at 807 (holding reliance on manufacturer's representations sufficient to support the direct dealing exception to the privity requirement). There can be no serious dispute that Plaintiffs have adequately alleged direct dealings between Plaintiffs and Evenflo as a result of Evenflo's false advertising. These factual allegations are sufficient to support the direct dealings exception to the privity requirement.

Dangerous Product Exception: New York and Tennessee both recognize an exception to the privity rule when the product is a source of danger. *See Hubbard v. Gen. Motors Corp.*, 1996 U.S. Dist. LEXIS 6974, *16 (S.D.N.Y. May 22, 1996) (plaintiff could assert breach of implied warranty claim against GM because defective brakes would "likely [] be a source of danger when driven."); *Charter Oak Fire Ins. Co. v. Broan Nutone, LLC*, 2006 U.S. Dist. LEXIS 103858, *14-15 (W.D. Tenn. Sept. 28, 2006) (holding that privity is not essential to establish claim for breach of implied warranty if product is unreasonably dangerous to user). This exception applies since Plaintiffs' allegations establish that the Big Kid booster seats are a potential source of danger for children less than 40 pounds and for children in a side-impact collision. *See, e.g.*, CAC ¶ 5 ("Evenflo's own testing demonstrates that the Big Kid booster seat leaves children—especially those under 40 pounds—vulnerable to serious head, neck, and spine injuries, and especially so in a side impact crash.").

Since Plaintiffs all fall within an exception to the privity requirement, no basis exists for dismissing the implied warranty of merchantability claims based on a lack of privity.

2. Plaintiffs satisfy implied warranty notice requirements.

Evenflo argues that Plaintiffs' implied warranty claims for the Alabama, Michigan, Ohio, Pennsylvania, and Tennessee Plaintiffs are barred for failure to provide pre-suit notice. Alabama Plaintiff Natalie Davis expressly alleges that Evenflo was given written, pre-suit notice of the dangerous and defective nature of the Big Kid booster seat on behalf of all Alabama class members. *See* CAC ¶ 338. Therefore, Evenflo had sufficient notice to resolve the issues under Alabama law before incurring litigation expenses if it wished.[11]

[11] Evenflo does not cite any authority that requires, in this context, that notice of the Alabama breach of the implied warranty come directly from Alabama Plaintiff Davis. In any event, the Court should waive the pre-notice requirement in this particular situation because the underlying policy reasons do not justify it. *See, e.g.*, *In re Ford Motor Co., E-350 Van Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 73690 at *22 (D.N.J. Sept. 3, 2008) ("The court's departure in certain circumstances from strict enforcement of the UCC notice requirement evinces a policy on the part of the Alabama Supreme Court to evaluate the underlying justifications for notice in a given case.").

Likewise, Evenflo was given written, pre-suit notice of the implied breach of warranty claims on behalf of Michigan Plaintiffs Reynolds, Holliday and Sapeika; on behalf of Ohio Plaintiff Cassandra Honaker; and on behalf of Pennsylvania Plaintiffs Hailey Lechner and Lauren Mahler. Plaintiffs have attached copies of the pre-suit notification letters to this brief. In each instance, Evenflo had the opportunity to cure its breach under the pertinent state law or resolve the matter but did not.

Citing only cases in which no pre-suit notice was provided at all, Evenflo has made no argument that the notice it received of the implied warranty claim for these states was inadequate. *See, e.g.*, *Gorman v. Am. Honda Motor. Co.*, 839 N.W. 2d 223, 229 (Mich. Ct. App. 2013) ("The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."). *See also Chemtrol Adhesives v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St. 3d 40, 54 (1989) (holding that the filing of a civil complaint may serve as notice of a breach); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 682-83 (E.D. Pa. 2011) (holding that defendant had notice under § 2607(c)(1) based on widespread consumer complaints notifying it of the defect).

3. Fitness for ordinary purpose.

Lastly, Evenflo argues that Plaintiffs have not plausibly alleged that the Big Kid booster seat was not fit for the ordinary purpose for which the goods are used under Alaska, California, Georgia, Indiana, Iowa, Louisiana, Michigan, New Jersey, Ohio, Pennsylvania, and Tennessee law. The CAC specifically alleges that Evenflo warranted that the Big Kid booster seat was safe for children weighing between 30 and 40 pounds when it was not. The CAC further alleges that Evenflo warranted that the Big Kid booster seat had been rigorously side-impact tested, a claim that a reasonable consumer would have understood to mean that the booster seat would be safe in a side-impact collision. As the CAC actually shows through photographs, Evenflo's own testing

demonstrated the falsity of that implied warranty. These allegations are more than adequate to support the Big Kid booster seat was not fit for the ordinary purpose it was used: keeping children weighing more than 30 pounds safe in accidents, including side-impact collisions.

III. PLAINTIFFS' CLAIMS UNDER THE LAWS OF D.C. AND STATES IN WHICH THEY DO NOT RESIDE SHOULD NOT BE DISMISSED

Evenflo erroneously contends that Count LVIII should be dismissed because it allegedly seeks relief "under state statutes that are unconnected to the allegedly fraudulent transaction." Def. Br at 36. In fact, that Count seeks to apply the laws of various states to purchases by residents of those states. Such purchases are plainly connected to those residents' state statutes. *See, e.g.*, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 278 (D. Mass. 2004) ("Massachusetts and Pennsylvania choice of law rules would select the various states in which consumers' purchases were made").

It is well established in this Circuit that the issue whether Plaintiffs can sue on behalf of residents of states in which they do not reside is an issue for class certification and not for a Rule 12(b)(6) motion. "[T]he growing consensus in the First Circuit, including this Court, is to defer the standing analysis to the class certification stage, so long as the named plaintiffs have 'essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members.'" *In re Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d 307, 359 (D.R.I. 2017) (quoting *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011). The *Loestrin* court explained that the "Defendants are not challenging [the named plaintiffs'] standing to bring their own claims; they are challenging their standing to bring claims on behalf of the class…. This question would be appropriately, and more efficiently, addressed at the class certification stage." *Id.* The court therefore denied the "Motion to Dismiss with respect to the [the named plaintiffs'] claims under state law in the twenty-five states and Puerto Rico in which the [the named plaintiffs] have not pleaded that they either reside in or purchased Loestrin 24 products in the state." Similarly here, the issue of whether

Plaintiffs can bring claims for residents of states in which they neither reside nor bought Evenflo booster seats should be addressed at the class certification stage.[12]

IV. PLAINTIFFS PLEAD THEIR STATE CONSUMER FRAUD CLAIMS WITH PARTICULARITY

Evenflo next argues pursuant to Rule 9(b) that 21 of the Plaintiffs have failed to plead their state consumer fraud claims with particularity. Evenflo does not—as it cannot—dispute that Plaintiffs have alleged the details relating to Evenflo's fraudulent acts in great detail. Instead, Evenflo argues that the CAC is inadequate because it does not include for the 21 Plaintiffs information such as the booster seat model, the specific source of the representation pled, the purchase date, and the purchase location.

This Court has recently addressed and rejected an identical argument in *Munsell v. Colgate-Palmolive Co.*, 463 F. Supp. 3d 43, 52–53 (D. Mass. 2020). With respect to the defendants' claim that the plaintiff failed to comply with Rule 9(b) when she did not identify the kind of Tom's deodorant that she purchased or the dates and locations of her purchases, the Court noted that "defendant misunderstands that the 'specificity requirement extends only to the particulars of the allegedly misleading statement itself'. . . , not to 'the circumstances of the plaintiff's conduct in reliance' on that statement." *Id.* (quoting *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004)). The Court concluded that the plaintiff adequately met the heightened pleading standard of Rule 9(b) by alleging, in a false advertising case, that defendants are "who" committed the fraud; the "what" is the misleading "natural" claim on the packaging of the products; the "where" is the packaging of the

[12] *Accord In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 403 (D. Mass. 2013) (rejecting argument that because the named plaintiffs "reside only in five states," they "only have standing to bring claims in those five states"); *Relafen*, 221 F.R.D. at 269–70 ("SmithKline challenged only [plaintiffs'] standing to 'represent a class of indirect purchasers of Relafen in the other 16 Indirect Purchaser jurisdictions.' … Accordingly, the Court applies the *Ortiz* exception to defer consideration of SmithKline's standing challenge and to address the remaining issues of certification first.") (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

products and the "when" is the class period. *Id.* at 53. *See also In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 751 F. Supp. 2d 277, 290 (D. Mass. 2010) (finding fraud allegations sufficiently definite when plaintiff alleged details of deceptive advertising and identified perpetrators and recipients of false information).

Plaintiffs have included allegations identical to those found sufficient in *Munsell* and *In re Celexa*. The additional allegations sought by Evenflo are merely the circumstances of Plaintiff's reliance—allegations that the *Munsell* opinion explains do not fall within the scope of Rule 9(b). Rule 9(b) provides no basis, therefore, for dismissing any of Plaintiffs' claims.

V. PLAINTIFFS STATE VALID CLAIMS FOR FRAUDULENT CONCEALMENT, UNJUST ENRICHMENT, AND NEGLIGENT MISRPRESENTATION.

Plaintiffs adequately plead claims for fraudulent concealment, unjust enrichment, and negligent misrepresentation. Evenflo's bare assertions that "some states" do not recognize certain claims in certain situations are wholly insufficient to support dismissal of these claims. Evenflo does not carry its burden of showing that Plaintiffs' allegations fail to establish "each material element necessary to sustain recovery under some actionable legal theory." *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005) (quoting *Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997)).

Unjust enrichment. Plaintiffs state valid claims for unjust enrichment under the laws of all states. Evenflo identifies only three issues in which state laws on unjust enrichment purportedly differ, none of which affect Plaintiffs' claims here. First, Evenflo points out that some states preclude unjust enrichment claims where the plaintiff received the benefit of the bargain. Def. Br. at 38. But, as explained above, Plaintiffs plausibly plead that none of them received the benefit of the bargain here.

Second, Evenflo argues that some states—citing one case each from Massachusetts and New York—preclude unjust enrichment claims "when there is an adequate remedy at law." Def. Br. at 39.

Although Evenflo does not explain why this argument requires dismissal at this stage, Evenflo also disregards the fact that Rule 8(d)(2) of the Federal Rules of Civil Procedure permits pleading in the alternative. *See Duncan v. Nissan N. Am., Inc.*, 305 F. Supp. 3d 311 (D. Mass. 2018) (Casper, J.) (declining to dismiss unjust enrichment claim, noting that it is "not uncommon for an unjust enrichment claim to proceed, in the alternative, with a breach of contract claim beyond the motion to dismiss stage.").

Finally, Evenflo argues, citing a single case, that "many states require contractual privity to state an unjust enrichment claim." Because a claim for unjust enrichment cannot be based on an express contract, a claim for unjust enrichment *requires* an absence of contractual privity between the parties. *See, e.g.*, *Array Techs., Inc. v. Mitchell*, 305 F. Supp. 3d 1256, 1276 (D.N.M. 2018) ("Unjust enrichment claims have evolved largely to provide relief where, in the absence of privity, a party may seek refuge in equity."); *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 214 (R.I. 2015) ("In the absence of privity between the parties, a party is permitted to seek equity through this quasi-contractual theory of unjust enrichment.").[13] Instead, most states only require that a plaintiff allege that it conferred a benefit on the defendant, which Plaintiffs have done. CAC ¶¶ 319-325. They have, therefore, stated a claim for unjust enrichment.

Negligent Misrepresentation and Fraudulent Concealment. Evenflo argues that Plaintiffs "fail to plead essential elements of negligent misrepresentation and fraudulent concealment, or their claims are otherwise barred by state laws." Def. Br. at 39.[14] First, Evenflo

[13] *See* 26 Williston on Contracts § 68:5 (4th ed.) (collecting cases); Daniel R. Karon, *Undoing the Otherwise Perfect Crime - Applying Unjust Enrichment to Consumer Price-Fixing Claims*, 108 W. VA. L. REV. 395, 418 and n. 80 (2005) (finding that "no state's unjust-enrichment law requires this additional element" of privity and collecting cases).

[14] Although Evenflo claims that Indiana does not recognize negligent misrepresentation as a distinct tort," Def. Br. at 40, the Indiana Supreme Court has, subsequent to the case Evenflo cited, emphasized that Indiana does allow claims for negligent misrepresentation, *Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 741 (Ind. 2010) ("Indiana has recognized liability for the tort of negligent misrepresentation."). The claim is viable in all states.

asserts that "some states apply the economic loss doctrine which prohibits Plaintiffs from recovering economic damages for negligent misrepresentation or fraud claims here." *Id.* Evenflo overlooks the fact that most states recognize an exception to the economic loss doctrine for claims sounding in fraud, especially fraud claims based on affirmative misrepresentations like those brought by Plaintiffs here. *See, e.g.*, *Rattagan v. Uber Techs., Inc.*, No. 19-CV-01988-EMC, 2020 WL 4818612, at *8 (N.D. Cal. Aug. 19, 2020) (economic loss rule does not bar fraud and intentional misrepresentation claims); *Francis et al. v. General Motors, LLC*, 2020 WL 7042935, at *17 (E.D. Mich. Nov. 30, 2020) (economic loss doctrine does not bar inducement to enter into a contract claims such as deceptively persuading customer to buy or overpay for defective car, or in cases where the information withheld concerns a safety-related defect); *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002) (recognizing exception to economic loss rule for fraud claims); *In re Takata Airbag Prod. Liab. Litig.*, 464 F. Supp. 3d 1291, 1307-08 (S.D. Fla. 2020) (finding a fraud exception to the economic loss rule in Arizona, Massachusetts, Michigan, New Jersey, New York, Ohio).[15]

Second, Evenflo argues that some states require a "special" or "privity-like" relationship to sustain misrepresentation or fraudulent concealment claims. Def. Br. at 40. In fact, a party need only show a "special" or "privity-like" relationship if no other source of defendant's duty to the plaintiff exists.[16] Here, Plaintiffs have no need to establish a "special" or "privity-like" relationship because Evenflo had a statutory duty to disclose material facts about the safety risks posed by its Big Kid booster seat under every state's consumer protection laws. *See* CAC ¶¶ 345; 378; 418; 470; 512; 535-36; 567; 606; 716; 740; 771; 835; 900; 931; 975; 1001; 1043; 1054.

[15] *See also Bradley Woodcraft, Inc. v. Bodden*, 795 S.E.2d 253 (N.C. 2016) (holding fraud claims not barred by economic loss rule); *Odelia v. Alderwoods (Georgia), LLC*, 823 F. App'x 742, 749 (11th Cir. 2020) (recognizing "misrepresentation exception" to economic loss rule under Georgia law).

[16] *See, e.g.*, *Cummins v. Robinson Twp.*, 770 N.W.2d 421, 434 (2009) (An actionable duty "may arise from a statute, a contractual relationship, or by operation of the common law.").

CONCLUSION

For all the foregoing reasons, Evenflo's motion to dismiss should be denied. In the event that the Court believes that any of Plaintiffs' claims are inadequately pled, Plaintiffs respectfully seek leave to amend the complaint.

DATED: December 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Steve W. Berman
Steve W. Berman

UNITED STATE DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE EVENFLO CO., INC. MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:20-md-02938-DJC
THIS DOCUMENT RELATES TO: ALL ACTIONS	

REPLY IN SUPPORT OF EVENFLO COMPANY, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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I. INTRODUCTION.

Plaintiffs' Memorandum in Opposition to Evenflo's Motion to Dismiss (12/18/20) ("Opp.") confirms that the factual allegations in the Consolidated Amended Class Action Complaint (10/20/20) ("AC") fail to adequately plead standing under Rule 12(b)(1) or to state a claim under Rule 12(b)(6). Plaintiffs cite no factual allegations establishing a plausible injury that permits this case to proceed. Plaintiffs further fail repeatedly to meaningfully respond to Defendant Evenflo Company, Inc.'s ("Evenflo's") arguments. For example, Plaintiffs reference Big Kid representations (at 4) that have no relevance to their proposed class period of "2008" to "the present." (AC ¶ 293). Plaintiffs exalt (at 1, 3, 6, 22, 30) a non-binding 1992 National Highway Traffic Safety Administration ("NHTSA") flyer, which both lacks legal force and predates the 30-pound weight threshold NHTSA set in FMVSS 213 (49 C.F.R. § 571.213) through formal rulemaking. And Plaintiffs respond (at 20) to Evenflo's primary jurisdiction argument with the discordant response that FMVSS 213 does not preempt state-law claims (an argument Evenflo never advanced). The AC should be dismissed.

II. PLAINTIFFS DO NOT HAVE ARTICLE III STANDING OR STATE A CLAIM.

A. Plaintiffs Fail To Plead A Cognizable Injury.

Plaintiffs concede (at 10, 13) that they do not rely on the risk of future harm to establish a cognizable injury. As a result, Plaintiffs' sole basis for pleading an injury that satisfies Article III and state laws is a single, threadbare allegation: "that they 'would not have purchased the seat' or 'would have paid less for it'" had they known the Side Impact and Weight Minimum representations were false. (Opp. at 8, 11). Such an "unsupported conclusion" of "overpayment" does not adequately plead economic injury. *See Kerin v. Titeflex Corp.*, 770 F.3d 978, 980 (1st Cir. 2014) (holding insufficient an allegation that, after buying an allegedly unsafe product, plaintiff suffered economic "damages 'that may be measured as his overpayment or as the cost of

remedying the safety issue'"); *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 285 (3d Cir. 2018) ("[A] plaintiff must do more than offer conclusory assertions of economic injury in order to establish standing. She must allege facts that would permit a factfinder to *value* the purported injury at something more than zero dollars without resorting to mere conjecture") (emphasis added). Nor do allegations that Plaintiffs "would not have purchased" the Bid Kid establish economic injury when they fail to identify a cheaper alternative booster seat they would have purchased. Tellingly, Plaintiffs do not point to any other factual allegations within their AC to support their claim of economic injury.[1]

Plaintiffs' heavy reliance on *Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1 (1st Cir. 2018), demonstrates the inadequacy of their allegations. The *Gustavsen* plaintiffs alleged prescription eye drop manufacturers "unfairly" designed dispensers to emit drops too big for the eye, "forc[ing] patients to waste medication." *Id.* at 5 (affirming dismissal of claims as preempted). They alleged that, "[i]f the bottles dispensed smaller drops, then each bottle would deliver more doses, and patients would be able to purchase fewer bottles," resulting in patients' saving "upwards of $500" "on a yearly basis." *Id.* While expressing skepticism regarding the claim's viability, the First Circuit reasoned that, because "plaintiffs expressly allege that scientific studies and the admission of a marketing executive for one of the major defendants all state that consumer cost would fall to some degree were the drops smaller," plaintiffs adequately pled an injury. *Id.* at 8. Unlike the detailed factual allegations in *Gustavsen* that quantified out-of-pocket

[1] Plaintiffs point the Court to nothing within the AC plausibly establishing that they would have purchased a "different or cheaper" booster seat had they known the truth; to the contrary, the AC alleges that the Big Kid was priced $10 less than its primary competition, Graco's TurboBooster. (AC ¶ 225). Plaintiffs instead declare (at 12), contrary to *In re Fruit Juice Prod. Mktg. & Sales Pracs. Litig.*, 831 F. Supp. 2d 507, 513 (D. Mass. 2011), and *Johnson & Johnson*, that the absence of such an allegation is "irrelevant" to whether they have adequately pled economic injury. In support, Plaintiffs cite only *Aspinall v. Philip Morris USA Inc.*, 2015 WL 9999126, at *4 (Mass. Super. Aug. 11, 2015), where a state trial court declined to rule on a motion to strike a class damages expert until completing an evidentiary hearing, an irrelevant issue here.

loss due to "wasted" medication, Plaintiffs plead nothing beyond the "unsupported conclusion" that, had Evenflo altered the challenged representations, Plaintiffs would have spent less money.

Importantly, the Third Circuit in *Johnson & Johnson* confronted and rejected the precise "eye dropper" analogy Plaintiffs attempt here. As in *Gustavsen*, in *Cottrell v. Alcon Labs.*, 874 F.3d 154 (3d Cir. 2017), a panel majority held that plaintiffs adequately alleged an economic injury. A year later, the *Johnson & Johnson* Court rejected the application of *Cottrell* to plaintiff's alleged economic injury resulting from her purchase of baby powder, explaining:

> We concluded that the *Cottrell* plaintiffs had standing only *after* we conducted an analysis of their economic theories . . . . [Estrada, the *Johnson & Johnson* plaintiff,] contends that *Cottrell* "confirmed that a consumer's purchase of a product based on the manufacturer's deceptive and unfair business practices constitutes injury-in-fact." Estrada Br. 2. In so arguing, Estrada overreads our opinion. The *Cottrell* plaintiffs did not have standing simply because they purchased a product that a consumer would view as flawed. Rather, the plaintiffs had standing only because they were unable to use a portion of the eye-drop medication they had purchased, and they alleged an economic theory that allowed them to value that unused portion.

Johnson & Johnson, 903 F.3d at 286-87. This Court should likewise reject Plaintiffs' attempt here to "overread[]" *Gustavsen* as authorizing consumer purchasers to state a claim in federal court simply "because they purchased a product that [they later] view[ed] as flawed." *Id.* at 287.

Plaintiffs cite scant authority to support their claim that their threadbare allegation adequately pleads injury. The closest (at 11) is *Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89 (D.N.H. 2020), where another district court found a gun purchaser alleged an economic injury due to false advertising that a gun was "drop safe." *Id.* at 98-99. The decision does little to help Plaintiffs here, however, because *Ortiz* alleged facts establishing the gun had "diminished resale value," an economic theory nowhere in the AC. *Id.* at 98.[2] The remaining cases Plaintiffs cite (at

[2] The *dicta* in *Ortiz* concerning an alternative "overpayment" injury "overreads" *Gustavsen* and is inconsistent with the First Circuit's admonishment in *Kerin* against alleging "unsupported conclusion[s]" to establish economic injury. 448 F. Supp. 3d at 98-99.

10 n.1) do not concern deceptive marketing and stand for little more than the simple proposition that overpayment, *if adequately factually alleged*, is a cognizable form of economic injury.[3]

Plaintiffs' effort to avoid this Court's holding in *Fruit Juice* is particularly unavailing. Plaintiffs assert (at 10-11) that *Fruit Juice* is somehow different because Evenflo "lied about the most important aspect of the seat—its ability to protect children—and [] the seats do not perform that basic function." But this is the exact injury the Court in *Fruit Juice* found insufficient to establish Article III standing. There, the plaintiffs alleged that "Defendants promised to provide products that were safe for consumption, but Plaintiffs received products that posed a health risk," making them "unsuitable for their intended purpose—consumption—and valueless." 831 F. Supp. 2d at 512. The *Fruit Juice* plaintiffs then alleged that, "[b]ecause [they] would not have purchased these products if they had known the products contained lead . . . they suffered an economic injury—the price of the product—when they purchased the products." *Id.* The *Fruit Juice* Court held these allegations insufficient, in language that applies equally here: "Because Plaintiffs are unable to show that *any* actual harm resulted from [use of the Big Kid], their allegation of 'economic' injury lacks substance . . . . Plaintiffs paid for [a booster seat], and they received [a booster seat], which they [used] without suffering harm." *Id.* Plaintiffs' equivalent allegations should fail here as well.

In sum, allegations that Plaintiffs "would not have purchased the seat" or "would have paid less for it" are insufficient to establish economic injury under controlling First Circuit law

[3] *See ITyX Sols. AG v. Kodak Alaris, Inc.*, 952 F.3d 1, 9-10 (1st Cir. 2020) (finding company had standing to enforce commercial contract); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015) (overpayments for prescription drug due to anticompetitive non-compete conferred standing); *Katz v. Pershing, LLC*, 672 F.3d 64, 77 (1st Cir. 2012) (affirming dismissal of data-privacy claims for lack of standing); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 161, 190 (1st Cir. 2009) (finding elevated reimbursement, insurance, and coinsurance costs due to drug company's publication of false average wholesale prices to confer standing); *Geis v. Nestle Waters N. Am., Inc.*, 321 F. Supp. 3d 230, 237 (D. Mass. 2018) (finding "specific facts" alleging that company breached its promise to lower plaintiff's monthly charge for water services to "$1.99 each month for one year" to confer standing).

and the other precedents in analogous consumer cases that require more. Plaintiffs have not suffered an economic injury by purchasing a product that worked as expected for them. Nor do Plaintiffs allege they would have purchased a cheaper alternative booster seat (let alone identify one), or that the Big Kid's market value would have been lower if the challenged representations were altered or omitted. Whether analyzed as lack of standing under Rule 12(b)(1) or failure to state a claim under Rule 12(b)(6), the AC should be dismissed in its entirety for failure to plead a cognizable injury.[4]

B. Plaintiffs Lack Standing To Seek Injunctive Relief.

Plaintiffs cite (at 18-19) neither allegations establishing their intention to purchase another Big Kid, nor authority permitting such plaintiffs to seek injunctive relief. Instead, Plaintiffs erroneously analogize themselves to the plaintiff in *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018). In *Davidson*, the Ninth Circuit explained that the plaintiff—who purchased wipes deceptively advertised as "flushable"—could seek injunctive relief because she adequately alleged that, in the future, "she would purchase truly flushable wipes . . . if it were possible" from the defendant. *Id.* at 968-71. No similar allegation appears here.

In addition, the Court should decline Plaintiffs' invitation (at 18) to defer ascertaining Plaintiffs' standing to seek injunctive relief until class certification, which request they base on *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997). Those cases were limited to considering the propriety of class settlements, and neither stands for the broad proposition that Article III standing should be deferred until later. *See, e.g., Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004)

[4] Plaintiffs cite (at 14-15) several cases they contend establish that their damages allegations are sufficient to establish several state-law consumer fraud claims. These cases are easily distinguishable—for example, in *In re Actiq Sales & Mktg. Practices Litig.*, 2012 WL 2135560, at *5 (E.D. Pa. June 13, 2012), the court considered whether the defendant's misleading representations caused physicians to prescribe a drug for off-label purposes, which would have violated a section of the Indiana Code that is not at issue here. *Id.* at *5.

("*Fibreboard* does not require courts to consider class certification before standing"). Much more narrowly, *Fibreboard* only suggests deferral in the event that certification issues are "logically antecedent" to Article III concerns. There is no antecedent connection here, where Plaintiffs allege they would have not have purchased a Big Kid if they had known then what they know now. (*See* AC ¶ 296); *Johnson & Johnson*, 903 F.3d at 293 (finding no standing to seek an injunction because "[t]he law affords [plaintiff] the dignity of assuming that she acts rationally, and that she will not act in such a way that she will again suffer the same alleged 'injury'").

III. PLAINTIFFS' STATUTORY STATE-LAW CLAIMS SHOULD BE DISMISSED.

Plaintiffs' state-law claims, all of which are premised on the Weight Minimum and Side Impact representations, also fail because the representations are either not deceptive, and/or are exempted by the various states' safe harbor/regulatory exemptions.

A. Plaintiffs Fail To Plead A Deceptive Act Under Many States' Laws.

Plaintiffs distort NHTSA's actions (at 21-22) to support the novel theory that Evenflo committed consumer fraud by using a Weight Minimum that recites the exact threshold NHTSA set in FMVSS 213.[5] In support, Plaintiffs rely on a non-binding 1992 NHTSA flyer that predates NHTSA's amendments to FMVSS 213, which set the 30-pound weight threshold. That antecedent reference allows Plaintiffs to condemn by saying that "Evenflo has known for 28 years that NHTSA believes that children under 40 pounds should not use booster seats[.]" (Opp. at 21.) Among other fallacies, Plaintiffs misapply agency law. *See Am. Rivers, Inc. v. NOAA Fisheries*, 2006 WL 1455629, at *8 (D. Or. May 23, 2006) (agency brochure published without any formal rulemaking was not evidence of agency's position). Plaintiffs also violate a "basic tenet" of interpretation (at 22, 29) in claiming the Weight Minimum violated FMVSS 213's

[5] Plaintiffs repeatedly mischaracterize the Weight Minimum as a safety guarantee for every child weighing between 30 and 40 pounds. (*See, e.g.*, Opp. at 30). There are, of course, a number of factors (weight, height, age, and maturity) that guide a parent as to when a booster seat is appropriate for his or her child. (AC ¶¶ 247, 254).

general prohibition on "misleading" statements, when its more specific provision, S5.5.2(f), established that threshold. *See, e.g., Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010) (applying "basic tenet" of construction that specific regulation controls over general regulation).

Plaintiffs also do not dispute (at 23) that Evenflo's Side Impact Representation is true. Plaintiffs merely repeat their subjective belief that the Side Impact Representation was some guarantee of absolute safety (notably, Plaintiffs cite nothing establishing that children using Big Kids are frequently injured in side-impact collisions). Ultimately, by conducting non-required side-impact testing, Evenflo did exceed government standards for booster seats. (Memorandum in Support of Evenflo Company, Inc.'s Motion to Dismiss the Amended Complaint (11/20/20) ("Memo") at 6-7).[6] And Evenflo's statement that the Big Kid was "rigorously tested" has been found to be subjective, and thus non-actionable, under state laws. *See, e.g., Beck v. FCA US LLC*, 273 F. Supp. 3d 735, 750 (E.D. Mich. 2017) (applying California law and dismissing claim based on representation that truck alleged to be unsafe was the product of "rigorous testing").[7]

B. Evenflo Is Entitled To State Regulatory Safe Harbors.

Plaintiffs cannot rely (at 28) on a general standard that regulatory safe harbors impose a "'heavy' burden," while conceding (*id.*) that statutory safe harbors, at a minimum, apply to

[6] Plaintiffs' cases (at 23-27) largely cite to unremarkable legal standards. When Plaintiffs do try to dispute Evenflo's authority, their effort fails—for example, Plaintiffs incorrectly contend (at 25) that Kentucky does not require privity. *See Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952, 962 (E.D. Ky. 2019) (explaining the few federal courts not requiring privity are outliers that ignore contrary state precedent). Plaintiffs also incorrectly assert (at 26 n.8) that North Carolina requires pleading egregious or aggravating circumstances for contract claims only. *See, e.g., Khouri v. Nat'l Gen. Ins. Mktg., Inc.*, 2020 WL 6749713, at *4 (M.D.N.C. Nov. 17, 2020) (dismissing UDTPA claim not involving any contract because "[t]o be deceptive within the meaning of § 75-1.1, a misleading act must occur under egregious or aggravating circumstances") (quotations and citations omitted). Finally, Plaintiffs' authority for Ohio predates the cases Evenflo cites in its Memo (at 32-33), which limit standing to a commercial class of potential claimants.

[7] Plaintiffs' comparison (at 4) between the 38.5 mph impact speed utilized in NHTSA's automobile side-impact test and the approximately 20 mph change of velocity used in Evenflo's Big Kid side-impact test improperly conflates two distinct engineering concepts, as it is the instantaneous change in velocity of a vehicle (also called delta-V), and not simply impact speed, that measures crash severity.

practices that are "affirmatively permitted." Evenflo's Weight Minimum, which repeats the exact weight threshold NHTSA established in FMVSS 213 through formal rulemaking, is exactly the type of "affirmatively permitted" conduct protected by these safe harbors.

C. Implied Warranty Privity Exceptions Do Not Apply To Plaintiffs.

Plaintiffs concede (at 31) that they failed to plead an exception to the Ohio implied warranty claim's privity requirement. Their claims to three exceptions in other states fail as well.

Plaintiffs are not third-party beneficiaries under Florida, Illinois, or New York law (at 30-31) because, to the extent the states recognize that exception, Plaintiffs fail to plead the requisite elements. *See, e.g.*, *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1118-19 (S.D. Fla. 2019) (dismissing implied warranty claim with prejudice); *Manley v. Hain Celestial Grp., Inc.*, 417 F. Supp. 3d 1114, 1124 (N.D. Ill. 2019) (finding purchaser was not a third-party beneficiary of contract between retailer and manufacturer); *Dixon v. Ford Motor Co.*, 2015 WL 6437612, at *6-7 (E.D.N.Y. Sept. 30, 2015) (casting doubt on exception and dismissing implied warranty claim). The direct-dealing exception (at 31) does not apply because the Illinois Plaintiff purchased her Big Kids from Walmart. (AC ¶ 63); *see Manley*, 417 F. Supp. 3d at 1124 (doubting exception and finding it inapplicable to retail purchase). Finally, the dangerous-product exception (at 32) does not apply to the New York or Tennessee Plaintiffs, as they assert economic loss claims. *Dixon*, 2015 WL 6437612, at *5 (under New York law, "there is no 'thing of danger' exception to the privity rule for implied warranty claims that involve purely economic loss"); *Americoach Tours, Inc. v. Detroit Diesel Corp.*, 2005 WL 2335369, at *7-8 (W.D. Tenn. Sept. 23, 2005) (dismissing claim as plaintiff sought economic damages; "the requirement of privity is not excused regardless of whether the product was unreasonably dangerous").

D. Plaintiffs' Pre-Suit Notice Is Insufficient.

Although Plaintiffs contend they provided pre-suit notice on behalf of the Michigan,

Ohio, and Pennsylvania Plaintiffs, they do not cite to the AC or their impermissible exhibits to support their assertion.[8] The challenged Plaintiffs cannot rely on notice provided by *others* to satisfy their own notice obligations. *See Schmidt v. Ford Motor Co.*, 972 F. Supp. 2d 712, 718 (E.D. Pa. 2013) (finding notice directly from other customers, including one named plaintiff, was insufficient to establish notice on behalf of other named plaintiffs).

IV. THE COURT SHOULD DISMISS COUNT LVIII.

Plaintiffs cite authorities (at 34, 35 n.12) suggesting that the Court may defer resolving the Plaintiffs' standing to bring claims on behalf of non-resident classes when the class plaintiffs have standing to seek their own claims. Here, where Plaintiffs lack standing to bring their own claims, they similarly lack standing to bring the claims in Count LVIII on behalf of absent class members. In addition, as detailed in Evenflo's Memo (at 20-35), there is variation in state consumer fraud laws; if Plaintiffs' other state-law claims fail, the Court should dismiss Count LVIII.

V. MANY STATE FRAUD CLAIMS ARE NOT PLED WITH PARTICULARITY.

Plaintiffs' cited authorities (at 35-36) do not establish that the 21 identified Plaintiffs pled their consumer fraud claims with the requisite particularity. *See Munsell v. Colgate-Palmolive Co.*, 463 F. Supp. 3d 43, 52-53 (D. Mass. 2020) (in a single-plaintiff class action, plaintiff alleged regular deodorant purchases and a uniform misrepresentation on which she relied); *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, 751 F. Supp. 2d 277, 290 (D. Mass. 2010) (claims sufficiently alleged because plaintiff identified "the time and place of the fraudulent

[8] Materials outside the complaint should not be considered. *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 320 (1st Cir. 2008) (sustaining district court's decision not to consider exhibits to motion to dismiss). Should the Court consider them, these exhibits: (1) fail to identify Ohio Plaintiff Honaker, Pennsylvania Plaintiff Lechner, or Michigan Plaintiff Sapieka; and (2) fail to raise or cite to Michigan or Pennsylvania claims, and cite to Ohio claims for the first time in a December 18, 2020 letter. (Dkts. 83-1, 83-2). Finally, Pennsylvania Plaintiff Mahler sent a pre-suit demand letter under Massachusetts law—not Pennsylvania. (Dkt. 83-3).

representations," "the identities of the perpetrators and recipients," and the misrepresentations' content). Here, 21 Plaintiffs fail to plead the representation on which he/she relied, or the source of the deceptive representation, and their failure to identify the model and purchase date also fails Rule 9(b) because the representations varied by year and model. (*See* Memo at 37 n.12).

VI. PLAINTIFFS' NATIONWIDE CLAIMS SHOULD BE DISMISSED.

Plaintiffs' rote recitation of elements, failure to plead facts, and conclusory assertion that the laws of all 50 states and two territories are "materially the same" in Counts I to III are insufficient, legally incorrect, and lack plausibility. Plaintiffs misrepresent or ignore (at 36-38) the differing state laws for the three nationwide claims. *E.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 433-34 (S.D.N.Y. 2017) (dismissing New York unjust enrichment claim due to adequate remedy at law); *Wortman v. C.R. Bard, Inc.*, 2019 WL 6329651, at *3 (S.D. Ind. Nov. 26, 2019) (explaining "Indiana law only permits a claim of negligent misrepresentation in certain contexts" and not for claims like Plaintiffs'). Their own authority (at 38) demonstrates a varied application of the economic loss doctrine. *See Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002) ("Pennsylvania state courts have exhibited a 'lack of hospitality to tort liability for purely economic loss'") (citation omitted). Plaintiffs do not plausibly plead undifferentiated claims under the laws of 52 jurisdictions. *See*, *e.g.*, *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 667 (E.D. Mich. 2011) (dismissing nationwide unjust enrichment claims as "[s]tate law requirements under unjust enrichment law vary widely").

VII. RELIEF REQUESTED.

Evenflo respectfully asks the Court to dismiss the Amended Complaint in its entirety pursuant to Fed. Rs. Civ. 12(b)(1) and 12(b)(6).

Dated: January 8, 2021

Respectfully submitted,

/s/ Lawrence G. Scarborough

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CERTIFICATE OF SERVICE

I, Lawrence G. Scarborough, hereby certify that this document was electronically filed and served using the Court's CM/ECF system on January 8, 2021.

/s/ Lawrence G. Scarborough
Lawrence G. Scarborough

SUPERIOR COURT
(Class Action)

Nº. 500-06-001049-200

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

ÉTIENNE LOMBARD

Petitioner

- vs -

EVENFLO COMPANY, INC.
and
GOODBABY CANADA INC.

Respondents

BS0350 **File: 147483-1001**

JOINT APPLICATION BY THE PARTIES TO TEMPORARILY STAY THE CLASS ACTION (Articles 18 and 577 of the Code of Civil Procedure) AND EXHIBITS R-1 TO R-5

ORIGINAL

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